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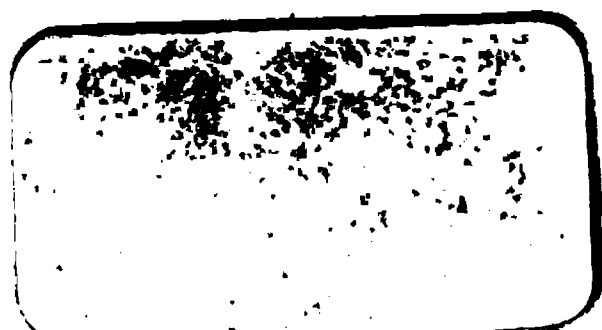
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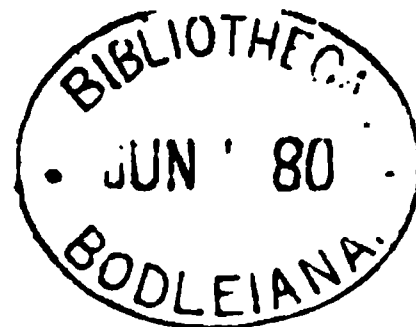
**FOR THE USE OF STUDENTS, THE LEGAL PROFESSION,
AND THE PUBLIC.**

BY
ARCHIBALD BROWN,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW, M.A. EDIN. AND OXON., AND B.C.L. OXON.;
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OBLIGATIONS IN ROMAN LAW;' AND
EDITOR OF 'SWELL'S PRINCIPLES OF EQUITY, WITH AN EPITOME OF THE
EQUITY PRACTICE.'

"Nosse quæ nunc aguntur in curiis, necque præterita ignorare."

SECOND EDITION.



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TO
THE RIGHT HONOURABLE
ROUNDELL BARON SELBORNE,
LORD HIGH CHANCELLOR OF GREAT BRITAIN,
THIS
SECOND EDITION
OF
“THE NEW LAW DICTIONARY,”
IS, BY PERMISSION,
RESPECTFULLY DEDICATED.

PREFACE

TO THE SECOND EDITION.

SINCE the First Edition of the Dictionary was published, very considerable changes in the Law have been made, principally through the coming into operation of the Judicature Acts, 1873–1879, and through other causes more or less connected therewith. The period of transition from the old to the new procedure appears to have now passed, and the Law is again in a condition which admits of its definite statement. It has accordingly been judged advisable to bring out a Second Edition of the Dictionary.

In preparing the Second Edition, the Author, having had the advantage of the First Edition as a groundwork, has found his material much more handy to work upon; and every care has been taken to supply omissions and to secure accuracy both of statement and of reference, and generally to render the work (in as true a sense as possible) a complete Institute of the Whole Law,—for the use both of students and of practitioners, and for the guidance and aid of public men, and of men of letters.

A. BROWN.

89, CHANCERY LANE, W.C.
May, 1880.

PREFACE

TO THE FIRST EDITION (ABRIDGED).

A NEW DICTIONARY of the LAW appeared to the Author as likely to prove useful, if it succeeded in combining with the usual contents of a Dictionary proper a compendious but at the same time accurate epitome or institute of the whole Law. In endeavouring this combination, the Author has left out matters of Law that are now entirely obsolete, in order to leave greater space for the expression of modern principles and rules; and he has stated these modern principles and rules in language that has been compressed to the maximum degree; and he has avoided iteration by means of carefully assorted references. The Dictionary and Institute comprises much that is historical,—necessarily so, as regards Constitutional Law, and properly so, as regards all those ancient names and phrases which are calculated to throw light upon their modern equivalents; but otherwise the book is not historical, but practical. The English Law in all its branches is fully and minutely dealt with; the Roman Law and the French Law are also included in the Dictionary, but as regards only their most material principles. And it is hoped, that a Dictionary presenting these characteristics may serve in some manner as a Remembrancer to the Student, and as a Vade-Mecum for the Practitioner, besides being an occasional Guide to the Politician and Friend to the Literary Man.

A. BROWN.

89, CHANCERY LANE, W.C.
October, 1874.

LIST OF BOOKS.

* * The following is a list of the books which have been principally consulted in compiling this Dictionary, in addition to those that are referred to in the body of the work. The list is classified under heads, which may perhaps serve the student or junior barrister in making up his own Law Library.

I. COMMON LAW.

(A.) Law of Contracts :

Benjamin on Sales, 1 vol.
 Broom's Common Law, 1 vol.
 Byles on Bills of Exchange, 1 vol.
 Chitty on Contracts, 1 vol.
 Grant's Law of Banking, 1 vol.
 Indermaur's Common Law, 1 vol.
 Kay on the Law of Shipmasters.
 Langdell's Contract Cases, 1 vol.
 „ Cases on Sales, 1 vol.
 Leake on Contracts, 1 vol.
 Maude and Pollock on Merchant Shipping, 1 vol.
 Mayne on Damages, 1 vol.
 Russell on Arbitrations, 1 vol.
 Sedgwick on Damages, 1 vol.
 Selwyn's Nisi Prius, 2 vols.
 Smith's Leading Cases, 2 vols.
 „ Mercantile Law, 1 vol.
 Williams's Personal Property, 1 vol.

(B.) Law of Torts :

Addison on Torts, 1 vol.
 Broom's Common Law, 1 vol.
 Indermaur's Common Law, 1 vol.
 Mayne on Damages, 1 vol.
 Sedgwick on Damages, 1 vol.

(C.) Law of Crimes :

Archbold's Criminal Pleading, 1 vol.
 Greaves' Criminal Statutes, 1 vol.
 Harris on Criminal Law, 1 vol.
 Stone's Justice of the Peace, 1 vol.

(D.) Law of Evidence :

Best on Evidence, 1 vol.
 Roscoe's Evidence at Nisi Prius, 1 vol.
 Roscoe's Criminal Evidence, 1 vol.
 Taylor on Evidence, 2 vols.

(E.) Law of Procedure :

Adams on Ejectment, 1 vol.
 Archbold's Criminal Pleading, 1 vol.
 Banning's Limitation of Actions, 1 vol.
 Brandon's Lord Mayor's Court, 1 vol.
 Brandon's Foreign Attachment, 1 vol.
 Browne's Probate Practice, 1 vol.
 „ Divorce Practice, 1 vol.

I. COMMON LAW—continued.

(F.) Law of Procedure—continued.

Bullen and Leake's Precedents in Pleading, 1 vol.
 Buller's Nisi Prius, 1 vol.
 Chitty's Forms, Q. B., &c., 1 vol.
 „ Archbold's Practice, 2 vols.
 Cole on Ejectment, 1 vol.
 Davis's County Courts Practice, 1 vol.
 Day's C. L. P. Acts, 1 vol.
 Cunningham and Mattinson on Pleading, 1 vol.
 Smith's Action at Law, 1 vol.

II. EQUITY LAW.

(A.) General Principles :

Fisher on Mortgages, 2 vols.
 Fry on Specific Performance, 1 vol.
 Kerr on Discovery, 1 vol.
 „ Fraud, 1 vol.
 „ Injunctions, 1 vol.
 „ Receivers, 1 vol.
 Lewin on Trusts, 1 vol.
 Lindley on Partnership, 2 vols.
 May on Fraudulent Conveyances, 1 vol.
 Smith's Manual of Equity, 1 vol.
 Snell's Principles of Equity, 1 vol.
 Spence's Equitable Jurisdiction, 2 vols.
 Sugden on Powers, 1 vol.
 Tudor's Leading Cases, Mercantile and Maritime Law, 1 vol.
 White and Tudor's Leading Cases, Equity, 2 vols.

(B.) Particular Subject Matters :

Adams on Trade Marks, 1 vol.
 Bainbridge on Mines and Minerals, by A. Brown, 1 vol.
 Brown (A.) on Fixtures, 1 vol.
 Buckley's Companies Acts, 1 vol.
 Cooke and Harwood's Charities, 1 vol.
 Copinger's Law of Copyright, 1 vol.
 Cross on Lien, 1 vol.
 Goddard on Easements, 1 vol.
 Godefroi's Railway Law, 1 vol.
 Hanson on Legacy and Succession Duty, 1 vol.
 Johnson on Patents, 1 vol.

II. EQUITY LAW—*continued*.(B.) Particular Subject Matters—*cont.*;

Newton on Patents, 1 vol.
 Tudor on Charities, 1 vol.
 Yate Lee on Bankruptcy, 1 vol.

(C.) *Evidence*.

Best on Evidence, 1 vol.
 Kerr on Discovery, 1 vol.
 Roscoe's Evidence at Nisi Prius, 1 vol.
 Taylor on Evidence, 2 vols.
 Wigram's Interpretation of Wills, 1 vol.

(D.) *Procedure*.

Daniel's Chancery Forms, 1 vol.
 " " Practice, 2 vols.
 Davis's County Courts Practice, 1 vol.
 Elmer's Practice in Lunacy, 1 vol.
 Griffith's Practice under the Judicature Acts, 1 vol.
 Hunter's Suit in Equity, 1 vol.
 Morgan's Chancery Acts and Orders, 1 vol.
 Morgan and Davey's Costs in Chancery, 1 vol.
 Pemberton on Supplement and Revivor, 1 vol.
 Roche and Hazlitt on Bankruptcy, 1 vol.
 Seton on Decrees, 2 vols.
 Wilson's (Arthur) Practice under the Judicature Acts, 1 vol.

III. REAL AND PERSONAL PROPERTY.

(A.) General Principles, and Particular Doctrines :

Burton's Compendium, 1 vol.
 Dart's Vendors and Purchasers, 2 vols.
 Deane's Principles of Conveyancing, 1 vol.
 Elton on Copyholds, 1 vol.
 Fawcett's Landlord and Tenant, 1 vol.
 Jarman on Wills, 2 vols.
 Platt on Leases, 2 vols.
 Preston on Conveyances, 3 vols.
 " Estates, 1 vol.
 Scriven on Copyholds, 1 vol.
 Shelford's Real Property Statutes, 1 vol.
 Sheppard's Touchstone, 2 vols.
 Smith's Real and Personal Property, 2 vols.
 Sugden's Vendors and Purchasers, 1 vol.
 Tudor's Leading Cases, Conveyancing, 1 vol.
 Williams's Personal Property, 1 vol.
 " Real Property, 1 vol.
 " on Executors and Administrators, 2 vols.
 Woodfall's Landlord and Tenant, 1 vol.

III. REAL AND PERSONAL PROPERTY—*cont.*

(B.) Forms in Conveyancing.

Copinger's Index, Conveyancing, 1 vol.
 Crabb's Conveyancing, 2 vols.
 Davidson's Conveyancing, 8 vols.
 Frend and Ware's Railway Precedents, 1 vol.
 Hayes' Concise Conveyancer, 1 vol.
 " and Jarman's Forms of Wills, 1 vol.
 Jarman's Powers of Attorney, 1 vol.
 Platt on Leases, 2 vols.
 Prideaux's Conveyancing, 2 vols.
 Woodfall's Landlord and Tenant, 1 vol.

IV. CONSTITUTIONAL LAW.

Broom's Constitutional Law, 1 vol.
 Blackstone's Commentaries, 4 vols.
 Forsyth's Constitutional Law, 1 vol.
 Hallam's Middle Ages, 3 vols.
 " Constitutional History, 3 vols.
 May's Constitutional History, 3 vols.
 " Parliamentary Practice, 1 vol.
 Stubb's Constitutional History.
 Taswell Langmead's Constitutional History, 1 vol.

V. ROMAN LAW AND JURISPRUDENCE.

Austin's Jurisprudence, 2 vols.
 Bentham, by Dumont, 3 vols.
 Brown's Savigny on Obligations, 1 vol.
 Gaius' Commentaries, 1 vol.
 Justinian's Institutes, 1 vol.
 " Digest and Code, &c., 8 vols.
 Ortolan's Justinian, 3 vols.

VI. INTERNATIONAL LAW.

Clarke on Extradition, 1 vol.
 Foote's Private International Jurisprudence, 1 vol.
 Guthrie's Savigny's Private International Law, 1 vol.
 Ortolan's Diplomatie de la Mer, 2 vols.
 Westlake's Private International Law, 1 vol.
 Wharton's International Law, 1 vol.
 Wheaton's International Law, 1 vol.
 " History of same, 1 vol.
 Wolsey's International Law, 1 vol.

VII. GENERAL DIGESTS, REPERTORIES, &c.

Blackstone's Commentaries, 4 vols.
 Chitty's Equity Index, 4 vols.
 " Statutes, 4 vols.
 Clark's House of Lords Digest, 1 vol.
 Coke's Institutes, 6 vols.
 " Reports, 6 vols.
 Cruise's Digest, 6 vols.
 Harrison's Digest, by Fisher, 5 vols.
 Justinian's Digest, Code, &c.
 Law Reports' Digests.
 Williams's Saunders' Reports, 2 vols.

A NEW LAW DICTIONARY.

À MENSÂ ET THORO. "From board and bed." See titles **DIVORCE**; **JUDICIAL SEPARATION**.

À VINCULO MATRIMONII. "From the bond of matrimony." See title **DIVORCE**.

AB INITIO, TRESPASS: See title **TRESPASS**.

AB INTESTATO: See titles **INTESTATE**; **TESTATE**.

ABANDONED MOTION. Where any person has given notice of motion either interlocutory or by way of appeal, and afterwards fails to bring on his motion without otherwise saving it, he is liable to pay the entire costs of the abandoned motion to the other party or parties served with notice of the motion (*In re Oakwell Collieries*, 7 Ch. Div. 706).

ABANDONMENT. This a word of very frequent occurrence in law, and in general its legal meaning coincides with its natural or popular meaning. Thus,—

(1.) *The Abandonment of Children*,—means the desertion and exposure of children under two years of age, whereby their life is endangered or their permanent health injured (24 & 25 Vict. c. 100, s. 27; *R. v. Falkingham*, L. R. 1 C. C. R. 222; *R. v. White*, L. R. 1 C. C. R. 311). See title **CHILD**, **ABANDONMENT OF**.

(2.) *The Abandonment of a Distress*,—means throwing up the distress. See title **DISTRESS**.

(3.) *The Abandonment of an Execution*,—means withdrawing from the possession of the goods seized. See title **EXECUTION**.

(4.) *The Abandonment of the Excess*,—means in a County Court action giving up the debt so far as it exceeds the County Court limit of jurisdiction, £50 being that limit. See title **COUNTY COURTS**, **JURISDICTION OF**.

(5.) *The Abandonment of Ship or Cargo*,—means giving up wholly to the underwriters the ship and cargo insured, in order to claim the entire sum insured. See titles **CARGO**; **TOTAL LOSS**; **UNDERWRITERS**.

(6.) *The Abandonment of an Action*,—

ABANDONMENT—continued.

means its discontinuance. See title **DISCONTINUANCE**.

ABANDONMENT OF CARGO OR VESSEL. In the case of *marine insurance*, where the vessel or goods insured are damaged beyond repair or recovery, but are not actually or completely destroyed or lost, the insured may **ABANDON** the vessel or goods to the underwriter, and thereafter recover upon his policy of insurance as for a total loss. (See title **TOTAL LOSS**.) A policy in express terms confined to *total loss* extends to such *constructive total loss* (*Adams v. Mackenzie*, 13 C. B. (N.S.) 442). The propriety of the abandonment in any particular case depends upon the question, whether an uninsured owner being upon the spot would or not in the particular case in the exercise of ordinary mercantile prudence have incurred the expenses of repairing the vessel or (as the case may be) of recovering the goods (*Roux v. Salvador*, 3 B. N. C. 266). Notice of the abandonment must be given to the underwriter at the earliest moment (*Dean v. Hornby*, 3 E. & B. 180); and such notice must proceed from the real owner and not from a mere incumbrancer or mortgagee (*Jardine v. Leathley*, 32 L. J. Q. B. 132). The notice must be couched in positive terms (*Thelsson v. Fletcher*, 1 Esp. 73); but it need not be in writing (*Parmeter v. Todhunter*, 1 Camp. 541). The effect of the abandonment is to transfer the whole property in the vessel or goods to the underwriter as from the date of the loss (*Cammell v. Sewell*, 3 H. & N. 617; 5 H & N. 728); and the underwriter is therefore entitled to whatever advantage he can make of the vessel or goods abandoned. If he should complete the voyage, he becomes entitled to receive in addition that portion of the freight which is earned after the abandonment, where the freight is divisible, and where it is indivisible, he becomes entitled [by survivorship] to the whole (*Case v. Davidson*, 5 M. & S. 79; 2 B. & B. 379).

See titles **INSURANCE**; **UNDERWRITERS**.

ABANDONMENT OF DOMICILE: *See* title DOMICILE.

ABANDONMENT OF LEGAL PROCEEDINGS. When a plaintiff has become aware of any defendant's defence, whether before delivery of same, or at any time before replying thereto, he may wholly discontinue his action, without any leave to do so, by delivering a notice in writing to that effect. And he may do the like at any subsequent stage of the action, but only with the leave of the Court or of a judge and upon terms. Leave is not granted as a matter of course (*Stahlschmidt v. Walford*, 4 Q. B. Div. 217). This abandonment or discontinuance does not prejudice any subsequent action, unless in the case of leave to discontinue one of the terms is to that effect (Order xxiii., rule 1). The plaintiff is in each case to pay to the defendant the costs of the action, and for such costs the defendant may sign judgment. Where an injunction has been granted to the plaintiff on his undertaking as to damages, the action continues as to such undertaking even after a discontinuance (*Newcomen v. Coulson*, L. R. 7 Ch. Div. 764). An action, when entered for trial, may be withdrawn by consent of all parties, either the plaintiff or the defendant producing the requisite consent in writing (Order xxiii., rule 2a).

ABANDONMENT OF RAILWAYS. Under the Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), and the Act 14 & 15 Vict. c. 105, and the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), ss. 31-35, any company authorised by statute passed previously to 1867 to make a railway may, with the consent of the holders of three-fifths of the shares or stock (if so much subscribed) of the company, apply to the Board of Trade for the Board's warrant to abandon the construction of their railway or of part thereof, and the Board may, if it deem the abandonment expedient, issue its warrant for such abandonment; and the warrant operates to release the company (Act 1850, s. 19) from the duty of constructing the railway, subject nevertheless to certain liabilities to make compensation to various persons aggrieved (Act 1850, ss. 19-22, 26). *See* Godefroi & Shortt, pp. 500-3.

ABANDONMENT OF SEAMEN: *See* title SEAMEN.

ABATE: *See* next following titles.

ABATEMENT OF ACTIONS. The provisions regarding abatement, and remedying same, that were contained in the C. L. P. Act, 1852 (ss. 135-141), as to actions at Common Law, and in the Chan-

ABATEMENT OF ACTIONS—continued. cery Jurisdiction Amendment Act, 1852 (s. 52) as to actions in Chancery, may be taken to be now wholly superseded by the Orders and Rules under the Judicature Acts, 1873-77, the exact purport of which is as follows:—

In case any party to an action dies, marries, or becomes bankrupt, and thereby some devolution of estate or interest arises by operation of law, the action is not to be deemed abated (Order L., rule 1); but the Court may order (as the case may require) the personal representative, or the husband, or the trustee, or other the successor in interest to be made (if necessary) a party to the action or to be served with notice thereof, and the Court may also otherwise order as may be just (Order L., rule 2). The order is made on summons or motion supported by an affidavit of the event occasioning the devolution of interest (Order L., rule 4). And where pending the action, there is any devolution of interest by act of the party, the action is not to be deemed abated (Order L., rule 1), but may be continued against the successor in interest (Order L., rule 3), and the requisite order may be obtained upon an *ex parte* application (by summons or motion) supported by an affidavit of the fact of the devolution of interest. The like procedure applies where any person interested comes into existence after writ issued, his subsequent coming into existence operating, in fact, as a devolution of interest (Order L., rule 4).

The order in all the foregoing cases is called an order of revivor; and the order of revivor is to be served on the continuing party or parties, and also upon the new (or substitutionary) parties or party to the action, and becomes binding as from the time of service on the party served therewith (Order L., rule 5), subject, nevertheless, to be discharged upon application at any time within twelve days after service (Order L., rule 6), or (in case of effective disability) within twelve days after removal of such effective disability.

Effective disability is infancy or unsoundness of mind, when the infant or unsound person has neither a guardian *ad litem* nor (being a lunatic so found by inquisition) a committee. Coverture is not an effective disability as regards revivor of actions.

But there cannot be (nor need there be) any such order of revivor, if the cause of action do not survive or continue as regards the particular party (Order L., rule 1). (*See Lloyd v. Dimmack*, 7 Ch. Div. 398).

An executor may revive, but only when the interest of the intestate is a transmissible interest (*Twycross v. Grant*, 4 C. P.

ABATEMENT OF ACTIONS—continued.

Div. 40). An executor by reviving the action makes the action his own, and therefore is liable personally to costs (*Boynston v. Boynton*, 9 Ch. Div. 250); whence, *semble*, he cannot be compelled to revive (*Wingrove v. Thompson*, W. N. 1879, p. 59; and see *Wright v. Swindon Ry. Co.*, 7 Ch. Div. 412).

The old rule that there could be no revivor as to costs only, which was inequitable in its operation and wholly devoid of principle, has been abrogated by the Solicitors Act, 1870 (33 & 34 Vict. c. 28), the 19th section of which gives to the "person interested" under the decree or order a right to revive as often as may be necessary. N.B.—The decree or order must have been for payment of costs in an action.

Under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 80, it is provided that when a debtor who has been adjudicated a bankrupt dies, the Court may order that the proceedings in the matter be continued as if he were alive.

ABATEMENT OF LEGACIES: See title LEGACIES.

ABATEMENT OF NUISANCE. In the case of a public nuisance the party abating same must have sustained some particular or special damage from it, i.e., some damage other than and besides the general inconvenience sustained by the public at large (*Mayor of Colchester v. Brook*, 7 Q. B. 339); but in the case of a private nuisance the party prejudiced may at once abate same (*Lonsdale (Earl) v. Nelson*, 2 B. & C. 302). However, the abatement must be made without any breach of the peace, and also without doing any unnecessary damage (*Roberts v. Rose*, 4 H. L. C. 163). Under the statute 38 & 39 Vict. c. 55, and the other Acts relative to the preservation of the public health, local authorities and their officers may abate nuisances in the manner mentioned in the Acts (*Scarborough (Mayor, &c.) v. Scarborough Sanitary Authority*, 1 Exch. Div. 344; *St. Helens' Chemical Co. v. St. Helens' Corporation*, 1 Exch. Div. 196).

See also title NUISANCE.

ABATEMENT OF POSSESSION. This is that species of injury to real property which is committed when a stranger, upon the death of an owner in fee, enters upon and takes possession of the land in exclusion of the heir or devisee of such deceased owner.

See also titles DETAINER; DISSEISIN; DISTURBANCE; INTRUSION.

ABATEMENT OF RENT. This is an agreement to accept a less sum for rent than that comprised in the original agree-

ABATEMENT OF RENT—continued.

ment. No parol agreement to make such an abatement is binding. *Levinge v. O'Brien*, 4 Ir. Jur. 22.

ABATEMENT OF WRIT. This was the defeat or overthrow of a writ. Thus, in stat. 11 Hen. 6, c. 2, the words are, that the justices shall cause the said writ to be abated and quashed. So in Staundf. P. C. 148, it is said that an appeal shall abate and be defeated by reason of covin or deceit.

ABATEMENT, PLEADINGS IN: See next title.

ABATEMENT, PLEAS IN. These pleas, which were also called dilatory pleas, because they delayed for the time the further progress of the suit, or action, or prosecution, were pleas of some matter not material to the merits of the proceeding, but technically necessary or proper; and as such they were opposed to pleas in bar or peremptory pleas. They occurred either in civil or in criminal proceedings.

I. In civil proceedings,—They were the following:

- (1.) To the jurisdiction of the Court;
- (2.) To the person of the plaintiff;
 - as that (a) He is an outlaw;
 - or (b) He is an alien;
 - or (c) He is an excommunicated person;
 - or (d) He is an attainted person, and such like;
- (3.) To the person of the defendant;
 - as that (a) He is privileged;
 - or (b) He is misnamed (see title MISNOMER);
 - or (c) He is misdescribed (see title ADDITION);
- (4.) To the writ and action; and formerly—
- (5.) On account of certain events happening, namely,—
 - (a) The demise of the sovereign, corrected by 1 Edw. 6, c. 7, and other subsequent statutes;
 - (b) The marriage { of the } cor-
 - (c) The death { parties } rected

by C. L. P. Act, 1852, and Chancery Jurisdiction Act, 1852, and by the Judicature Acts, 1873-7 (see title ABATEMENT OF ACTIONS).

II. In criminal proceedings, they are, generally speaking, the same; but under the statute 7 Geo. 4, c. 64, s. 19, no indictment or information is to be abated for *misnomer*, or *addition*, but the same shall

ABATEMENT, PLEAS IN—*continued.*

be amended if the Court is satisfied by affidavit of the true name or description. See *Rex v. Shakspeare*, 10 East, 83.

Inasmuch as pleas in abatement were odious, they must have been certain to every intent (2 Wms. Saund. 620), and must have gone so far as to specify the true mode of procedure (*Evans v. Stevens*, 4 T. R. 227): and the rule holds good in criminal cases (*O'Connell v. Reg.* (in error), 11 Cl. & F. 155). And so a plea in abatement for non-joinder of defendants should have mentioned all the co defendants who were not joined (*Crellin v. Calvert*, 14 M. & W. 11). Every such plea must also have been verified by affidavit (4 & 5 Anne, c. 16, s. 11), otherwise the plaintiff might sign judgment (*Poole v. Pembrey*, 1 Dowl. 692); and such affidavit must have been delivered with the plea, unless an extension of time were granted. The time for pleading was also very limited, being four days after declaration (*Ryland v. Wormwald*, 5 Dowl. 581).

Upon issue joined on a plea in abatement, the judgment, when for the plaintiff, might be of either of two kinds, namely,—

- (1.) Final, as when the issue was an issue of fact; or
- (2.) Respondeat ouster, as when the issue was one of law.

Pleas generally, whether in bar or in abatement, must have been pleaded in the following order, which was invariable, namely,—

- (i.) To the jurisdiction;
- (ii.) In abatement,
 - (a) To the person (1) of the plaintiff, or (2) of the defendant,
 - (b) To the count,
 - (c) To the writ;
- (iii.) In bar of the action.

Pleading a plea in any one of these classes was a waiver of the right to plead in any of the preceding classes. As regards all civil proceedings (being actions), in lieu of pleading in abatement, the party may now apply to the Court summarily (by motion or on summons) for an order to remedy the alleged defect in the pleading objected to, or to dismiss the action, or for such other relief as is proper to be granted. And *quære*, whether these summary applications should now follow one another in the old order in which pleas in abatement used to be pleaded.

See also title **PLEAS IN BAR**.

ABBAT, called also *Abbot*, was a spiritual lord, and abbacy was the lordship with the revenues thereof and the spiritual duties attaching thereto. In England, abbats were either elective or presentative; and again some abbats were mitred,

ABBAT—*continued.*

having episcopal authority, and not being themselves subject to the jurisdiction of any diocesan, but others were unmitred and were subject to such jurisdiction. The mitred abbats alone were lords of parliament. It is supposed that there were twenty-seven such parliamentary abbats. All the abbacies are supposed to have been founded between 602 and 1133. An abbat together with his monks formed a *convent*, and were a corporation. By statute 27 Hen. 8, c. 28, the lesser monasteries were abolished, and by statute 31 Hen. 8, c. 13, the larger ones were dissolved also.

ABDICATION. This is a renunciation of office by some magistrate or other person in office before the natural expiration thereof. Such a renunciation differs from a *resignation* of office, being usually pure and simple, whereas resignation is commonly in favour of some particular successor. James II. was considered to have abdicated the Crown in 1688.

ABDUCTION. This word is commonly used of the criminal offence of carrying off females on account of their fortunes. See statute 9 Geo. 4, c. 31; but the law is now comprised in 24 & 25 Vict. c. 100, ss. 53-4, which has provided that (in effect) any one who *from motives of lucre* or *by force* takes away a female of any age, or *by fraud* takes away any female under twenty-one years of age, with intent to marry her or to procure her to be married, or to carnally know her or procure her to be carnally known, such female being possessed of or entitled to property either in possession, reversion, contingency, or expectancy, shall be guilty of felony, and liable upon conviction to penal servitude for not less than five or more than fourteen years, or to imprisonment for a period not exceeding two years, with or without hard labour, and shall be incapable of taking any benefit or interest from or in the female's property, which is to be settled by the Court upon an information at suit of the Attorney-General. And by the same statute (24 & 25 Vict. c. 100), s. 55, the unlawfully taking away any unmarried female under the age of sixteen years out of the possession and against the will of her parents or guardian is a misdemeanour; and under s. 56 of the same Act the like offence in respect of an unmarried female under the age of fourteen years is a felony. See title **MARRIAGE**.

ABET.—Encourage: See title **ABETTERS**.

ABETTERS: See title **AIDERS AND ABETTERS**.

ABEYANCE. This word as applied to real property, whether estates or dignities, denotes that the same are in expectation, remembrance, or intendment of the law. Abeyance is said to be of two sorts, being either—(1) Abeyance of the fee simple, or (2) Abeyance of the freehold. The first is where there is an actual estate of freehold *in esse*, but the right to the fee simple is suspended, and is to revive upon the happening of some event; *e.g.* in the case of a lease to A. for life, remainder to the right heirs of B. who is alive, the fee simple is in abeyance until B. dies (Co. Litt. 342 b.) Similarly, during the incumbency of each successive incumbent of a church, he having only a freehold interest therein, the fee simple is in abeyance (Litt. §§ 644–6.) The second species of abeyance, *i.e.* an abeyance of the freehold itself, occurs on the death of an incumbent, and until the appointment of his successor (Litt. § 647.) But saving this one case, the freehold is never in abeyance, and cannot possibly be so.

It was customary in speaking of a thing in abeyance to say that it was “*in nubibus*” (which was rather a profane expression), or “*in gremio legis*” (*Carter v. Barnardiston*, 1 P. Wms. 516), the latter phrase denoting that the fee simple or freehold which was in abeyance was meanwhile under the care or protection of the law.

There is no abeyance either of the fee simple or of the freehold in the case of conveyances operating under the Statute of Uses, for in these what is not given away remains in the grantor until it is so given.

ABHORREERS. A name applied to the Crown party (afterwards called Tories) in the reign of Charles II., because they expressed their strong disapproval (*i.e.* “abhorrence”) of the custom then growing up of petitioning the Crown for the assembling of Parliament,—the Crown had forbidden such petitioning, by proclamation in 1679. The opposite party were called “Petitioners.” The free right to petition was afterwards recognised in the Bill of Rights.

See titles BILL OF RIGHTS; PETITION, SUBJECT’S RIGHT TO.

ABILITY TO PAY. Before any one may be imprisoned at the present day under the 32 & 33 Vict. c. 62 (The Debtors Act, 1869), it is necessary (subject to the exceptions mentioned in s. 4 of the Act), that the debtor should have had since the date of the order or judgment the means to pay the sum in respect of which he has made default, s. 5 of the Act being substituted for ss. 98 and 99 of the County Court Act, 1846. Moreover, no imprison-

ABILITY TO PAY—continued.

ment under this section is to operate as a satisfaction or extinguishment of any debt or demand, or cause of action, or to deprive any person of any right to take out execution against the lands or goods of the person imprisoned.

ABJURATION. This is a foreswearing or renouncing upon oath. To abjure the realm was to take an oath to quit it for ever, and such abjuring persons were and are civilly dead. So also to abjure the Pretender was to take an oath disclaiming all allegiance or obedience to him. The oath of abjuration is a natural issue from the duty of allegiance, but, apparently, was not devised until after the Revolution of 1688, when the 7 & 8 Will. 3, c. 27, first imposed it in respect of temporal sovereigns at least. (See title PRÆMUNIRE, as to spiritual sovereigns.) More recently the oath of abjuration has been wrapped up in the oath of allegiance prescribed by the 21 & 22 Vict. c. 48, s. 1, which is in these words: “I, A. B., do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, &c., and I do faithfully promise to maintain, &c.” the succession to the Crown as settled by the Act of Settlement, 1701 (12 & 13 Will. 3, c. 2), “hereby utterly renouncing and abjuring any obedience or allegiance unto any other person claiming or pretending a right to the Crown of this realm; and I do declare that no foreign prince, person, prelate, state, or potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm.” Under the Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 9, the oath of allegiance leaves out the words of abjuration, being merely an expression of the positive duty of allegiance to the Queen.

Formerly, *i.e.*, in the time of Edward the Confessor, and the other succeeding sovereigns, down to the reign of James I., if a person committed a felony he might obtain sanctuary in a church or churchyard: and there on confession of the crime, he might abjure the realm. But this privilege growing into an abuse, the thing was abolished by 21 Jac. 1, c. 28, since which statute this kind of abjuration has ceased. 2 Inst. 629.

ABORTION. Under the statute 24 & 25 Vict. c. 100, s. 58, any woman being with child who with intent to procure her own miscarriage, unlawfully administers to herself any poison, or uses any instrument with the like intent, and any person other than the woman doing for her the like (whether or not the woman is with

ABORTION—continued.

child), is guilty of Felony; and by s. 59, the person supplying such poison or instrument with knowledge of the intended unlawful use thereof, is guilty of a misdemeanour. For the complete commission of this offence, the earlier statutes of 43 Geo. 3, c. 58, and 9 Geo. 4, c. 31, s. 14, had required that the woman should be quick with child; but that is no longer a requisite. *R. v. Goodall*, 2 C. & K. 293; *R. v. Isaacs*, 9 Cox, C. C. 228; Arch. Crim. Pl. and Evid. 711.

ABRIDGMENT. That is an epitome. The principal abridgments of the law are the following;—

- 1516. Fitzherbert's Abridgment, going down to 21 Henry VII.
- 1568. Brooke's "Grand Abridgment," going down to Elizabeth.
- Statham's Abridgment, going down to Henry VI.
- 1762. Comyns' Digest.
- 1736–51. Bacon's Abridgment.
- 1741–51. Viner's Abridgment.
- 1799–1806, with Supplement.
- 1853. Chitty's Equity Index, 3rd Ed.; and
- 1870. Harrison's Digest, by Fisher.

ABSCONDING DEBTOR. Under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 12, a bankrupt or liquidating debtor, who either after or within four months before the commencement of the bankruptcy or liquidation, quits England, and wrongfully takes with him property to the amount of £20 or upwards, is guilty of felony. And under the statute 33 & 34 Vict. c. 76, intituled "The Absconding Debtors Act, 1870," such a debtor may be arrested, notwithstanding the abolition of arrest on mesne process by the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 6.

See title *NE EXEAT REGNO, WRIT OF*.

ABSENCE. In French law, where a person has absented himself, from his residence and domicile for four years, and nothing has meanwhile been heard of him, a declaration of absence may be obtained against him (*la déclaration d'absence*), one year after the parties have applied for same, failing the success of the inquiries for him that are officially directed upon such application. The effect of such a declaration is to put his next of kin (*héritiers présomptifs*), into possession of his property, they giving security, and distributing the property according to the will of the absent person, or (in the case of intestacy), according to law. In case the absentee returns home, the next of kin are accountable to him, and return him a fifth part of the income if he returns before

ABSENCE—continued.

fifteen years, and one-tenth part if after fifteen years and before thirty; if after thirty, they return no part at all, and cease to be accountable, their security being discharged. The consort of such an absentee may re-marry, and the second marriage is not impeachable excepting by the absentee (personally).

ABSENCE BEYOND SEAS.—Used to be a disability in a plaintiff, entitling him to further time to bring his action after his return home; but it has now ceased to be so (M. L. Amendment Act, 1856, 19 & 20 Vict. c. 97), subject to this exception, viz.:—the time for appealing to the House of Lords is one year after returning from abroad, so only five years in all be not exceeded (Appellate Jurisdiction Act, 1876, S.O. i.). On the part of a defendant, absence still prevents the Statute of Limitations running so as to protect him against actions, provided the statute has not commenced running before he went abroad. But when once the statute has begun to run, no subsequent absence (or other disability) will prevent its continuing to run (*Rhodes v. Smethurst*, 6 M. & W. 351).

ABSENTING HIMSELF. This conduct, if done with the intention of avoiding one's creditors, is an act of bankruptcy sufficient to found an adjudication of bankruptcy within the meaning of the Bankruptcy Act, 1869, s. 6.

See title *BANKRUPTCY*.

ABSQUE HOC (*without this*). These were formal words made use of in the conclusion of a special traverse, and the traverse itself was thence frequently called a traverse with an *absque hoc*. These words were not essential to a special traverse, others of a similar import being sometimes used in their stead; their object was directly to deny some proposition or averment set forth in the plaintiff's declaration. By the C. L. P. Act, 1852, s. 65, it was enacted that special traverses should not be necessary in any pleading; but under the Judicature Acts, 1873–7, a party must deny specifically, or state specifically that he does not admit, every material allegation in the previous pleading which he wishes to traverse or to not admit; and he frequently does so, introducing his special traverse with the words, "save as aforesaid," or words to the like effect.

See titles *DE INJURIA*; *REPLICATION*; *PLEADING*; *SPECIAL TRAVERSE*.

ABSTRACT OF TITLE. This is an epitome of the vendor's evidence of ownership. It should commence with a purchase deed or marriage settlement; and if it commences with a *will*, proof of the testa-

ABSTRACT OF TITLE—continued.

tor's seisin or possession, or at any rate of his receipt of the rents and profits at the time of his decease should be furnished. If the abstract commences with a disentailing deed (or fine or common recovery), then the creation of the entail which purports to be barred thereby ought to be shewn. The abstract should set forth in epitome every subsequent document relating to or affecting the title, excepting leases which have expired, but not excepting mortgages, although the money has been repaid, unless perhaps, where the mortgage was only equitable (*Drummond v. Tracy*, John. 608). But a deed which does not affect the right to sell need not be abstracted. When it is necessary (as it almost always is), to shew the birth, death, or marriage of any person, the proper certificates of these facts must be produced; when it is necessary to prove a pedigree, as where a descent occurs in the course of the abstract, then the heirships must be proved if possible by strict evidence, i.e., by means of certificates of births, deaths, and marriages, and by the wills and letters of administration of persons having a possible prior title; but failing such proof, evidence of deeds, wills of relatives, extracts from parish books, from family Bibles, from tombstones, and such like, may be given. It should also be shewn that no outstanding interest requires to be got in, such as dower, freebench, curtesy, or any unsatisfied charge; also (in the usual case) that legacies charged on the land have been paid; also (if the property is sold free of land tax), the certificate of such redemption, together with the receipt and memorandum of registration, should be produced. Where the property sold is allotted land (*see* title ALLOTMENT), the abstract down to the award must be that of the title to the lands in respect of which the allotment was made; and when the allotment has been made indiscriminately in respect of lands held under different titles, all such titles must be shewn by the abstract (*Major v. Ward*, 5 Hare, 604). When the property sold is tithes (in lay hands), the abstract should set forth the original grant from the Crown, and then, omitting intermediate instruments, take up the history so as to shew a good sixty (or forty) years' title; and the like rule holds good generally with reference to all properties originating in grant from the Crown. Copyhold lands do not differ materially from freehold lands, excepting that the abstract consists for the most part of copies of entries on the Court Rolls of the Manor.

In the case of leasehold properties, the abstract should shew the original lease

ABSTRACT OF TITLE—continued.

and all subsequent assignments thereof, unless where the original lease is of very ancient date, when some of the mesne assignments may be left out. Also, when the lease is less than sixty years old, the lessor's title required to have been shewn; but now under the Vendor and Purchaser's Act, 1874 (37 & 38 Vict. c. 78), under any contract entered into after the 31st of December, 1874, that is no longer required.

When land (whether freehold or leasehold), has devolved upon any one by the death of another since the 19th of May, 1853, the payment of succession duty must be shewn.

By the Act 22 & 23 Vict. c. 35, s. 24, the wilful concealment of any document, or the falsification thereof, is a misdemeanour.

It is usual, however, to limit the contents of the abstract of title by special conditions of sale; and, whether so limited or not, the abstract delivered must be a "perfect" abstract, i.e., as perfect as the vendor can make it at the time (*Dean's Conveyancing*, 325).

See title CONDITIONS OF SALE.

ABUNDANTI CAUTELÂ : *See* title PRO MAJORI CAUTELÂ.

ABUTTALS (*abutter*). The buttings and boundings of land, either to the east, west, north, or south, shewing on what other lands or places it does abut. But strictly speaking, the sides on the breadth are properly *adjacentes*, i.e., lying or bordering, and only the ends on the length are *abutantes*, i.e., abutting or bounding. Cowel.

The importance of a careful statement of the abutments in describing the parcels in conveyancing consists in the facility thereby afforded of establishing the identity of the lands or plots of land sold, at almost any distance of time. Also, in criminal law, in indictments for those offences which the law regards as being of a local character, an accurate description is necessary, and this is often best given by abutments. Thus, an indictment for not repairing a highway must specify the situation of the road within the parish; also, on an indictment for night poaching, the *locus in quo* must be described either by name, ownership, occupation, or *abutments*, and it would not be sufficient to describe it as a certain close in the parish of A. And by the rules of pleading (H. T. 16 Vict. r. 18) in an action of trespass *quare clausum fregit*, the close must have been designated in the declaration by name or *abutments*, or other description, to avoid on the one hand the necessity of the defendant's pleading *liberum tenementum*, and

ABUTTALS—*continued.*

on the other hand the necessity of the plaintiff's new assigning (Taylor on Evidence, 268, 327); and under the Judicature Acts the like accuracy of specific description of the place of the alleged trespass is still required.

See title PLEADING.

ACCELERATION: See title ACCUMULATIONS.

ACCEPTANCE AND RECEIPT. The acceptance which is intended by the Statute of Frauds must either precede or be contemporaneous with the receipt of the goods, and as there can be no receipt without delivery, it follows that the acceptance must be separated from the receipt by the delivery, thus,—1, acceptance; 2, delivery, and 3, receipt. Consequently the acceptance signifies a mere expression of one's selection of the particular goods or article.

Upon the goods being delivered and received, the purchaser if dissatisfied with those sent may return them; consequently the acceptance and receipt which the statute speaks of does not preclude subsequent objection.

ACCEPTANCE FOR HONOUR: See titles ACCEPTANCE OF BILL; ACCEPTANCE SUPRA PROTEST.

ACCEPTANCE OF BILL. When a bill is drawn by A. B. upon C. D., and C. D. writes [the word "accepted" and] his name across the face of the bill, the bill becomes his acceptance. Such an acceptance is usually made by C. D. when he holds goods consigned to him by A. B. and not yet paid for, or when he is otherwise in debt to A. B. When he accepts it under other circumstances, the acceptance is for the accommodation or honour of the drawer. An acceptance by E. F., who is not a party to the bill, would also be an acceptance for honour. Every acceptance must since 1 & 2 Geo. 4, c. 78, s. 2, be on the bill,—a requisite which by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, s. 6), is extended to a foreign bill as well as an inland one; but by the statute 41 Vict. c. 13 (Bills of Exchange Act, 1878), writing the word "accepted" is dispensed with, a statute passed in consequence of the decision in *Hindhaugh v. Blakey*, 3 C. P. Div. 136. An acceptance may be either *general*, as where the word "accepted," either alone or with the words "payable at" a particular place is written on the bill, or it may be *special*, as where the words "and not elsewhere" are added to the particular place mentioned in the acceptance for payment. For the general law as to the liability of an acceptor, see title BILLS OF EXCHANGE.

ACCEPTANCE OF OFFER. An offer may be withdrawn at any time before acceptance, and even if there is a time fixed for acceptance, *semble*, unless there is a binding agreement that the offer should not be sooner withdrawn. An acceptance by letter is complete, so soon as the letter is posted; the withdrawal of either party from a contract after acceptance is a breach of contract, see *Cooke v. Oxley*, 3 T. R. 653; *Adams v. Lindsell*, 1 B. & Ald. 681; *Potter v. Sanders*, 6 Ha. 1; *Dunlop v. Higgins*, 1 H. L. Ca. 381. See title CONTRACTS.

ACCEPTANCE SUPRA PROTEST. When acceptance of a bill is refused by the drawee, and the bill is thereupon protested (see title PROTEST) for non-acceptance, any person may voluntarily accept it supra protest (i.e., after protest) for the honour of the drawer or of any one of the indorsers: The form of such an acceptance is "*Accepts S. P.*" adding or not adding the person for whose honour it is made. The acceptor supra protest contracts a liability to pay that is conditional on the drawee refusing to pay (*Hoare v. Cazenove*, 16 East, 391); and after payment, the acceptor supra protest has a remedy over against the person for whose honour he accepted, and also against all (if any) parties antecedent to him (Byles on Bills, 10th ed., 261-267).

ACCEPTILATIO.—In Roman law, was a release of a verbal obligation, under the fiction of an actual receipt and payment of the debt. In the time of Gaius, a female could not make such a release *fragilitate muliebri*. Actual payment was *solutio*.

See title EXPENSILATIO.

ACCESS: See titles BASTARD; NON-ACCESS.

ACCESS OF LIGHT. Is an easement, attaching to houses, and is commonly called the easement of "ancient lights." When a building was entitled to ancient lights, and was pulled down and replaced by another, in which were material changes both of size and of position of windows, it was held that the right of access of light was not lost, but that the entire right remained, if any portion of the light which would have passed over the servient tenement through the old windows passed through the new windows (*N. P. Plate Glass Co. v. Prudential Assurance Co.*, 6 Ch. Div. 757).

See title EASEMENTS.

ACCESSARY. A person guilty of a felonious offence, not by being the actor, or actual perpetrator, of the crime, nor by

ACCESSARY—*continued.*

being present at its performance, but by being some way concerned therein, either before or after its commission. If he has been concerned in it before its commission he is termed an accessary before the fact; if after, an accessary after the fact. An accessary *before the fact* is defined to be one who, being absent at the time the crime is committed, yet procures, counsels, or commands another to commit it; and, in this case, absence is necessary to constitute him an accessary, for if he be present, he is guilty of the crime as principal. Thus, if A. advises B. to kill another, and B. does it in the absence of A., in this case B. is principal and A. accessary to the murder. An accessary *after the fact* is one who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon; and generally any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes such assister an accessary, as furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or using open force and violence to rescue or protect him (2 Hawk. P. C. 316, 317, 318). And now by stat. 24 & 25 Vict. c. 94, s. 1, it is enacted, that whoever shall become an accessary *before the fact* to any felony, may be indicted, tried, convicted, and punished in all respects as if he were the principal felon. And by sect. 3 of the same statute, it is enacted that whoever shall become an accessary *after the fact* to any felony, may be indicted and convicted either as an accessary after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, and may thereupon be punished in like manner as any accessary after the fact to the same felony, if convicted as an accessary, may be punished. And see generally the last-mentioned Act, which is intituled "An Act to consolidate and amend the Statute Law of England and Ireland relating to Accessaries to and Abettors of Indictable Offences."

To a misdemeanour there are no accessaries, as neither is there to the offence of high treason. But see the Debtors Act, 1869 (32 & 33 Vict. c. 62), ss. 11, 16, as to liability of an accomplice in a fraudulent bankruptcy.

See also title **AIDERS AND ABETTORS**.

ACCESSIO. This is a term in Roman Law used to denote a mode of acquisition of property by natural means; and the

ACCESSIO—*continued.*

like use of the word is not uncommon in English law. Thus, the maxim "*accessio cedit principali*" denotes generally that an accessory thing when annexed to (as it naturally is annexed to) a principal thing becomes part and parcel of the latter, and thereupon and thereby becomes the property of the owner of the principal thing. This mode of acquisition is particularly illustrated by the Law of Fixtures, as well in English as in Roman law, the maxim of the English law being "*Quidquid plantatur solo, solo cedit*," and of the Roman law being "*Omne quod inædificatur solo, solo cedit*." (See Brown on Fixtures, 3rd ed. 1875.) But the principle is of universal application, applying to the incorporation of any substance of minor importance in, or its addition to, another substance of a larger or principal importance. By many civilians it is used as the general term, including in it the various more particular natural modes of acquisition, which are designated respectively, *Alluvio*, *Specificatio*, *Confusio*, *Commixtio*. See these several titles.

ACCESSIO CREDIT PRINCIPALI: See title **ACCESSIO**.

ACCIDENT. This is any unforeseen event that is not attributable to the contrivance or negligence of the party. It is a rule of all systems of jurisprudence that no one is liable for an accident, being purely such (*Wakeman v. Robinson*, 1 Bing. 213; 8 Moore, 63); but it is an equally universal rule, that the slightest negligence will exclude the defence of accident (*Kearney v. London, Brighton, &c. Ry. Co.*, L. R. 5 Q. B. 411). But this non-liability from accident does not, of course, protect the purchaser of a specific chattel from payment of the price, in case the chattel is either injured or destroyed by accident (*Tarling v. Baxter*, Tudor's M. C. 596).

The Courts of Equity go further than the Courts of Law, and attempt even to relieve parties against the consequences of accident, but within a limited group of cases only. Thus, if a party has, to begin with, a conscientious title to relief, then if the accident consists in the loss of a bond, or of a negotiable or non-negotiable instrument, the Court of Chancery will assist him to getting paid, upon the one condition of his giving a bond of indemnity to the obligor against any possible second payment; but the Courts of Law also have now acquired jurisdiction to give relief in such cases upon the like condition, 17 & 18 Vict. c. 125 (C. L. P. Act, 1854). Equity will also occasionally relieve in the case of a lost deed (*Dalston v. Coutnecorth*, 1 P.

ACCIDENT—*continued.*

Wms. 731). With reference to a destroyed instrument, whether the same is negotiable (*Wright v. Maidstone*, 1 K. & J. 708) or non-negotiable (Byles on Bills, 372), Equity seems to give no relief, inasmuch as the Law can do so. *Sed quære*, *Hansard v. Robinson*, 7 B. & C. 95.

The Courts of Equity will also relieve against the defective execution of a power, but that only in favour of a purchaser (including a mortgagee or lessee), or of a creditor, or of a wife, a child, or a charity. They also relieve against mistaken payments by an executor, decreeing, for example, the residuary legatees or next of kin to make up, *i.e.*, refund, to an annuitant-legatee the diminution which the annuity fund may have sustained through a reduction in the value of stock, occasioned by Act of Parliament.

But the Court refuses to extend its relief to cases of contract, for there the parties have been to some extent negligent in not providing against the particular casualty, *e.g.*, the destruction of premises leased (*Bullock v. Dommitt*, 6 T. R. 650); when the contract contains any such provision, it is very strictly construed (*Saner v. Bilton*, 7 Ch. Div. 815); and the relief which the Court gives to one party will never be given so as to prejudice another (*White v. Nutts*, 1 P. Wms. 61).

Of course, under the Judicature Acts, 1873-7, the Courts or Divisions at Common Law now grant all the like relief in these cases that Equity does.

See also title ACCIDENTS, INSURANCE AGAINST.

ACCIDENTAL DEATH. For the law of compensation in the case of persons killed by railway accidents, see Lord Campbell's Act (9 & 10 Vict. c. 93); also the Act amending same (27 & 28 Vict. c. 95). By the latter Act any of the persons beneficially interested in the death may, when no action for compensation is brought within six months from the death by the executor or administrator of the deceased, bring such action: and the defendant is enabled to pay a lump sum of money into Court, without specifying the shares into which the same is to be divided among the parties interested. The jury in general indicate the shares in which the money is to be divided among the parties; and in case there is no jury, the Court appears to follow the proportions of the Statutes for the Distribution of the effects of Intestates (*Sanderson v. Sanderson*, W. N. 1877, p. 151).

ACCIDENTS, INSURANCE AGAINST. The law of insurance in its general principles is applicable to this particular

ACCIDENTS, INSURANCE AGAINST—*continued.*

species of insurance. Thus, the assuring person must have an interest in the life of the assured, under the stat. 14 Geo. 3, c. 48, s. 2 (*Shilling v. Accidental Death Insurance Co.*, 2 H. & N. 42). Also, there must be a full disclosure of all circumstances material to the exposure to accidents (*Shilling's Case*, *supra*). It is usual in such policies to provide that the injury from the accident insured against shall be caused by some outward and visible means of which satisfactory proof can be furnished to the company; as to the meaning of such a provision, see *Trew v. Railway Passengers Insurance Co.*, 5 H. & N. 211; on app. 6 H. & N. 839. And see generally Fisher's Dig. 4926-30. Moneys paid on an accident assurance policy cannot be taken into account in reduction of damages sustained from the injury (*Bradburn v. Great Western Ry. Co.*, 10 Exch. 1).

ACCOMMODATION: See the three next following titles.

ACCOMMODATION ACCEPTANCES: See titles ACCEPTANCE FOR HONOUR; ACCOMMODATION BILL.

ACCOMMODATION BILL.—Is a bill drawn by A. B. on C. D., and accepted by the latter gratuitously or without consideration, and merely for the benefit of A. B. No action lies on it at suit of A. B. against C. D., for want of any consideration between them; nor is A. B. entitled to receive any notice of presentment and dishonour by C. D., prior to any subsequent holder of the bill suing him on it (*Bickerdike v. Bollmann*, 1 T. R. 405); save and except to the drawer, the acceptor is as much liable on an accommodation bill to the *bonâ fide* holder thereof as on a bill drawn for value in the ordinary course of business.

See title BILL OF EXCHANGE.

ACCOMMODATION WORKS. Where under the Railways Clauses Act, 1845, any railway company takes land compulsorily and intersects the land of the landowner, the latter is entitled under s. 68 of the Act to require the company to make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, that is to say, convenient gates, bridges, arches, culverts, and passages over or under or by the sides of or leading to or from the railway, necessary for making good any interruptions caused by the railway to the use of the intersected lands; also, sufficient posts, rails, hedges, ditches, mounds, or other fences for separation of the lands adjoining from the lands taken, and for the protection of cattle, &c., on the

ACCOMMODATION WORKS—*continued.*

lands adjoining; also, culverts and such like arches for the conveyance of water; also, proper watering places for cattle, &c., with the incidental watercourses for supplying same. In lieu of such accommodation works, the landowner may accept compensation in money. The compensation for accommodation works should also be kept distinct from the sum or sums paid by way of purchase-money and compensation money for severance. See *Frend & Ware's Railway Precedents*.

In respect of sewerage works, the Metropolitan Board of Works is under similar regulations (25 & 26 Vict. c. 102, s. 25). *Lloyd on Compensation*, 271.

ACCOMPLICE: See title **AIDERS AND ABETTERS**; **PRINCIPALS AND ACCESSORIES**.

ACCORD AND SATISFACTION. This is a defence in law, consisting (as the name imports) of two parts: viz. something given or done to the plaintiff by the defendant as a satisfaction, and agreed to (or accorded) as such by the plaintiff.—Therefore accord without satisfaction is not a good plea (*Parker v. Ramsbottom*, 3 B. & C. 257), as neither is satisfaction without accord (*Hardman v. Bellhouse*, 9 M. & W. 596); but accord and satisfaction with one of several enures to the benefit of all (*Wallace v. Rensall*, 7 M. & W. 264; *Nicholson v. Revill*, 4 A. & E. 675). But the satisfaction must be complete and executed (*Flockton v. Hall*, 16 Q. B. 1039).

In the case of an ascertained sum of money, a less sum is no satisfaction for the debt unless there is some additional consideration (*Fitch v. Sutton*, 5 East, 230; *Cumber v. Wane*, 1 Sm. L. C., 6th ed. 301); but in other cases the value of the satisfaction is not inquired into (*Pinnel's Case*, 5 Rep. 117 a; *Curlewis v. Clark*, 3 Exch. 375); excepting so far as to ascertain that the chattel given in satisfaction is of some value (*Preston v. Christmas*, 2 Wils. 86; *Cartwright v. Cook*, 3 B. & Ad. 701). One security is no satisfaction for another, unless it is of a higher or better quality than the original security: e.g., by being negotiable (*Sibree v. Tripp*, 15 M. & W. 23).

After breach, accord and satisfaction is in general a good defence (when specially pleaded) to an action on any contract, whether made by parol or by specialty (*Blake's Case*, 6 Rep. 43 b); unless where a sum certain is payable under the specialty (*Peyton's Case*, 9 Rep. 79 a); but before breach it is never a good defence to an action on a specialty "*nam unumquodque eodem modo quo colligatur dissolvi debet.*"

An accord and satisfaction obtained by fraud may be set aside in equity (*Stewart v. Great Western Ry. Co.*, 2 De G. J. & S.

ACCORD AND SATISFACTION—*contd.*

319); and a receipt given for money received as compensation under circumstances amounting to imposition, or even undue consideration, will not estop the injured party even at Law (*Roberts v. Eastern Counties Ry. Co.* 1 F. & F. 460; *Lee v. Lancashire and Yorkshire Ry. Co.*, L. R. 6 Ch. App. 527).

ACCOUNT: See next title.

ACCOUNT, ACTION OF. An action which lies against a party to compel him to render an account to another with whom he has had transactions; and the writ by which this action was commenced was thence termed a writ of account (F. N. B. 116 to 119; Co. Litt. 172 a). From the greater facilities, however, which were afforded by the Courts of Equity in taking an account of profits or receipts, the action of account at law was seldom resorted to, one of the most recent cases in which it was used being *Beer v. Beer* (12 C. B. 2). The action might still, however, be brought in a proper case: for by the common law, it lay against a bailiff or receiver; also, against one merchant at the suit of another for not rendering a reasonable account of profits; and by the stat. 4 Anne, c. 16, s. 27, it was made to lie by one joint tenant or tenant in common against the other as bailiff (although not expressly so appointed) for receiving more than comes to his just share or proportion. This action as between merchants and merchants was an exception to the Statute of Limitations (21 Jac. 1, c. 16, s. 3), but since the M. L. A. Act, 1856 (19 & 20 Vict. c. 97), s. 9, it was no longer so, the limit for bringing the action being now six years in all cases.

The equitable jurisdiction in account applied in the following cases:—(1.) Where a principal asked for an account against his agent, there existing in this case a fiduciary relation between the parties (*Mackenzie v. Johnston*, 4 Mad. 373), but not in the converse case of agent against principal (*Padwick v. Stanley*, 9 Hare, 627). (2.) Where there were *mutual accounts* between plaintiff and defendant; i.e., when each of two parties had *both received and paid* on the other's account (*Phillips v. Phillips*, 9 Hare, 471). And (3.) where the accounts were of a very complicated character, and therefore not admitting of being examined on a trial at Nisi Prius (*O'Connor v. Spaight*, 1 Sch. & Lef. 305).

Since the coming into operation of the Judicature Acts, 1873–5, the jurisdiction in account has become co-extensive at law and in equity; consequently, no intricacy of account or fiduciary relation or other special ground is necessary now to found the jurisdiction in equity; and nothing

ACCOUNT, ACTION OF—*continued.*

but reasons of convenience should now determine whether the action should be commenced at law or in equity.

Where an ordinary trust or partnership account is wanted in an action, the writ of summons should be indorsed with an express claim for an account, and in that way immediate judgment for an account may be obtained. Order xv., rules 1, 2.

ACCOUNT SETTLED. Settled accounts are accounts rendered by, *e.g.*, a trustee or executor to his *cestuis que trustent*, or to the residuary legatees upon their releasing him of his accountability to them, and which accounts so rendered they have approved and accepted. Usually settled accounts are not opened, that is, taken over again *in toto*, but the practice of the Court is at the most to give merely liberty to surcharge and falsify the accounts, and not even that unless at least one clear error is proved.

See titles ACCOUNT STATED; SURCHARGE AND FALSIFY.

ACCOUNT STATED. This is nothing more than the admission of a balance due from one party to another; and that balance being due there is a debt: and the statement of the account implies a promise in law to pay the debt shewn by the balance. For an account stated, it is requisite that a sum certain should be due in certainty (*Hughes v. Thorpe*, 5 M. & W. 656); but the sum need not be payable *in presenti* (*Wheatly v. Williams*, 1 M. & W. 533). The account must have been stated to the creditor himself or his agent, and is not sufficient if made to a stranger (*Tucker v. Barrow*, 7 B. & C. 623). The statement may be in writing or by word of mouth (*Singleton v. Barrett*, 2 C. & J. 368); an I. O. U. is evidence of an account stated (*Jacobs v. Fisher*, 1 C. B. 178). But to revive debts barred by statute, the account stated must be in writing (9 Geo. 4, c. 14, s. 1).

An account stated is not conclusive, but an error therein may be shewn (*Thomas v. Hawkes*, 8 M. & W. 140); also, that an item therein is not a valid debt for want of consideration (*French v. French*, 2 M. & G. 644). It is, however, no objection to a debt that it arose upon a contract which was bad for want of writing within the Statute of Frauds (*Cocking v. Ward*, 1 C. B. 858), unless the contract has continued executory (*Lord Falmouth v. Thomas*, 1 C. & M. 89).

It is a rule of law, that an infant cannot state an account (*Trueman v. Hurst*, 1 T. R. 40); upon attaining his age of twenty-one years he might, however, have ratified such an account (*Williams v. Moor*,

ACCOUNT STATED—*continued.*

11 M. & W. 256); but see now Infants Relief Act, 1874.

ACCOUNT, JUDGMENT FOR: See title ACCOUNT, ACTION OF.

ACCOUNTANT-GENERAL. This was an officer of the Court of Chancery, appointed by the statute 12 Geo. 1, c. 32, but who has since been superseded by an officer called the Paymaster-General of England, under the Chancery Funds Act, 1872 (35 & 36 Vict. c. 44), and the Chancery Fund Rules, 1872, which came into operation on the 7th January, 1873.

See title PAYMASTER-GENERAL.

ACCOUNTANT TO THE CROWN. This denotes generally one who receives money for the Crown, and is accountable therefor. The Crown has a lien upon the lands (including the copyhold lands) of the accountant for any moneys he may misapply or become chargeable with, and such lien attached as from the time he became such accountant, and continued to attach, even as against purchasers of the lands without notice (*Coxhead's Case*, F. Moore, 126). Since June 4th, 1839, every such lien of the Crown must be registered under 2 & 3 Vict. c. 11, and under the Act 22 & 23 Vict. c. 85, must be re-registered every five years; but since 1st November, 1865, no future lien is to affect a purchaser, although with notice, until a writ of execution has been registered, under 28 & 29 Vict. c. 104.

See title CROWN DEBTS.

ACCOUNTS CURRENT. These are running accounts, or open accounts.

ACCRETION. A mode of acquisition by natural law.

See titles ACCESSIO; ACCRUER, CLAUSE OF.

ACCRUER, CLAUSE OF. This is an express clause frequently occurring in the case of gifts by deed or will to persons as tenants in common, providing that upon the death of one or more of the beneficiaries his or their shares shall go to the survivors or survivor. It is a rule of law, that there is "no survivorship upon survivorship;" *i.e.* that the clause of accruer extends only to the original, not also to the accrued, shares, unless in terms the clause is expressly made to extend to the latter also, which it customarily is made to do. *Pain v. Benson*, 3 Atk. 80.

ACCUMULATIONS. The rule which limits the accumulation of the income of property used to be the rule of perpetuities, *viz.*, a life or lives in being, twenty-one years, and (where gestation actually

ACCUMULATIONS—continued.

existed) the period of gestation (*Cadell v. Palmer*, 1 Cl. & F. 372); but, in consequence of the supposed abuse of that rule in *Thellusson v. Woodford*, 4 Ves. 112, and by virtue of the so-called Thellusson Act (39 & 40 Geo. 3, c. 98), the period within which such accumulation may at the present day be lawfully directed is one or other severally, and not two or more together, of the following periods, namely:—

- (1.) The life of the grantor;
- (2.) The term of twenty-one years from the death of such grantor, or (but in the case of a will only) from the death of the testator;
- (3.) The minority or minorities of any life or lives in being, or *in ventre*, at the death of such grantor or of such testator (as the case may be);
- (4.) The minority or minorities of any person or persons who, under the deed or will (as the case may be), is entitled to the income or rather would if of full age, and but for the direction to accumulate, be entitled thereto.

The Thellusson Act applies both to real and to personal property; also, whether the direction to accumulate is given expressly in so many words, or arises by implication only (*Macdonald v. Bryce*, 2 Keen, 276), taking place by operation of law, and without regard to the question whether the accumulation, when it arises from an implied direction, takes place accidentally or necessarily (*Evans v. Hellier*, 5 Cl. & F. 114), and also without regard to the question whether the interests of takers are vested or not (*Shaw v. Rhoades*, 1 My. & Cr. 135).

The direction to accumulate is, in the general case, void as to the excess only (*Marshall v. Holloway*, 2 Sw. 450); but where the direction exceeds not only the limit prescribed by the Thellusson Act, but also the rule of perpetuities, it is void *in toto*, and not merely as to the excess (*Boughton v. James*, 1 Coll. 26).

The Thellusson Act directs that the income directed to be accumulated shall, so far as the direction is void for excess, belong to the person or persons who "would have been entitled thereto if such accumulation had not been directed:" and the statute, in this part of it, has been construed as follows:—

I. As to realty,—

- (1.) If there is no residuary devise, the heir takes (*Eyre v. Marsden*, 2 Keen, 564); and in case of his death during the period of excess, the future income will go;
 - (a.) In the case of the heir having taken a chattel

ACCUMULATIONS—continued

interest to his next of kin (*Sewell v. Denny*, 10 Beav. 315); and

- (b.) In the case of the heir having taken a freehold interest, to his next of kin (1 Vict. c. 26, s. 6), as being at the best an interest *pur autre vie* only;

- (2.) If there is a residuary devise, the residuary devisee takes (1 Vict. c. 26, s. 25).

II. As to personalty,—

- (1.) If there is no residuary bequest, the next of kin take;
- (2.) If there is a residuary bequest, the residuary legatee takes (*Haley v. Bannister*, 4 Madd. 275), and takes as capital, as to which, therefore, if tenant for life, he would be entitled to the income of it only (*Crawley v. Crawley*, 7 Sim. 427); and

III. As to realty and personalty equally.

If the income directed to be accumulated is the income of residue, then,

- (1.) So far as the residue consists of personal estate, the next of kin take (*Pride v. Fooks*, 2 Beav. 430); but
- (2.) So far as the residue consists of real estate, the heir takes (*Wildes v. Davies*, 1 Sm. & Giff. 475).

The Thellusson Act expressly excepts from its operation the following directions, namely:—

- (1.) Provisions for the payment of the debts, whether of the settlor or testator (as the case may be), or of any other person (*Barrington v. Liddell*, 2 De G. M. & G. 480); and such provisions are also exempt from the rule of perpetuities (*Briggs v. Oxford (Earl)*, 1 De G. M. & G. 363);
- (2.) Provisions for raising portions, whether given by the same instrument or by a different one (*Beech v. Lord St. Vincent*, 3 De G. & Sm. 678), the parents of the portionists taking, however, some interest under the instrument which directs the accumulation (*Barrington v. Liddell*, *supra*), however small that interest may be (*Evans v. Hellier*, 5 Cl. & F. 126), the interest of the parents acting analogously to the rule of perpetuities, *semble*;
- (3.) Provisions for raising a timber fund, provided such provisions do not

ACCUMULATIONS—continued.

exceed the rule of perpetuities (*Ferrand v. Wilson*, 4 Hare, 344).

ACCUMULATIVE JUDGMENT. The passing distinct sentences for two or more distinct offences. By the Common Law such a judgment could only be given in cases of misdemeanors, and not upon convictions for felony, the party attainted of felony becoming thenceforth dead in law. Latterly, however, by stat. 7 & 8 Geo. 4, c. 28, s. 10, the Court was empowered to pass a second sentence, to commence after the expiration of the first, in a case of felony; and under the criminal statutes at present in force (24 & 25 Vict.) such accumulative punishments are in general use, not exceeding three in all.

See titles LARCENY; PERJURY.

ACCUSED. This is the generic name for the defendant in a criminal case, and (as not prejudging the case, but being a wholly neutral description) it is more appropriate than either prisoner or defendant. *Rex v. M'Naughten*, 1 C. & K. 131.

AC ETIAM BILLÆ. The *ac etiam* clause was a form or fiction of law adopted first in the Queen's Bench, and afterwards in the Common Pleas, to give jurisdiction to these Courts in actions for ordinary debts. The bill of Middlesex in the Queen's Bench being framed only for actions of trespass; and the statute, 13 Car. 2, st. 2, c. 2, having required that the true cause of action should be expressed in the writ or process, the Court of Queen's Bench was in danger of losing its entire jurisdiction in matters of debt; to obviate that result, the *ac etiam* clause was invented. And some few years afterwards, North, C.J., directed that in the Common Pleas the like fiction should be added to the usual complaint of breaking the plaintiff's close. But after the Uniformity of Process Act (2 Will. 4, c. 39) the necessity for this fiction ceased.

ACKNOWLEDGED DEED: See titles DEED ACKNOWLEDGED; FINE; RECOVERY, COMMON.

ACKNOWLEDGMENT BY MARRIED WOMEN: See titles DEED ACKNOWLEDGED; FINE; RECOVERY, COMMON.

ACKNOWLEDGMENT MONEY. A sum of money once paid by copyhold tenants in some parts of England on the deaths of their lords as an acknowledgment of their new lords. It is the *laudemium*, or *laudatium* of Roman law, being so called a *laudando domino*. Leominster used to be an instance of it, see Cowel; but there is no trace of it at Leominster at the present day. The author is not aware of any district in England in which it is now payable. The payment of fines by copyhold

ACKNOWLEDGMENT MONEY—contd.

tenants on the lord's death is, however, an analogous payment.

ACKNOWLEDGMENT OF A DEBT. This consists in the admission that a debt is owing. Its effect upon a debt is to cause the statutory period of limitation to commence running anew. The acknowledgment must be in writing under Lord Tenterden's Act (9 Geo. 4, c. 14), s. 1, and must be addressed to the creditor, or *semble*, his agent (*Fuller v. Redman*, 26 Beav. 614); it may be signed either by the debtor himself or his agent (19 & 20 Vict. c. 97, s. 13). The acknowledgment, in order to be sufficient, must involve a promise to pay (*Tanner v. Smart*, 6 B. & C. 602); therefore the effect of a sufficient acknowledgment of a debt already actually barred is the same as the acknowledgment of a debt not yet barred, *i.e.*, the time will run afresh from the last acknowledgment. An acknowledgment by one of several joint debtors affects him alone, and not the other non-acknowledging co-creditors (9 Geo. 4, c. 14).

ACKNOWLEDGMENT OF TITLE. Under the stat. 3 & 4 Will. 4, c. 27, s. 14, a written acknowledgment of the title of a person entitled to any land, when given to him or his agent, and signed by the party in possession or in receipt of the rents and profits of the lands, has the effect of rendering such possession or receipt that of the person whose title is acknowledged; and the title of the latter to make an entry or to bring an action for the recovery of the lands shall be deemed to accrue at the date of such acknowledgment for the purpose of saving the Statute of Limitations. And the effect of such an acknowledgment is the same under the present Real Property Limitations Act, 1874 (37 & 38 Vict. c. 57), which came into operation on the 1st January, 1879.

ACCUSARE NEMO SE DEBET. An accused may always plead not guilty, and in general ought to so plead.

See title NOT GUILTY.

ACQUIESCENCE. Where a person having a full knowledge of the facts (*Ramsden v. Dyson*, 1 H. L. C. 129) neglects to dispute the right of another, he is said to acquiesce in such right; but there can be no acquiescence where there is not full knowledge (*Eardley v. Lord Granville*, 3 Ch. Div. 826). The effect of such acquiescence is a species of *estoppel by conduct* (see title ESTOPPEL); and it is one of the principal grounds upon which Courts of Equity and also of Law rely in refusing relief to persons bringing forward their claims. The Courts of Equity carry this principle so far that in a matter of purely equitable jurisdiction they refuse

ACQUIESCENCE—*continued.*

relief to a plaintiff although he is within the period allowed by the Statutes of Limitation for the recovery of his rights. (See titles **EQUITY FOLLOWS THE LAW**; **LACHES**.) And when a person stands by and allows another to deal with property to which he claims (or has) a right, he is prevented from disputing the right of such other person, at least to the prejudice of a purchaser for value without notice (*Teasdale v. Teasdale*, Sel. Ch. Ca. 59). For the effect of acquiescence on the part of a landlord in avoiding the effect of a forfeiture for breach of covenant by his tenant, see title **WAIVER**.

ACQUITTAL. This word has two meanings. 1. It signifies to be free from entries and molestations of a superior lord for services issuing out of lands. 2. It signifies a deliverance or setting free of a person from a charge or suspicion of guilt.

ACQUITTANCE. A discharge in writing of a sum of money or other duty is so called. Such a discharge, unless it is by deed, is not pleadable, neither is it conclusive as evidence, for it may be shewn to have been given through mistake. A duly authorized agent may sign an acquittance so as to bind his principal.

ACT OF BANKRUPTCY. This phrase denotes any one of the various grounds upon which a debtor may be adjudicated a bankrupt. Under the Bankruptcy Act, 1869, s. 6, these acts of bankruptcy are the following:—

- (1.) A general conveyance or assignment by the debtor in trust for his creditors;
- (2.) A fraudulent conveyance or transfer by the debtor of part of his property;
- (3.) The debtor having done any of the following things with intent to defeat or delay his creditors, namely:
 - (a.) Departed out of England;
 - (b.) Remained out of England;
 - (c.) Being a trader, departed from his dwelling-house;
 - (d.) Begun to keep house; or
 - (e.) Suffered himself to be outlawed;
- (4.) The debtor having filed in Court a declaration of his inability to pay;
- (5.) The levying of an execution for not less than 50*l.* against the debtor by seizure and sale of his goods;
- (6.) The debtor having neglected, if a trader, for seven days, and if not a trader for twenty-one days, after service thereof to pay or to secure or compound for the amount (not

ACT OF BANKRUPTCY—*continued.*

being an amount under 50*l.*) demanded on the debtor's summons of the petitioning creditor.

ACT OF FORBEARANCE: See titles **FAIT**; **FORBEARANCE**.

ACT OF GOD. This is a pious phrase for an inevitable accident. No one is to be prejudiced by the *act of God*. But when a debtor has agreed to an alternative obligation, and one of the alternatives becomes impossible by the act of God, he is not thereby discharged from doing the other, which remains possible (*Barkworth v. Young*, 4. Drew. 1); for that is no prejudice to him, and the contrary would be a prejudice to the creditor.

See also titles **CONDITIONS**, **IMPOSSIBLE**; **IMPOSSIBILITY**.

ACT OF PARLIAMENT: See title **STATUTE**.

ACT OF SETTLEMENT: See title **SETTLEMENT**, **ACT OF**.

ACT OF SUPREMACY: See title **SUPREMACY**, **ACT OF**.

ACT OF UNIFORMITY: See title **UNIFORMITY**, **ACT OF**.

ACTA, RES INTER ALIOS. Anything done between or among third persons, i.e. persons other than the person concerning whom the now question arises. A thing so done is neither binding by estoppel nor admissible as evidence.

See titles **ADMISSIBILITY OF EVIDENCE**; **ESTOPPEL**.

ACTES. In French law, denotes documents, e.g., *les actes de l'état civil*—public documents. Compare the use of *acta* in Roman law, and the phrase *Acts of Parliament* in English law.

ACTES DE DÉCÈS. In French law, are the certificates of death, which are required to be drawn up before any one may be buried. (*Aucune inhumation ne sera faite sans une autorisation de l'officier de l'état civil.*—*Code Nap.* i. 2-4.)

ACTES DE MARIAGE. In French law, are the marriage certificates, and contain names, professions, ages, and places of birth and domicile of the two persons marrying and of their parents; also the consent of these latter, and the mutual agreements of the intended husband and wife to take each other for better and worse, together with the usual attestations.

ACTES DE NAISSANCE. In French law, denote the certificate of birth, and must contain the day, hour, and place of birth, together with the sex and intended

ACTES DE NAISSANCE—*continued.*

Christian name of the child, and the names of the parents and of the witnesses.

ACTIO NON ACCREVIT INFRA SEX ANNOS. In the times of Latin pleading, this was the phrase by which a defendant pleaded the Statute of Limitations to an action of *assumpsit* or on other simple contract, six years being the period limited for bringing the action.

ACTIO PERSONALIS MORITUR CUM PERSONA. This maxim, which denotes that a personal ground of action dies with the person, has been largely infringed upon by a succession of statutes, and may be roughly stated to hold good at the present day only in actions of libel and slander where the defendant is the deceased person, and of course also in all criminal prosecutions. The successive infringements of the maxim may be arranged as follows:—First of all, the maxim never applied to contracts but only to torts: and as regards torts, for an injury to the property of the deceased person, his executor was enabled by the statute 4 Edw. 3, c. 7, as regards personal property, and by the statute 3 & 4 Will. 4, c. 42, as regards real property, to bring an action against the wrongdoer; but in the case of such injury to real property, it must have been committed within six calendar months before the death, and the action for it must be commenced within one year after the death; on the other hand for an injury to the person of the deceased, if the injury caused death, the executor has an action under 9 & 10 Vict. c. 93 and 27 & 28 Vict. c. 95, and if the injury did not cause death the executor has no action excepting so far as the injury to the person incidentally carried with it an injury to the property of the deceased, *e.g.*, by medical fees, loss of business and such like. Again, where the wrongdoer dies, an action against his executor or administrator was given by the stat. 3 & 4 Will. 4, c. 42, for an injury done by the dead man to the property (whether real or personal) of the living plaintiff, if such injury was committed within six calendar months before the death, and the action is commenced within six calendar months after probate or administration granted to the deceased wrongdoer.

ACTIO SACRAMENTI: See title SACRAMENTI, ACTIO.

ACTION AND SUIT. This is defined as the right of recovering in a Court of justice what is due or owing to oneself (*jus persequendi in judicio quod sibi debetur*).

All actions arise either out of contract or out of tort; if a proceeding originates out of a crime it is not (in English law, at any

ACTION AND SUIT—*continued.*

rate) an action but a prosecution. The varieties of the several actions are the following:—

I. On contract,—

- (1.) Covenant, being on a deed alone;
- (2.) Assumpsit,—being on a simple contract only;
- (3.) Debt,—being indifferently on a deed or a simple contract;
- (4.) *Scire facias*,—being on a judgment;
- (5.) Account; and
- (6.) Annuity.

II. On tort,—

- (1.) Trespass,—being either
 - (a.) Trespass *quare clausum fregit*,—to real property; or
 - (b.) Trespass *de bonis asportatis*,—to personal property;
- (2.) Case.—
- (3.) Trover,—
- (4.) Detinue,—and
- (5.) Replevin.

For a particular explanation of each of these forms of action, see the respective titles.

There were also a numerous group of actions called real and mixed actions, but all of these, saving *ejectment* only, have been abolished by the stat. 3 & 4 Will. 4, c. 27, s. 36, and the C. L. P. Acts, 1852, 1854, and 1860; and under the Judicature Acts, 1873–7, none of the old forms of action are preserved, but every action is now commenced with a writ indorsed merely with the claim made therein, and followed by a statement of the simple facts out of which the right in question is alleged to have arisen.

There are certain general principles that are applicable to all actions and suits. Thus, first, it is necessary before commencing an action to see that the cause of action is complete, and, therefore, in the case of payments due against a certain day to see that the day has arrived and is over, and in the case of payments to become due only upon the performance of some condition to see that such condition has been performed; otherwise, if there was no cause of action at the date of the issuing of the writ of summons whereby the action is commenced, the plaintiff must necessarily fail. Secondly, it is necessary, especially in actions growing out of contracts, to see that the plaintiff has that privity which is necessary to support the action and as against the particular defendant, otherwise the action will be demurrable (*Lumley v. Gye*, 2 E. & E. 216). Thirdly, in the case of torts, the ground of action must be what the law regards as an *injuria* and not a *damnum* merely (*Stevenson v. Newnham*, 13 C. B. 285; *Acton v. Blundell*,

ACTION AND SUIT—continued.

12 M. & W. 324). Fourthly, that the wrongful act does not amount to a felony (*Wellock v. Constantine*, 2 H. & C. 146), or if it does, then that the felon has been prosecuted or his prosecution become impossible (*Wells v. Abrahams*, L. R. 7 Q. B. 554, Lord Blackburn's judgment; *Ex parte Ball*, *In re Shepherd*, 10 Ch. Div. 667). And, fifthly, in case of the *injuria* being the breach of a public duty, private damage must have arisen to the plaintiff from it (*Kearns v. Cordwainers Co.*, 6 C. B. 388).

See also following titles; also CONSOLIDATION RULE; CROSS ACTIONS; JOINDER OF CAUSES; PARTIES, &c.

ACTION, NOTICE OF: See title NOTICE OF ACTION.

ACTION OR PROSECUTION, WHICH?

When an act producing injury to a private individual is of such a character as to amount to a criminal offence, the general rule is that the private tort is merged in the public felony, or, speaking more correctly, that the public injury must be first regarded, and the private wrong only secondarily, if at all, that is to say, the prosecution must come first, and the action, if at all, only after the prosecution, unless where the prosecution has become or has always been impossible (*Wellock v. Constantine*, 2 H. & C. 146; *Wells v. Abrahams*, L. R. 7 Q. B. 554; *Ex parte Ball*, *In re Shepherd*, 10 Ch. Div. 667; and see *South Wales Atlantic Steamship Co.*, 2 Ch. Div. 763). But in general actions for assault or assault and battery may be brought at the option of the plaintiff without his having first criminally prosecuted, and in these cases the action is in lieu of the prosecution, *semble*.

See titles ACTION AND SUIT; PROSECUTION.

ACTION PENDING, PLEA OF: See title PENDING ACTION, PLEA OF.

ACTOR SEQUITUR FORUM REI. The plaintiff chooses the jurisdiction to which the defendant is subject—a maxim which facilitates the prosecution of the action, and especially the execution that is afterwards to issue on the judgment therein. The maxim used to have no application to local, but only to transitory actions.

See titles TRANSITORY ACTIONS; VENUE.

ACTUS CURIAE NEMINEM LÆDIT. The act of the Court hurts no one; and therefore any inconvenience occasioned by the Court to a suitor will be remedied by the Court, wherever it would be likely if unredressed to work hardship or loss to the party. The maxim applies exclusively to

ACTUS CURIAE NEMINEM LÆDIT—continued.

the minor rules of procedure, which the Courts have established for their own convenience.

ACTUS NON FACIT REUM, NISI MENS SIT REA. The act apart from the intention does not constitute a man a criminal. See title INTENTION.

AD COLLIGENDA BONA. A species of administration sometimes granted to a stranger for the purpose of realizing and getting in (*i.e.*, collecting) the goods of a deceased person.

See title ADMINISTRATION, GRANT OF.

AD DAMNUM. That part of the old declaration which commenced with the words "to the damage," &c., was termed the breach, and was thence sometimes called the breach *ad damnum*. *Ch. on Pleading*, 362, 6th ed.

AD INQUIRENDUM. A judicial writ commanding inquiry to be made of anything relating to a cause depending in the King's Courts. It was granted upon many occasions for the better execution of justice.

See title WRIT OF INQUIRY.

ADDICTIO BONORUM LIBERTATIS CAUSA. An assignment of an inheritance to a nominal *haeres* for the sake of giving effect to the liberties bequeathed by the will, and which liberties were in danger of falling through from want of an executor of the will (*i.e.*, *haeres*). This mode of succession was introduced by Marcus Aurelius. It extended to cases of intestacy as well as to cases of wills.

ADDITION. This term is used in law to denote the address and profession of the party to, or of any deponent in, an action. The greatest accuracy in the addition is often necessary, *e.g.*, in the affidavit which is to accompany the registration of a bill of sale.

ADELING, otherwise ATELING. An expression which was used to designate among the Saxons their chief nobility, and pre-eminently the eldest son of the king. *Spelman*.

ADEMPTION. The taking away. For the application of this word to legacies and devises, see title LEGACIES AND DEVISES. It is sufficient here to note that in Roman Law the *animus adimendi* required to be proved as a substantive fact independently of the alienation; but in English Law, the intention is concluded from the fact of alienation.

ADEQUACY OF CONSIDERATION: See title INADEQUACY OF CONSIDERATION.

ADGNATI: See title AGNATI.

ADITIO HÆREDITATIS. In Roman Law, was the entry of the *Haeres* upon the inheritance, whether coming to him under a will or under an intestacy. It was distinguished from *Gestio pro Haerede*, which was acting as *Haeres* before the *aditio*. The executor's obtaining probate of the will, or the administrator's obtaining a grant of administration, corresponds with the *aditio* of the *Haeres*; and the intermeddling of either before the grant of probate or administration corresponds with the *gestio* of the *Haeres*. In English Law there is nothing corresponding with the *aditio* of the Roman *Haeres* as regards the heir to real estate.

ADJACENT SUPPORT: See title *SUPPORT, RIGHT OF*.

ADJOURNMENT. A putting off until another time or place. Thus, a Court may be adjourned; Parliament is adjourned; the further consideration or hearing of an action is adjourned; and in consequence of such adjournment, the parties and witnesses have permission to forbear their attendance during the period of adjournment. See, as to the old Adjournment Days, *Cheetham v. Sturtevant*, 12 M. & W. 615.

ADJUDICATIO: See titles *FINIUM REGUNDORUM*; *FORMULÆ*.

ADJUDICATION. A giving of judgment. In Roman Law, the *adjudicatio* was the fourth of the four formulæ in use during the period of the formulary procedure (177 B.C. till 286 A.D.). It occurred in three actions only, viz., *Finium Regundorum*, *Communi Dividundo*, and *Familix Erciscundæ*. In English Law, when a man is made a bankrupt, it is under an order of *adjudication*.

See title *ADJUDICATION ORDER*.

ADJUDICATION ORDER. That order of the Court of Bankruptcy whereby a debtor is adjudicated or declared a bankrupt is so called. The adjudication order relates back to the act of bankruptcy on which it was founded, and it may even relate back further, the rule being to found upon some act that has happened within six months prior to the presentation of the petition, and then to carry back the order to the first available act of bankruptcy that has happened within the twelve months preceding such presentation. But in determining what is or what is not a fraudulent preference within the Bankruptcy Act, 1869, there is no relation back of the order of adjudication.

See titles *ACT OF BANKRUPTCY*; *FRAUDULENT PREFERENCE*; *PROTECTED TRANSACTIONS*; *RELATION BACK*.

ADJUSTMENT. This is the rateable distribution of a loss which is matter for general average (see title *GENERAL AVERAGE*). In an adjustment, the rule now adopted in England differs according as,—

(1.) The ship arrives at its port of destination, in which case the selling price of the goods is taken; or

(2.) The ship puts back to the port of lading, in which case the invoice price of the goods is taken.

But in either case the goods sacrificed as well as the goods saved are liable to contribute towards making good the loss, it being obvious that the owners of the goods sacrificed are not to be on a better footing than the owners of the goods saved. *Sm. M. Law*, 295.

The remedy for enforcing contribution towards a general average was by action at law or suit in equity, but not (as a rule) in the Court of Admiralty.

When the amount of the indemnity for damage sustained in the course of a voyage is ascertained, and the proportion thereof which each underwriter of the policy is liable to pay is settled, it is usual for the underwriter to indorse on the policy, "adjusted this loss at so much per cent.," or some words to the same effect, and this is called an adjustment (1 Park on Ins. 192). The adjustment when so made is *prima facie* evidence both of the underwriter's liability on the policy, and also of the amount due; and the onus of proof is therefore thrown on the underwriter if he alleges that the adjustment was obtained through fraud, or was made under a mistake of fact, or even (it seems) of law. It is the common practice after an adjustment for the broker of the underwriter to give to the assured his (the broker's) own note, called a credit note, for the amount of the loss payable in a month; but the underwriter still in such a case remains liable, as a surety for the broker, in case the latter should become insolvent during the month.

See title *GENERAL AVERAGE*.

ADJUSTMENT OF ACCOUNTS. As between the tenant for life of residuary personal estate (*Allhusen v. Whittell*, L. R. 4 Eq. 295) or even of residuary real estate (*Marshall v. Crowther*, 2 Ch. Div. 199) on the one hand and the person or persons entitled thereto in remainder after the tenant for life's death on the other hand, it is a rule that in the case of debts or of legacies, or of debts and legacies charged thereon or payable thereout, the tenant for life must keep down all the interest that accrues due; and again, the tenant for life is entitled to all the interest, income,

ADJUSTMENT OF ACCOUNTS—contd.

or dividends arising on legacies that are contingently payable until such contingency happens; and the ascertainment of these liabilities and rights is called the adjustment of the accounts between tenant for life and remainderman.

See titles APPORTIONMENT; APPORTIONMENT OF RENT; CAPITAL OR INCOME.

ADMEASUREMENT, WRIT OF. A writ which lay against those who usurped more than their share. It used to lie in two cases, first, for *admeasurement of dower*, and secondly, for *admeasurement of pasture*. In the former case, it was brought by the heir against the widow of a deceased, who withheld from such heir, or his guardian, more land in respect of her dower than she was justly entitled to, in which case the heir was to be restored to the overplus. In the second case, it lay between those who had common of pasture appendant to their freehold, or common by vicinage, when any one or more surcharged the common with more cattle than he or they ought to have thereon (F. N. B. 125, 148; *Les Termes de la Ley*). Nevertheless, the writ for admeasurement of dower did not lie where the excess in the assignment of dower was attributable to the act of the heir himself, who made the assignment *being at the time of full age*; unless, indeed, the excess had arisen from the discovery of mines which had been overlooked at the time of the assignment. At the present day, this writ of admeasurement is practically extinct as a form of process in both of the two cases in which it was formerly used; and now an action on the case is the common mode of proceeding by one commoner against another for a surcharging of the common, and a suit in Equity is the course to be adopted by the heir against the widow for the purpose of correcting an excess in the assignment of dower (*Hoby v. Hoby*, 1 Vern. 218). There is no question, however, but that the writ of admeasurement, never having been expressly abolished, is still available for either of the two purposes before-mentioned, although the wholesale abolition of real and mixed actions which was effected by the Acts 3 & 4 Will. 4, c. 27, s. 36, and 23 & 24 Vict. c. 126, s. 26, may be thought by some to have extended to the writ of admeasurement also.

ADMINICULUM. An aid or support to something else, whether a right or the evidence of one. It is principally used to designate evidence adduced in aid or support of other evidence, which without it is imperfect.

ADMINISTRATION. The discharging of some duty or office, usually that of getting in and distributing the assets of a deceased person.

See titles ADMINISTRATION OF ASSETS; ADMINISTRATOR.

ADMINISTRATION BOND. A bond for good administration of the estate of a deceased person invariably given by his executor or administrator upon obtaining a grant of probate or of administration.

See title ADMINISTRATOR.

ADMINISTRATION DUTY. Where the estate of the intestate exceeds £100, the grant of administration is subject to the payment of *ad valorem* stamp duty, the duty being at a higher rate than is Probate duty. The stat. imposing the duty is 55 Geo. 3, c. 184. Estates not exceeding £100 are exempted from this duty by the stat. 27 & 28 Vict. c. 56.

See title PROBATE DUTY.

ADMINISTRATION, GRANT OF. The administration of the personal estate of a deceased intestate belonged anciently to the sovereign as *parens patriæ*, or to certain lords of manors under a general grant from the sovereign, and afterwards to the ordinary who by the Statute of Westminster 2 (13 Edw. 1.), c. 19, was required to pay the debts of the deceased, and who, at a still later period, by the stat. 31 Edw. 3, st. 1, c. 11, was required to depute the administration to the next of kin of the intestate. Thus stood administration until the Court of Probate Act (1857), 20 & 21 Vict. c. 77, whereby the power of granting administration was transferred to that Court from the Ecclesiastical Courts.

In the grant of letters of administration, there are certain relations of the deceased who are considered to have a preferable right. Thus, the husband has an absolute right to administer to his wife, and the widow has a moral right (which the Court generally recognises) to administer to her husband. When there is no husband or widow, the right to administer belongs to the next of kin according to their proximity in relationship, the right to the beneficial interest under the Statute of Distributions generally regulating the right to the grant of administration; and in the case of their being several next of kin in equal proximity, he whom the majority shall elect in general administers. A creditor may also administer; and the Court may even appoint to the administration a person entirely without interest, in which latter case the grant is merely *ad colligendum*.

There are various species of administration, namely:—

ADMINISTRATION, GRANT OF—*contd.*

(1.) A general administration,—when the deceased is wholly intestate;

(2.) Administration *de bonis non*,—as upon the death of a sole executor after probate intestate, or upon the death of a sole administrator, while the administration is still incomplete (*de bonis nondum administratis*).

(3.) Administration *durante minoritate*,—as where the executor appointed by the will being a sole executor is a minor;

(4.) Administration *pendente lite*,—as where any suit touching the validity of the will is pending, and generally wherever the Court of Chancery would appoint a receiver of the estate;

(5.) Administration *durante absentia*,—as where a sole executor is out of the kingdom, and either (a) by the Common Law, before probate, or (b) by stat. 38 Geo. 3, c. 87, after probate; and

(6.) Administration *cum testamento annexo*,—as where either a sole executor dies without having proved the will, or a sole or surviving executor dies intestate.

There are also various other administrations of a limited or temporary kind, *e.g.*, until the will can be proved, or until the executor attains a certain age other than majority, and so forth.

Under the stat. 20 & 21 Vict. c. 77, s. 46, the district registrars of the Court of Probate may grant probate; and under 21 & 22 Vict. c. 95, s. 10, the County Court may make the grant.

The duty on administrations is regulated by the stats. 55 Geo. 3, c. 184, 23 Vict. c. 15, and 27 & 28 Vict. c. 56; and the stamp which is payable upon the bond commonly given by an administrator is now regulated by the Stamp Act, 1870 (33 & 34 Vict. c. 97).

ADMINISTRATION OF ASSETS. The Court of Chancery after the grant of probate or administration undertakes to apply the assets of the deceased person in payment of all his debts and legacies in their due and proper order. At the present day property of every kind or sort is available to pay the debts, but there is a certain order observed by the Court in its application of the different properties for that purpose, the following being the usual order:—

- (1.) The general personal estate not bequeathed at all, or by way of residue only;
- (2.) Real estate devised for the payment of debts;
- (3.) Real estate descended;
- (4.) Specific (including *residuary*) devises, and specific and general legacies all being charged with the payment of debts;

ADMINISTRATION OF ASSETS—*contd.*

(5.) General pecuniary legacies;

(6.) Specific (including *residuary*) devises and specific legacies, neither being charged; and

(7.) Real or personal estate appointed by deceased person by deed or will under a general power.

In the application of these properties in or towards payment of debts in a due course of administration, the following is the order of priority in which different classes of creditors used to rank:—

- (1.) Debts due to the Crown by record or specialty;
- (2.) Income tax, overseer's moneys, and other debts to which particular statutes assign priority;
- (3.) Judgment debts duly registered;
- (4.) Recognizances and statutes;
- (5.) Specialty contract debts; arrears of rent-service;
- (6.) Simple contract debts; unregistered judgments;
- (7.) Voluntary bonds in hands of volunteers;

Previously to the stat. 32 & 33 Vict. c. 46, specialty contract debts and arrears of rent-service were entitled to priority over simple contract debts and unregistered judgments in the distribution of what were termed *legal* assets, but were never so entitled in the distribution of equitable assets; and the effect of the stat. 32 & 33 Vict. c. 46, appears to be to abolish that distinction in the case of legal assets in administrations.

Under the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10, where the estate is insolvent, the rules of bankruptcy are to be applied to the administration of assets in the Chancery Division, and thus an equality is introduced in the order of payment of all debts whatsoever, out of all assets (whether legal or equitable) whatsoever, when the estate is insolvent,—being the only occasion in which the question of priority in payment is of any importance, a voluntary bond in the hands of the volunteer even not being excepted (*Ex parte Pottinger, In re Steward*, 8 Ch. Div. 621). But, N.B., Crown debts are not affected by the Bankruptcy Act, 1869, or by the Judicature Act, 1875.

See titles **EQUITABLE ASSETS; LEGAL ASSETS; and MARSHALLING OF ASSETS.**

ADMINISTRATOR. Is the person appointed to administer the estate of a person who has died intestate, or who (if testate) has appointed no executor in his will, or the executor (if any) thereby appointed is not yet able or enabled to act. If appointed during a minority, such an administrator is

ADMINISTRATOR—continued.

called an administrator *durante minoritate*, and so forth; if there is a will, he is called an administrator *cum testamento annexo*; and sometimes he is called an administrator *de bonis non*, when the executor (if any) or the previous administrator has left some portion of the estate unadministered. An administrator may also be a general administrator (in which case he is called simply an administrator), or an administrator appointed for the purposes of a particular litigation only (in which case he is called an administrator *ad litem*). The executor of the executor of an original testator is also the executor of such testator; *secus*, in the case of administrators.

See title ADMINISTRATION, GRANT OF.

ADMINISTRATOR AD LITEM. An administrator is so called when appointed for a particular litigation only.

See title ADMINISTRATION, GRANT OF.

ADMIRALTY, COURT OF. For the origin of this Court, see title COURTS OF JUSTICE. The general jurisdiction of the supreme Court is regulated at the present day by the stats. 24 & 25 Vict. c. 10, and 26 Vict. c. 24; and jurisdiction in Admiralty causes was conferred upon the County Court by the stat. 31 & 32 Vict. c. 71. The Court of Admiralty was thrown open to practitioners by the stat. 22 & 23 Vict. c. 6; but the modes of practice, together with the effects of a judgment in that Court, are of a peculiar nature, partaking largely of the rules of the civil law; thus an objection to the jurisdiction of the Court may be taken at any stage of the proceedings (*The Mary Ann*, 34 L. J. (Adm.) 73), and the party is not prejudiced in taking that objection by appearing (*The Eleanor*, 32 L. J. (Adm.) 19); and these rules are not materially altered by the new Judicature Acts, and orders and rules thereunder, but the Court is now a mere Division of the High Court. The judgments of the Court are chiefly *in rem*, and bind all the world as well as the parties to the action. The Court has power to arrest even any foreign ship coming within the maritime jurisdiction for any alleged damage occasioned by it to any British vessel anywhere.

See titles COLLISION; PRIZE; SALVAGE; SEAMEN; SHIPPING.

ADMISSIBILITY OF EVIDENCE. This phrase denotes the quality of matters adduced in evidence, according to which they are or not receivable, *i.e.*, admissible, as evidence,—a question for the judge or Court to determine. It is commonly opposed to the *weight* of the evidence once it has been admitted, the weight being for the

ADMISSIBILITY OF EVIDENCE—continued.

jury or for the judge sitting as a jury. For example, letters written to third persons are not admissible as between the plaintiff and the defendant.

See title EVIDENCE.

ADMISSION. This word denotes the ordinary's signification of his approval of the clerk presentee of a living; it sometimes includes both approval and institution. Co. Litt. 341a. In the law of evidence, the word denotes a sort of estoppel which may be either by word of mouth (*Neale v. Jakle*, 2 C. & K. 709), or by conduct (*Pickard v. Sears*, 6 A. & E. 469), or by the assumption of a particular office or character (*Peacock v. Harris*, 10 East, 104), or by writing under hand, unless stated to be "without prejudice" (*Paddock v. Forester*, 3 Scott, 734), or by deed; as to all which see title ESTOPPEL.

But the word "admissions" is more commonly used to denote the mutual concessions which the parties to an action or suit make in the course of their pleadings, and the effect of which is to narrow the area of facts or allegations requiring to be proved by evidence.

See title EVIDENCE; and next two titles.

ADMISSIONS OF DOCUMENTS. Regarding documents, either party to an action may give to the other a notice to admit documents, saving all just exceptions. The other party or his solicitor admits the documents specified in the notice by writing at the foot thereof the words "we admit," &c., saving all just exceptions.

See title NOTICE TO ADMIT.

ADMISSIONS IN PLEADINGS. Under the New Judicature Rules of Pleading, allegations in pleadings may be admitted either by express admissions or by the absence of any specific denial or express non-admission thereof, or where any party bound to plead makes default in pleading, or bound by order to answer interrogatories or to make other discovery, upon failing to do so has his entire defence (or other pleading) struck out. On these admissions, immediate judgment may be obtained, and that judgment frequently terminates the action. See Brown's Snell's Equity, Book ii. Procedure.

ADMITTANCE. Every devisee of copyholds, and also every other alienee thereof, whether for value or voluntary, perfects his title by procuring his admittance from the lord of the manor, paying where such admittance is compulsory the fine which the custom of the manor has ascertained, and

ADMITTANCE—continued.

where the admittance is voluntary on the part of the lord, such fine as the lord chooses to demand. Admittance may be made either within or outside of the manor under 4 & 5 Vict. c. 35.

See titles COPYHOLD; FINES ON ALIENATION.

ADOPTION. In French Law, is permitted to persons of either sex, aged fifty years, and being at the least fifteen years older than the persons whom they adopt; which latter persons being of full age, must be either, (1), persons to whom the adoptive parent has rendered assistance during minority and for six years at least without interruption; or, (2), persons to whom the adoptive parent is indebted for his rescue from fire, shipwreck, or battle. This adoption leaves intact the rights of the child in respect of his natural parents, being in fact the adoption of Roman Law, in time of Justinian.

See title ABROGATIO.

ADPROMISSOR. Appears to have been the most general name in Roman Law for a surety, whether sponsor, fidepromissor, or fidejussor; the etymology of the word indicates that the surety is in the nature of an accessory to the promissor, i.e., to the principal debtor in the verbal contract or stipulation.

See titles SPONSOR; &c.

AD PROXIMUM ANTECEDENS FIAT RELATIO. Where a pronoun or relative adjective, such as "he," or "who," or "such," or "said," has a doubtful reference to two or more different substantives, it is to be referred (in the absence of other grounds of reference) to the last preceding substantive, i.e., to the substantive nearest to itself going backwards.

AD QUESTIONES FACTI. The jury (and not the Court) are the judges of fact; and the Court (and not the jury) is the judge of the law. The full expression of this maxim is—*Ad questiones facti non respondent iudices; ad questiones legis non respondent juratores.*

AD QUOD DAMNUM. A writ so called, which ought to have been issued before the King granted certain liberties, as a fair, market, &c., which might happen to be prejudicial to others. The writ directs the sheriff to inquire what damage it might do for the King to grant such fair or market. It was also formerly in use for obtaining a right to alter or divert the course of an old road, or to make a new one (F. N. B. 221, *et seq.*; *Les Termes de la Ley*); but it is the opinion of the editor of Williams' Saunders' Rep. vol. ii. ed. of

AD QUOD DAMNUM—continued.

1871, p. 484, n. (d), that this latter use of the writ has been virtually done away with.

ADSTIPULATOR. Was an accessory to the stipulator, i.e., to the principal creditor in the verbal contract or stipulatio. He was in use prior to Justinian, but in consequence of that Emperor's legislation he ceased to be wanted for any purpose. Prior to Justinian's legislation a person could not validly stipulate for a payment to be made to him after his death, but he could stipulate a present obligation to pay to a third person after the death of him the stipulating person, and as agent for him; and this third person was called the adstipulator.

See title STIPULATIO.

AD TERMINUM QUI PRÆTERIIT. A writ of entry that lay for the lessor and his heirs when a lease had been made of lands or tenements for the term of life or years, and after the term was expired the lands were withheld from the lessor by the tenant or other person possessing the same. Cunningham; F. N. B. 201. This writ was abolished by the Act 3 & 4 Will. 4, c. 27, s. 36.

ADULTERATION. This phrase is commonly applied to the offence of mixing up with food or drink intended to be sold, other matters of an inferior quality, and generally of a more or less deleterious character. The principal statute upon the subject is the 35 & 36 Vict. c. 74, which incorporates the 23 & 24 Vict. c. 84, and also (The Pharmacy Act, 1868) 31 & 32 Vict. c. 121. See also the Adulteration of Seeds Act, 1869 (32 & 33 Vict. c. 112), and the Act 41 & 42 Vict. c. 17, amending same.

ADULTERY OR ADVOWTRY (*Adulterium*). The sin of incontinence by married persons. The offence of adultery is sometimes distinguished into single and double adultery. Single adultery is the illicit sexual intercourse of two persons one only of whom is married. Double adultery is the illicit sexual intercourse of two persons both of whom are married (Cowel). This offence is of a tortious and not of a criminal nature (*Mordaunt v. Moncreiffe*, 1874). For adultery on the part of a wife, or for adultery combined with desertion or cruelty on the part of a husband, the Court of Divorce will grant a dissolution of the marriage under the stat. 20 & 21 Vict. c. 87; but for mere adultery on the part of the husband, the most that the Court will grant to the wife is a judicial separation.

ADVANCEMENT. This is a well-known term both in conveyancing and in equity

ADVANCEMENT—*continued.*

law. In marriage settlements, a power of advancement is commonly given to the trustees, that is to say, a power in them to raise some portion (not as a rule to exceed one half part) of the capital moneys to which each child of the marriage is either actually or contingently entitled under the settlement for his or her advancement in the world; that is to say, for his or her apprenticeship in a profession or trade, or for his or her bringing out in society, or (if intended for the church) for his education at one of the universities of Oxford or Cambridge.

In Equity, the term has a similar meaning, but a somewhat different application. Thus, it being a rule of Courts of Equity, that where a person purchases an estate or stock, and takes the conveyance or assignment thereof in the name of a third person, such third person is intended to be, and is construed as being, a trustee only for the purchaser.—An exception to that rule is admitted in the case of such third person being a person for whom the purchaser was under an obligation to provide, and for whom he has not as yet made a provision, and the conveyance or assignment which is made in this latter case is taken to be for the benefit of the grantee or assignee in discharge of the obligation of the purchaser. The presumption of advancement is raised in favour of the following persons:—

- (1.) A legitimate child (*Sidmouth v. Sidmouth*, 2 Beav. 447);
- (2.) An illegitimate child (*Beckford v. Beckford*, Loft. 290);
- (3.) A grandchild (father being dead) (*Ebrand v. Dancer*, Ch. Ca. 26);
- (4.) A wife (*Drew v. Martin*, 2 H. & M. 130);
- (5.) A wife's nephew (*Currant v. Jago*, 1 Coll. Ch. Ca. 261);

But the presumption has not hitherto been extended to the following cases:—

- (1.) An illegitimate grandchild (*Tucker v. Burrow*, 2 H. & M. 515);
- (2.) A kept woman (*Rider v. Kidder*, 10 Ves. 360);
- (3.) The child of a widow, when the widow is the purchaser (*Holt v. Frederick*, 2 P. Wms. 356; *Bennet v. Bennet*, 10 Ch. Div. 474).

In all these cases the presumption of advancement arises or not from a regard purely to the relationship of the parties; the presumption may be rebutted or corroborated by extrinsic or parol evidence.

AD VENTREM INSPICIENDUM. A writ which lies for the heir presumptive to an estate, to examine the woman who says she is with child, and who is suspected to

AD VENTREM INSPICIENDUM—*continued.*

feign being so, with the view of producing a supposititious heir to the estate. Cowel; Reg. Orig. 237.

ADVERSE CLAIM. Where the sheriff in levying an execution upon the goods of a debtor, finds that some third person claims the goods as his own, he may have an interpleader summons requiring the execution creditor and such third person to settle the right to the goods between them; so also, where the seller of goods attempts to stop them *in transitu*, and the buyer insists upon having the goods delivered to him, the wharfinger or other person in custody of the goods may have an interpleader summons requiring the two parties to litigate between themselves their adverse claims.

See title INTERPLEADER.

ADVERSE POSSESSION. The possession of the tenant for life under a settlement is consistent with the right of the remainderman; and such tenant may not alter the quality of his possession so as to make the same adverse to the remainderman (*Nemo potest mutare causam possessionis suæ*). On the other hand, the possession of a mortgagee is adverse to the title of the mortgagor; and precisely because it is such it will mature after twenty years' (now twelve years') duration and non-acknowledgment into an absolute and independent legal right.

See titles LIMITATIONS, STATUTE OF; PRESCRIPTION; USUCAPIO.

ADVERSE WITNESS. This is defined to be a witness whose mind discloses a bias hostile to the party examining him; it is not a witness whose evidence, being honestly given, is adverse to the case of the examinant. An adverse witness may be cross-examined by the counsel calling him.

See titles EVIDENCE; WITNESSES.

ADVERTISEMENT, CONTRACT BY. Although at one time some doubt was entertained whether a strict contract could be entered into by advertisement, for want of privity between the person advertising and the person who closes with the advertisement, still there can hardly be any doubt at the present day that a good contract arises thereby, not perhaps by force of the advertisement and acceptance thereof, but by virtue of the contract that is made expressly or impliedly between the parties when they are both ascertained and brought together, the offer in the advertisement being deemed to continue open and unwithdrawn. In case there should not be any contract, an action of tort would

ADVERTISEMENT, CONTRACT BY—
continued.

lie for a fraudulent advertisement producing damage (*Gerhard v. Bates*, 2 El. & Bl. 476).

ADVERTISEMENTS. Under the stat. 24 & 25 Vict. c. 96, s. 102, whosoever shall publicly advertise a reward for the return of any property whatsoever which shall have been lost or stolen, suggesting that no questions will be asked, or offering to repay to any pawnbroker or other the amount advanced on the security of the property, forfeits the sum of £50 for every such offence, to be recovered by any informant thereof. And the printer and publisher are also liable, but in their case the action is to be commenced within six months, and only after obtaining the sanction of the Attorney-General or Solicitor-General to the institution of the prosecution.

ADVOCATE. In the Roman Law, and also in those English Courts which have largely moulded themselves upon that law, the persons who undertake and have the liberty to plead the causes of others are called advocates. Their duties are analogous to those of barristers, and since the recent Acts, which have thrown open to all practitioners the practice in all the various Courts, the term "advocate" is used interchangeably with, although less frequently than, that of barrister. In ecclesiastical law, those persons whom we now call patrons of churches, and who reserved to themselves and their heirs a liberty to present to the living on any avoidance, were also called *advocati ecclesiarum*, i.e., defenders of the church (*Spelman's Advocatus*). So that the original meaning of *advowson* was that of a fortress or defence of the church. Patrons of churches were also sometimes called *advowees* or *avowees*, and the sovereign was *advowee paramount*.

ADVOCATE-GENERAL. The adviser of the Crown in matters of Naval and Military Law.

See titles **MARTIAL LAW**; **QUEEN'S ADVOCATE**.

ADVOCATE, LORD. A Scotch legal official corresponding to the English Attorney-General.

ADVOWEE: See title **ADVOCATE**.

ADVOWSON. The right of presentation to a church or benefice: and he who has the right to present is called the patron or *patronus*, sometimes also *advocatus*, and sometimes *defensor*. Advowsons are of two kinds: (1) Appendant, and (2) In gross. An *advowson appendant* means an *advowson* which is, and which from the first has been and ever since continued to be, appended or annexed to a manor, so that,

ADVOWSON—continued.

if the manor were granted to any one, the *advowson* would go with it as incident to the estate. An *advowson in gross* signifies an *advowson* that belongs to a person, but is not annexed to a manor; so that an *advowson appendant* may be made an *advowson in gross* by severing it by deed of grant from the manor to which it was appendant. Advowsons are also either (1) presentative, (2) collative, or (3) donative. An *advowson* is termed *presentative* when the patron has the right of presentation to the bishop or ordinary, and also to require of him to institute his clerk, if he finds him qualified. An *advowson* is termed *collative* when the bishop and patron happen to be one and the same person, so that the bishop, not being able to present to himself, performs by one act (which is termed collation) all that is usually done by the separate acts of presentation and institution. An *advowson* is termed *donative* when the king or a subject founds a church or chapel, and does by a single donation in writing place the clerk in possession, without presentation, institution, or induction (*Cowell; Co. Litt. 17 b. & 119 b.*) Again, *advowsons* are either *advowsons of rectories* or *advowsons of vicarages*; the former having been created in very early times, almost contemporaneously with the creation of the manor itself; the latter having grown up more gradually, and as a consequence of the monasteries appropriating to themselves the tithes of the churches, and delegating to a *locum tenens* (vicar) the duties of the rector. The stipend of the vicar, which was at first precarious and inadequate, was settled at an adequate amount, and also secured to him, by the Acts 15 Ric. 2, c. 6, and 4 Hen. 4, c. 12; whence at the present day a vicarage is in general as valuable a living as a rectory is.

An *advowson*, being the right of presentation *in perpetuum*, as often as a vacancy arises, is considered real estate, while a right of presenting once only, or a single presentation, is considered personal property only.

See title **INCORPOREAL HEREDITAMENTS**.

ÆSTIMATIO CAPITIS. This phrase denotes the value or price set upon an individual. In Anglo-Saxon times, when money penalties were the universal punishments of offences, King Athelstan, in a parliament held at Exeter, fixed a tariff of mulcts to be paid *pro æstimatione capitis*, i.e., according to the rank of the party wounded or slain. A like tariff existed for some purposes in Roman Law, "*nam secundum gradum dignitatis vitæque honestatem crescit aut minuitur æstimatio injuriæ.*" Just. Inst. iv. 4, 7.

ÆTATE PROBANDÆ. A writ that used formerly to be directed to the sheriff of a county, commanding him to summon twelve men, as well knights as other honest and lawful men, to be before certain commissioners previously appointed to inquire whether or not the king's tenant, holding in chief by chivalry, was of full age to receive his lands into his own hands. The commission by which the above commissioners were appointed was thence called "The commission *pro ætate probandæ*." Cowell; 4 Co. Dig. 139.

ÆTHELINGS. Were originally persons of royal birth, and afterwards persons of kindred with the reigning sovereign only, and latterly only the nearest of such kindred. Taswell-Langmead, 29.

AFFIANCE. To agree to marry, and generally to pledge one's troth or trust.

AFFIDATIO. A swearing of the oath of fidelity or of fealty to one's lord, under whose protection the quasi-vassal has voluntarily come.

AFFIDAVIT. A written or printed statement made voluntarily, and verified by oath, for the purpose of being used in a Court of Justice as evidence of facts. In Courts of Law, affidavits are chiefly used upon summary applications only; but in Courts of Equity they are commonly used upon all sorts of applications, whether formal or summary, the present rule of practice in all the divisions being that affidavit evidence is to be used on summary proceedings, and only by consent of the parties in writing on formal proceedings, *i.e.*, at the final trial or hearing.

An affidavit consists of three essential parts: (1) the title, (2) the statement of facts, and (3) the jurat. The affidavit should be entitled in the Division in which it is to be used, and in the cause or matter, or both (as the case may be), in which it is made. The statement of facts should be plain and unequivocal; the best evidence should as a rule be adduced, but (on interlocutory applications, at least when they do not determine any right) matters of hearsay, belief, or information are not excluded. The affidavit may be sworn either at the office of the Record and Writ Clerks, or before one of the commissioners appointed for that purpose; and if made in a foreign country, then it may be sworn before the mayor or other magistrate, attested and certified by a notary public. If the affidavit is in a foreign language, it must be accompanied with a verified translation.

See titles EVIDENCE; EXAMINATION OF WITNESSES.

AFFIDAVIT OF DOCUMENTS: See title DISCOVERY.

AFFIDAVITS, EVIDENCE BY. Upon all interlocutory applications (*i.e.*, upon any motion, petition, or summons) in the action, the evidence may be given by affidavit (Order xxxvii., rule 2); and the evidence of any particular witness may for sufficient reasons be taken (by order) before an officer of the Court (either official referee or examiner), or before a special examiner, the evidence so taken being a deposition, and the deposition being (by order) filed, and the deposition so filed being (by order) made available in evidence upon terms (Order xxxvii., rule 4); and at the trial of the action, or upon any assessment of damages, any particular facts may (by order) be proved by affidavit, but not if the witness can be produced, and the other side wishes to cross-examine him (Order xxxvii., rule 1); and at the trial, or upon any assessment of damages, the entire evidence may (by agreement of all parties) be taken by affidavit (Order xxxvii., rule 1). All affidavits at the hearing must be regarding matters of the deponent's own positive knowledge; but upon interlocutory applications, may be regarding matters of information or belief only, provided that the sources or grounds of the information or belief respectively are shown (Order xxxvii., rule 3), but not when an application, although interlocutory in form, is final in effect (*Gilbert v. Endeau*, 9 Ch. Div. 259).

The agreement to take the entire evidence by affidavit must be in writing (*New Westminster Brewery Co. v. Hannah*, L. R. 2 Ch. Div. 217); but when the agreement does not exclude oral evidence, the affidavits may be supplemented, *semble*, at the trial by *viva voce* evidence. Where there is such an agreement, the plaintiff files his affidavits within fourteen days (extendible) after the agreement, and gives the defendant a list thereof (Order xviii., rule 1); and the defendant files his affidavits within fourteen days (extendible) after receiving plaintiff's list, and gives the plaintiff a list thereof (Order xxxviii., rule 2); and the plaintiff files his affidavits in reply, being strictly in reply to the defendant's affidavits, or else merely confirmatory of previous affidavits (*Peacock v. Harper*, 7 Ch. Div. 648), within seven days (extendible) after receiving defendant's list, and gives the defendant a list thereof (Order xxxviii., rule 3).

AFFILIATION ORDER. An order made by a police magistrate or justice against the reputed father of a bastard and upon the oath of the mother (being an unmarried woman) as to the bastard's paternity, for

AFFILIATION ORDER—*continued.*

the payment of some small sum weekly for the bastard's maintenance. The mother's oath must be confirmed in some material particular under the Bastardy Laws Amendment Act, 1872 (*Cole v. Manning*, 2 Q. B. Div. 611).

AFFINITY. The relationship which marriage occasions between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband. Thus, there is an affinity between the wife and her husband's brother, but there is no affinity between the wife's sister and the husband's brother, or between the husband's sister and the wife's brother.

AFFIRMATION. This has been substituted for an oath in the case of certain religionists who object, on grounds of conscience, to take an oath—*e.g.* in the case of Quakers, Separatists, and others; and, in short, any person objecting to be sworn (or being an Atheist) may make a solemn affirmation instead (33 & 34 Vict. c. 49).

See title DECLARATIONS, STATUTORY.

AFFIRMATIVE, PROOF OF. According to the maxim *ei incumbit probatio qui dicit*, the party alleging any fact must prove same; and in the application of this rule it makes no difference whether the fact alleged is an affirmative fact or is a negative averment, but the simple traverse of an affirmation need not be proved.

See titles NEGATIVE AVERMENT; ONUS PROBANDI.

AFFOREST (*afforestare*.) To turn ground into a forest (Cowel). When forest ground is turned from forest to other uses, it is said to become disafforested. Tomlins.

See title FOREST.

AFFRAY (from the Fr. *effrayer*, to affright). The fighting of two or more persons in some public place to the terror of others; and there must be a stroke given or offered, otherwise it is no affray, howsoever quarrelsome or threatening the words may be; and the fighting must also be in public; for if it be in private, it is no affray, but an assault. The punishment for an affray is fine or imprisonment, or both.

See title DUELLING.

AFFREIGHTMENT: *See* title FREIGHT.

AFTER-ACQUIRED PROPERTY. Property acquired after the date of a marriage settlement is called by this name, and would (if acquired on the part of the wife) fall usually within the scope of the covenant to settle such property that is contained in nearly all such settlements (*see* title SETTLEMENT OF PERSONAL ESTATE).

AFTER-ACQUIRED PROPERTY—*continued.*

Property acquired after the date of a will is also called by this name, or by the name *after-purchased lands*; and since the New Wills Act (1 Vict. c. 26) it is comprised in the will if there are general words of devise contained therein, but prior to that Act such property would not have been comprised in the will.

See title WILLS.

AFTER-PURCHASED LANDS: *See* title AFTER-ACQUIRED PROPERTY.

AGE. Signifies in the law those periods in the lives of persons of both sexes, which enable them to do certain acts which, before they had arrived at those periods, they were prohibited from doing. As for example: a male at the age of twelve years may take the oath of allegiance; at fourteen, which is his age of discretion, he may consent to marriage or choose his guardian; and at twenty-one he may alien his lands, goods, and chattels. A female at nine years of age is dowable; at twelve may consent to marriage; at fourteen is at years of discretion, and may choose a guardian; and at twenty-one may alien her lands, &c. But the full age of either male or female is twenty-one, until which time they are considered as infants (Co. Litt. 78; Cowel). The age of twenty-one years is complete on the first moment of the last day next before the twenty-first anniversary of the birth.

See title DAY.

AGENT: *See* title PRINCIPAL AND AGENT.

AGENT AND PATIENT. Are terms denoting respectively the doer and the sufferer of an act. Their principal application is in criminal law. The same person who is the doer of a thing may also be the party to whom it is done; as when a woman endows herself of part of her husband's possessions, this being the act of herself to herself, makes her agent and patient. Co. Litt. 8, 138; Cowel.

AGER PUBLICUS. The original territory of the Roman state was called the *Ager Romanus*, and the territory afterwards acquired by conquest was called the *Ager Publicus*. The *Ager Romanus* belonged to the private owners thereof (and who were the governing or patrician class) in full ownership; the *Ager Publicus* belonged to the same patrician body, but as a governing body, and not as individuals; it was therefore held by them upon trust for the state generally. Grants of any portions of the *Ager Publicus* were grants of possessory interests only, and were incapable of being acquired by usucapio or

AGER PUBLICUS—*continued.*

otherwise in full *dominium*, for the *dominium* always remained in the state. The Ager Romanus developed into the *solum Italicum*, and the Ager Publicus into the *solum Provinciale*; and in Justinian's time the distinction between them was wholly abolished.

See title **USUCAPIO**.

AGER ROMANUS: See title **AGER PUBLICUS**.

AGGRAVATED ASSAULT: See title **ASSAULT AND BATTERY**.

AGGRAVATION (MATTER OF). In the language of pleadings signified matter which only tended to increase the amount of damage, but which did not concern the right of action itself. Thus, in an action of trespass for chasing sheep, by which the sheep died, the dying of the sheep was matter of aggravation only, and needed not to be alleged by the plaintiff in his declaration (Steph. on Pl. 270, 4th ed.), and under the present rules of pleading such matter might be alleged in an action which was *injuria sine damno*, where the plaintiff desired to obtain special damage.

See title **SPECIAL DAMAGE**.

AGGREGATE AND SOLE: See titles **CORPORATION**; **CORPORATION SOLE**.

AGIST. To take in and feed the cattle of strangers for reward; whence agistment is the taking in and feeding of such cattle; and an agister is the person who does it. The agister has no lien on the cattle he takes care of, unless by express agreement (*Jackson v. Cummins*, 5 Mee. & W. 342). He is not liable to re-deliver the cattle; but he is liable for cattle straying through an open gate (*Chitty on Contracts*, 8th ed. 439).

AGISTMENT: See title **AGIST**.

AGNATI. Sometimes called *Adgnati*, were those relations of a person, not being of course *sui heredes*, who connected themselves with him by a male relationship all through. They ranked next after the *sui heredes*, and next before the *cognati*. Justinian, after numerous approximations, eventually entirely abolished all distinctions between *agnati* and *cognati*, so that *agnati* and *cognati* indifferently were the next of kin of a person, or, more properly speaking, his nearest relations.

See title **NEXT OF KIN**.

AGREEMENT: See title **CONTRACT**.

AGRICULTURAL CONTRACTS: See title **AGRICULTURAL HOLDINGS ACT, 1875**.

AGRICULTURAL FIXTURES: See title **FIXTURES**.

AGRICULTURAL HOLDINGS ACT, 1875. Is the stat. 38 & 39 Vict. c. 92, and its object was to secure (with a due regard to the interests of landlords) compensation to agricultural and pastoral tenants for their unexhausted improvements. The Act applies to all such tenancies created after the passing of the Act unless and to the extent that it is excluded. The Act has also substituted twelve calendar months' notice to quit in lieu of six months' notice in these classes of tenancies. The Act has also materially modified the law of fixtures generally in all classes of tenancies, making removable fixtures the property of the tenant even while they are affixed, but giving the landlord an option of pre-emption at the end of the tenancy.

See titles **COMPENSATION**; **FIXTURES**; **TILLAGE**.

AIDER. This word is commonly used in two senses, 1st, by itself, when it signifies an abettor: See title **AIDERS AND ABETTERS**. 2ndly, in conjunction with the word verdict. **AIDER BY VERDICT** means curing by verdict. The phrase is used in reference to faults or omissions in pleading. Some faults, errors, or omissions in pleading are aided or cured by the adverse party taking no notice of them, or pleading over, as it is termed, instead of demurring. Others, however, are of so serious a character that even after the party has obtained the verdict of a jury in his favour, the Court, on being applied to, will stay or arrest the judgment, upon the ground that the error is of so important a nature as to vitiate the proceedings. Thus, where a plaintiff brought an action on the case as being entitled to the reversion of a certain yard or wall to which the plaintiff alleged in his declaration a certain injury to have been committed, but omitted to allege that the reversion was prejudiced, or to shew any grievance which, in its nature, would necessarily prejudice the reversion, the Court arrested the judgment after a verdict had been given in favour of the plaintiff; for in this case the gist of the action was the injury to the reversion, and the plaintiff in his declaration had in fact not shewn any such injury to exist. When, however, it may be reasonably presumed, that is, presumed consistently with the general tenor of the pleadings, that the defect was supplied or taken into consideration by the jury previously to giving their verdict, in such cases the error, defect, or omission cannot be made a ground of objection, and is thence said to be cured by the verdict. The principle of aider by verdict is thus stated by Mr. Serjeant Williams: "Where there is any defect,

AIDER—*continued.*

imperfection, or omission in any pleadings, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict." See *Stennel v. Hogg*, 1 Wms. Saund. (ed. 1871), p. 260; *Rushton v. Aspinall*, Doug. 679; 1 Sm. L. C. 614.

AIDER BY VERDICT: See title **AIDER**.

AIDERS AND ABETTERS. These are persons who either actually or constructively are present at the commission of an offence, aiding and abetting or counselling and procuring the same to be done; they are principals in the second degree. The aider and abettor of high treason is a principal in the first degree, *propter oilium delicti* (3 Inst. 138); the aider and abettor of a misdemeanor is also a principal in the first degree, but for a very different reason, namely, the maxim *de minimis non curat lex*. Consequently, aiders and abettors that are principals in the second degree are only found in the case of felonies, whether at common law or under any statute. The aider and abettor must participate in the felony, in the sense of acting in concert with those committing it; for although he be present, yet if he do not participate, but remains merely passive, he is not an abettor (1 Hale, 439). Moreover, the participation must be with a felonious intent, and not in ignorance of the nature of the act. 1 Hale, 446.

See also title **ACCESSARY**.

AIDS. Grants of money to the sovereign in support, *i.e.*, aid, of his person and government. They were of two kinds, either (1) feudal, of which there were three sub-varieties, or (2) parliamentary, being tenths, fifteenths, &c.

See title **TAXATION, HISTORY OF**.

AIR: See title **EASEMENTS**; sub-title **AIR**.

ALDERMAN. This word was of very frequent occurrence among the Anglo-Saxons. According to Spelman, all princes and rulers of provinces, all earls and barons, were designated aldermen in a general sense; and in that sense aldermen were *ex officio* members of the Witenagemote or House of Parliament, and had a seat in the shiregemote along with the bishops; but the word was applied more particularly to certain chief officers, *e.g.*, "the alderman of all England," whoever that officer

ALDERMAN—*continued.*

was. In modern times, and for many ages past, the word is used to denote certain officers in municipal corporations who are a kind of assessors to the chief magistrate.

See title **MUNICIPAL CORPORATIONS**.

ALE AND BEER HOUSES. Every inn is not an ale-house, nor is every ale-house an inn; but if an inn uses common selling of ale, it is then also an alehouse; and if an ale-house lodges and entertains travellers, it is then also an inn. Numerous statutes have been passed from time to time for the licensing and regulation of ale-houses, the latest of which are the Licensing Act, 1872 (35 & 36 Vict. c. 94), and the Act of 1874, amending same.

See title **LICENSING ACTS**.

ALIA ENORMIA (*other wrongs*.) Declarations in the action of trespass, after stating or alleging the specific wrongs or injuries complained of, usually concluded with the general words, "and other wrongs to the plaintiff then did, &c.;" and this conclusion was frequently called in the language of pleading, the allegation of *alia enormia*. 1 Ch. on Pl. 397; *Sowden v. Goodrich*; Peake, 46, *per* Kenyon.

ALIAS WRIT. This was a second writ issued after a former one had proved ineffectual. If the *alias* also failed, a third writ might have been sued out, which was called a *pluries*. These writs derived their respective names from the words occurring in their respective forms, *viz.*, "*Sicut alias præcipimus*," "*Sicut pluries præcipimus*." Both forms of writ were abolished by the C. L. P. Act, 1852, s. 10, and the same statute in its 9th section enacted that the plaintiff in any action might, at any time during six months from the issuing of the original writ of summons, issue one or more concurrent writ or writs. And now under the Judicature Acts, 1873-77, at the time of issuing the original writ, or within twelve months thereafter, the plaintiff may issue one or more concurrent writ or writs (*i.e.*, copies of the original writ, even the date being the same) with a seal containing the word "concurrent" impressed on each copy. A writ for service within the jurisdiction may be issued concurrently with one for service out of the jurisdiction, and *vice versa* (Order vi., rule 2). The concurrent writ is in force only so long as the original is in force, but may be renewed like the original writ.

ALIBI (*elsewhere*). This word signifies that mode of defence in a criminal prosecution which the accused party resorts to in order to prove that he could not have committed the crime with which he is charged, because he was in a different

ALIBI—continued.

place at the time of the alleged commission. As a true alibi is conclusive proof of innocence, guilty parties frequently set up false ones in answer to criminal charges; consequently the defence must be strictly proved. A false alibi is easily proved if the witnesses are cross-examined out of the hearing of each other.

ALIEN; See titles **ALLEGIANCE**; **NATURALIZATION**.

ALIEN AMI. Is the subject of a foreign country with which this kingdom is at peace; and he becomes an *alien ennemi*, when this kingdom goes to war with his country. The war suspends his civil rights, but they revive on the return of peace. The plea of *alien ennemi* used to be a complete stay of his action; and notwithstanding the prevalence of commerce over war in modern times, and notwithstanding also the Naturalization Act, 1870, the plea would probably still be an effective stay, until the restoration of peace. But the plea is odious to the Court.

ALIEN ENNEMI; See title **ALIEN AMI.**

ALIEN PRIORIES. These were cells of religious persons in England belonging to foreign monasteries. Most of them were dissolved by Act of Parliament in the reign of Henry IV., and some were converted into domestic priories.

ALIENATION. This is the power of the owner or tenant to dispose of his interest in real or personal property. With reference to personal property, the power appears to have always existed, subject only to certain difficulties in the mode of the alienation; but with reference to real property, the power was only slowly and gradually acquired. For,

I. As to Voluntary Alienation.—

Originally no estate of freehold was alienable by the tenant without the consent of the lord of whom he held; and in fact all estates in land were at first only life estates. (See title **ESTATE**). By the time of Henry II., however, the power of alienation was permitted to the tenant over lands acquired by purchase, to the extent of defeating his heirs of their succession (1 Reeve's Hist. E. L. 223), or of part thereof (l. c. 105). Gifts in frank-marriage and in frankalmoign (see these titles) were the earliest of these partial modes of alienation. *Subinfeudation* was the other mode of alienation, which was most common (see that title); and as the heir of the subinfeudor became entitled to the rent or services in lieu of the land, that equivalent (being most probably a substantial equivalent) may have hastened

ALIENATION—continued.

the development of the ancestor's power over the expectant interests of his heir. For, at any rate, as early as the reign of Henry III., the power of the ancestor to destroy the expectation of his heirs, whether collateral or lineal, was become absolute.

The process of subinfeudation infringed also on the right of the lord, rendering it more precarious and also more difficult to levy the services to which he was entitled as landlord in chief; and accordingly it was attempted by statute (Magna Charta, ch. 32) to check the practice of subinfeudation. But the practice was not effectually checked by that enactment; and a new mode of grant also about that time came into use, being to a man and his heirs, or to whomsoever he might assign the land,—words which expressly conferred upon the tenant a power of alienation (Mad. Form. Angl. Prel. Diss. p. 5). In consequence of this last-mentioned mode of grant, and the power of alienation which it carried with it, the lord was still more prejudiced in his interests, and in particular in his reversion, or right to resume the lands upon the determination of the issue of his grantee. This change to the disadvantage of the lord is commonly assigned to the feebleness and distractions of the reign of Henry III., and it is said to have also been fostered by the crusading spirit of the age.

At length it was enacted by the statute *Quia Emptores*, 18 Edw. 1 (or Statute of Westminster the Third), c. 1, that every freeman might, without his lord's consent, sell his entire lands, or any portion thereof, the purchaser to hold the lands of the same chief lord that his vendor previously held. In this manner alienation by deed *inter vivos* became complete.

The power of alienation by will grew up later. Putting on one side certain limited customary powers of devise, lands could not originally be devised by will at all, excepting in an indirect and circuitous manner. The method resorted to was to convey the lands by deed *inter vivos* to some third person to hold the same to such uses as the person conveying should mention in his will. This process was checked for the future by the statute 27 Hen. 8, c. 10 (Statute of Uses); but the process having been long in use, the power of testamentary disposition over lands could not be withheld altogether, and accordingly it was partially restored by the stat. 32 Hen. 8, c. 1, which enabled a tenant to dispose of the entirety of his socage tenures and two-third parts of his knight service tenures; and the Act 12 Car. 2, c. 24, having converted all knight service

ALIENATION—*continued.*

into socage tenures, the power of alienation by will was, by a side wind, made absolute.

II. As to Involuntary Alienation—

Originally lands were not liable to be taken in payment of debts, but subsequently to the reign of Henry III., when estates of inheritance first became general, the liability has been gradually imposed by statute. For, (A.), During the life of the debtor.—By statute 13 Edw. 1, c. 18, one moiety of his legal fee simple lands became liable upon judgment debts by means of the writ of *elegit*, and by the Statute of Frauds (29 Car. 2, c. 3, s. 10), one moiety of his equitable fee simple lands became also liable in like manner. Then by statute 1 & 2 Vict. c. 110, the entirety of the fee simple lands, whether legal or equitable, of the debtor were rendered liable upon judgment. (See title JUDGMENT DEBTS.) And (B.), After the decease of the debtor.—His legal fee simple lands were liable if and so far as he had either charged them with the payment of his debts or specially bound his heir with such payment; and by the stat. of Fraudulent Devises (3 Will. & Mary, c. 14), the word *heir* was extended so as to include devisee of the lands. Also, by the Statute of Frauds (29 Car. 2, c. 3), his equitable fee simple lands were made liable to the same extent as if they had been legal; and finally by 3 & 4 Will. 4, c. 104, all his lands (whether legal or equitable or of whatever tenure) were rendered liable for his debts of all kinds.

An estate tail, although of inheritance, is not liable for debts after the decease of the debtor; but it is liable during his life in case of his bankruptcy, and also upon a judgment duly executed against him, in either case to the same extent that he (the debtor) himself could, without the assistance of any other person, alienate the same. See Bankruptcy Act, 1869, s. 25, and 1 & 2 Vict. c. 110, ss. 13, 18.

ALIENI JURIS: See title SUI JURIS.

ALIMONY (*alimonia*). That allowance which is made to a woman for her support out of her husband's estate when she is under the necessity of living apart from him. This provision is allowed the wife during the pendency of a suit for divorce or judicial separation between her and her husband, as well to provide the wife with the means to obtain justice as for her ordinary subsistence. When there has been a sentence of divorce, on the ground of the adultery and cruelty of the husband, the allowance for alimony becomes a permanent allowance, and is continued during the period of their separation. Upon an

ALIMONY—*continued.*

application for alimony, the Court requires on the part of the husband a statement both of his casual and of his certain income to be set forth. See *Hakevill v. Hakevill*, 30 L. J. (M. & P.) 254; *Margetson v. Margetson*, 36 L. J. (M. & P.) 80. The wife, although the guilty party, has been allowed alimony, or a provision by way of alimony, subject to conditions. See *Browne's Divorce Practice*, 2nd ed. 144-146.

ALIUD EST POSSIDERE. The maxim *aliud est possidere, aliud in possessione esse*, is a maxim rather of the Roman than of the English Law, and denotes the distinction between, on the one hand, *possessio civilis* (which is the foundation of *dominium* when it matures by *usucapio*), and on the other hand *possessio naturalis*, which is mere naked detention.

See titles ADVERSE POSSESSION; POSSESSIO CIVILIS; USUCAPIO.

ALLEGANS SUAM TURPITUDINEM. The maxim *allegans suam turpitudinem non est audiendus* means that a person is not to be listened to as a plaintiff in a Court of Justice when his statement of claim is based in whole or in part upon his own unclean conduct or turpitude. It is a variety of the maxim of equity, that he who comes into equity must come with clean hands. Considerations of public policy sometimes override the maxim.

See title FRAUD.

ALLEGIANCE. Otherwise called *li-geance*, is the obligation or tie existing between the sovereign and the subjects of any given state, and may be described as the lawful and faithful obedience and duty which the subjects of every state owe to the head of that state in return for the protection which the state affords to them. The learning on this subject will be found in *Calvin's Case* (*Calvin v. Smith*, 7 Rep. 1), 6 Jac. 1, and in the notes to that case in *Broom's Const. Law*. It is there said that allegiance is of four kinds, namely:—

- (1.) Natural allegiance—that which arises by nature and birth;
- (2.) Acquired allegiance—that arising through some circumstance or act other than birth, e.g., by denization or naturalization;
- (3.) Local allegiance—that arising from residence simply within the country, for however short a time; and
- (4.) Legal allegiance—that arising from oath taken usually at the tourn or leet; for by the Common Law the oath of allegiance might be tendered to every one upon attaining the age of twelve years.

ALLEGIANCE—continued.

In *Calvin's Case* the point decided was, that Calvin, although born in Scotland after the union of the Crowns of Scotland and England in the person of James I. in 1603, was nevertheless a subject of the king of England, and as such capable of holding or of acquiring by descent lands in England, this decision involving the further more general principle that allegiance to a sovereign is personal and not territorial, and that the maxim, *quando duo jura (imo duo regna) concurrunt in una personâ, æquum est ac si essent in diversis* was inapplicable. That maxim does, however, apply in determining to what laws a person is to be subject.

Until 1870 it was a rule of the English law that no one could lay aside an allegiance which he had once acquired (*nemo potest exuere patriam suam*) whence arose the difficulty of a "double allegiance" as it was called, with conflicting duties; but by the Naturalization Act, 1870, this rule has been abandoned.

Under the stat. 11 Hen. 7, c. 1, allegiance to the king *de facto*, i.e., for the time being in actual possession of the Crown, whether or not he be *de jure* also, is an effectual protection to the subject against all forfeitures on the ground of disloyalty or treason.

According to the law of England, and also that of America, locality of birth determines the primary allegiance,—a principle which is still adhered to in the Naturalization Act, 1870; but according to the laws of most continental countries, the parentage of the parties determines their primary allegiance. However, by a series of statutes special provision has been made for the following classes of persons born abroad, all of whom are to be esteemed natural-born subjects, namely—

- (1.) Children inheritors of British parents, not merely for the purposes of inheritance (25 Edw. 3, st. 2), but for all other purposes also (*Doe d. Duroure v. Jones*, 4 T. R. 308; 7 Anne, c. 5; and 10 Anne, c. 5):
- (2.) Children of British fathers (4 Geo. 2, c. 21);
- (3.) Grandchildren, being the children of such latter children (13 Geo. 3, c. 21); and
- (4.) Children of British mothers (7 & 8 Vict. c. 66), but apparently only as to the estates in England (real or personal) of such mothers.

Aliens becoming permanently subjects of another country may become so either by denization in virtue of the king's letters patent, or by naturalization in virtue of a particular Act of the Legislature, or in

ALLEGIANCE—continued.

virtue of proceedings taken in pursuance of the general Act or Acts.

See titles DENIZEN; NATURALIZATION.

ALLOCATUR (*it is allowed*). After an attorney's bill has been examined or taxed by one of the masters, and the items which he disallows have been deducted, the remaining sum, certified by the master to be the proper amount to be allowed, is termed the *allocatur*. The *allocatur* is conclusive as to the amount of costs. 6 & 7 Vict. c. 73, s. 43; 23 & 24 Vict. c. 127.

ALLODIAL LAND. Land not held of any lord or superior, in which, therefore, the tenant has an absolute property and not an estate merely. The lands of the Anglo-Saxons were allod, but under the oath taken at Salisbury in 1087, all the lands in England became feudal, i.e., held of some superior lord, and for an estate only.

See titles FEUDAL SYSTEM; TENURE OF LAND, HISTORY OF.

ALLOTMENT. Under the Acts for the inclosure of commons and waste lands, of which the principal Act is 41 Geo. 3, c. 109, the commissioners by their award make allotments of the common or waste to persons diversely interested; e.g., to the lord of the manor in respect of his demesne lands, and also in respect of his lordship, to a rector (or to the lay impropriator and vicar) in lieu of tithes, and to commoners in respect of their lands entitled to common, and usually in lieu of such right of common. The land allotted is of freehold tenure, unless the award specifies a different tenure. Awards are to be enrolled in one of the Courts at Westminster, or with the clerk of the peace for the county, and some are deposited in the parish church. The award, once made, is conclusive that all the provisions of the stat. 41 Geo. 3, c. 109, have been complied with. A copy of, or extract from, the award, signed by the clerk of the peace or his deputy, is evidence.

See titles INCLOSURE; WASTE LANDS.

ALLOTMENT, LETTER OF. Is the notice received by an applicant for shares in a company, informing him of the number of shares allotted to him. Such a notice (either in writing or verbal) is necessary before the applicant is bound (*Gunn's Case*, L. R. 3 Ch. App. 40). The letter of allotment requires a penny stamp (33 & 34 Vict. c. 97); of course, when not in writing, it can bear no stamp, and it is then not a letter, but a notice of allotment simply.

ALLOTMENT NOTE. Is a writing executed by a seaman in the form sanctioned by the Board of Trade, and purports to

ALLOTMENT NOTE—*continued*.

entitle the person therein mentioned (being the wife, father or mother, child or grandchild, or brother or sister of the seaman) to the proportion of the seaman's wages thereby allotted. The amount is recoverable in the county court: Maude and Pollock's Merchant Shipping, 3rd ed. 165-166.

ALLOWANCES AND DEDUCTIONS.—

In rating such properties as mining and manufacturing properties, the fabric and the machinery being liable to deterioration by constant wear and tear, and requiring to be periodically repaired, and even replaced or renewed, and the mineral bed ever becoming more and more exhausted, it is a principle or rule of the Rating Acts to make certain allowances and deductions from the gross assessable rental. Thus, allowances and deductions have been allowed to be made on account of the costs of working and management, the average probable cost of repairs of machinery, &c., the cost of insurance of the machinery, &c., and even in respect of interest upon the capital sunk in the mine. And the amount (after such deductions and allowances) which a yearly tenant would pay as a reasonable rent likely to yield him a fair profit is then made the basis of the assessment.

See titles HYPOTHETICAL YEARLY TENANCY; POOR RATE.

ALLUVIO. This is defined to be a latent increase (*latens incrementum*), whereby something goes on adding itself, but it is impossible to say how much at any one moment is added. It is one of the natural modes of acquisition whereby property accrues to one who is already the owner of the principal thing to which the accrual attaches itself. Acquisition by alluvio arises chiefly in the case of lands adjoining to rivers or to the sea; where the river or the sea encroaches suddenly and visibly, or retires suddenly or visibly, that is no case of alluvio; but the ownership remains as before, the aspect of the property only being changed.

See title ACCESSIO.

ALMANACK. The almanack annexed to the Book of Common Prayer, subject to the alterations made in the calendar by the 24 Geo. 2, c. 23, is taken judicial notice of by the Courts of Justice (*Brough v. Perkins*, 6 Mod. 81). And the Court will generally, to refresh its memory, refer to any almanack of received credit (*Page v. Faucet*, Cro. Eliz. 227).

ALMS. Used to signify and include not only charity in the sense of relief to the body of the poor, but also charity in the

ALMS—*continued*.

sense of saying masses for the repose of the souls of the deceased; wherefore a gift of lands in *frankalmoign* included both these duties or supposed duties. Masses are now held to be superstitious in law, and to be void on that account: (See title SUPERSTITIOUS USES); and charity is now regulated by statute in most cases (See title POOR). And as a consequence, gifts in frankalmoign have practically wholly ceased; but there are still certain alms distributed as a matter of law (e.g., by the Queen through her almoner, or by municipal bodies as trustees of some private foundation); and scholarships at the colleges in the two universities are really alms in their origin, although they are now in fact prizes competed for by every one; also, alms or private charity is frequently indulged in towards beggars, although the law forbids begging in the public streets.

See titles CHARITY; FRANKALMOIGN.

ALNAGE DUTIES. These were duties payable on woollen cloths at so much per ell (Fr. *aulne*); and the officer whose business it was to examine into the assize of woollen cloths was called the *alnager*. All such duties were abolished by 11 & 12 Will. 3, c. 20, s. 2.

See also title TAXATION, HISTORY OF.

ALTARAGE (*altaragium*). This word used to include not only the offerings made upon the altar, but also all the profit which accrued to the priest by reason of the altar. When the altarage in part or in the whole was allotted to the vicar or chaplain, it meant only the customary and voluntary offerings at the altar for some divine office or service of the priest, and not any share of the standing tithes, whether predial or mixed. In the case of *Franklyn v. The Master and Brethren of St. Cross*, 1721 (Bumb. 78), it was decreed that where *altaragium* was mentioned in old endowments, and supported by usage, it would extend to small tithes, but not otherwise. See also Spelm. Gloss. 28; Cro. Eliz. 578.

ALTERATIONS IN WRITTEN INSTRUMENTS. The effect of such alterations in a deed (*Pigot's Case*, 11 Rep. 26 b), bill of exchange (*Master v. Miller*, 4 T. R. 320), or promissory note (*Warrington v. Early*, 2 E. & B. 763) is this—

- (1.) If the alteration is material,—then whether (a) it is made by a party or (b) it is made by a stranger, the alteration vitiates the instrument; and
- (2.) If the alteration is immaterial,—then if (a) it is made by a party, the alteration vitiates the in-

ALTERATIONS IN WRITTEN INSTRUMENTS—continued.

strument. *Semble, Aldous v. Cornwall* (Law Rep. 3 Q. B. 573) must be distinguished, as the case of an immaterial alteration by some *unknown person*;

But if (b) it is made by a stranger, the alteration has no effect at all in vitiating the instrument.

ALTERNATIVE OBLIGATIONS. With reference to these obligations, Lord Coke has said that in case an election be given of two several things, always he who is the first agent shall have the election (Co. Litt. 145 a). And it has been laid down as a general rule that the person who has to perform one of two things in the alternative has the right to elect (*Layton v. Pearce*, 1 Doug. 15). The Roman law agrees generally with the English law in these respects. Brown's Savigny, 68-69.

An election once made is binding, and the promise is thenceforth single to perform the alternative chosen: *Quod semel placuit in electionibus, amplius displicere non potest* (Co. Litt. 146 a). Where the one of two alternatives becomes impossible, or is so from the first, the promise is absolute to perform the other (*Da Costa v. Davis*, 1 B. & P. 242), unless, in the case of an impossibility subsequently arising, the construction of the contract or the circumstances under which it was entered into exclude the ordinary rule (Leake, Contracts, 371-375). It seems that no difference is made, whether the alternative which is impossible is so for *natural* or for *legal* reasons. Brown's Savigny, 67.

ALTERNATIVE RELIEF. Under the old practice, it was usual in a Bill in Chancery to pray for certain specified relief or such other or general relief as the nature of the case may require; and there is a like claim in every action (or in mostly every action) in every division of the High Court under the present practice. But such prayer or claim is not an example of alternative relief properly and strictly so called; for alternative relief is claimed when one or other of two specified and particular modes of relief are pointed out, e.g., a claim for specific performance of the contract or else the rescission of such contract. The alternative relief may even be inconsistent with the primary or principal relief (*Bagot v. Easton*, 7 Ch. Div. 1), but within certain narrow limits only (*Evans v. Davis*, 10 Ch. Div. 747; *Newby v. Sharpe*, 8 Ch. Div. 39).

AMALGAMATE. Two companies cannot amalgamate with each other, unless

AMALGAMATE—continued.

such a transaction is authorized by the constitutions of both companies, or unless all the shareholders in both consent to the amalgamation. And where there is a power to amalgamate, that power must be strictly pursued (2 Lindl. Pner. 627). Speaking generally, corporations cannot amalgamate (Brice on *Ultra Vires*, 431). The validity of an amalgamation cannot be disputed under the jurisdiction in a winding up of the company; but an action is necessary to impeach it (*Imperial Bank of China, &c.*, L. R. 1 Ch. App. 339).

AMBASSADOR. This is the commissioner who represents one country at the seat of Government of another; and as such representative, he is exempt, together with his family, secretaries, and servants, from the local jurisdiction, not only in civil, but also in criminal, cases. In England, his exemption depends principally on the stat. 7 Anne, c. 12. Where such an ambassador involves himself in commercial relations, much inconvenience arises, the better opinion being that even in that case he is exempt from the local jurisdiction. But an ambassador may waive his privilege in all these respects, and submit himself to the jurisdiction. Such an ambassador is, however, amenable in his own country to the national jurisdiction thereof; and in fact it is because he carries with him into the foreign country the territory of his own country that he is exempted from the local jurisdiction. (See title EXTRA-TERRITORIALITY). Whether the exemption operates to deprive a creditor of his *real* (as opposed to a mere *personal*) right, is a disputed question (see case of the United States Ambassador to Prussia. Wheaton, pp. 307-318).

AMBIGUITY: See titles EXTRINSIC EVIDENCE; LATENT AMBIGUITY.

AMBULATORY UNTIL DEATH. A will is said to be ambulatory until death, because it ambles about uncertainly until it can amble about no more; and then only are its intentions ascertainable.

AMELIORATIVE WASTE. When a tenant commits waste in the technical sense of that word, but the acts of commission are really a bettering of the inheritance and not a worsening of the property, such waste is called meliorative or ameliorative waste. (See title WASTE.) The Courts will not at the present day grant an injunction to stay such waste (*Doherty v. Allman*, 3 App. Ca. 709), although they would formerly do so (*Smythe v. Carter*, 18 Beav. 78). The remainderman or reversioner is now left to recover the damages (if any) he may have sustained.

AMENDMENT. Is the correction of some error or omission, or the curing of some defect, in judicial proceedings.

First, in *civil cases*.—Here amendments are either at Common Law or by statute. In the times of oral pleading, the parties were allowed to correct and adjust their pleadings at any time during the oral altercation, and were not held to the form of statement which they might first have advanced. And so at the present day, until judgment is signed, either party may even at Common Law amend his pleading until judgment is signed, subject to the discretion of the Court or judge, who will not allow amendments which appear unreasonable, or whereby the opposite party may be prejudiced. And even after judgment had been signed, the Courts had a power, even at Common Law, of amending, it being considered that during the term wherein any judicial act was done, the record remained in the breast of the judges (Co. Litt. 260 a). This power of amendment at Common Law was largely supplemented by various Acts of Parliament called the Statutes of Amendment, which were commonly classed with the Statutes of Jeofails, and by which almost all errors in pleading, being errors in *form* only, were amendable, and certain objections to defective pleadings, being defective as to form only, were obviated after certain stages had been reached in a cause. The so-called Statutes of Amendments were the 14 Edw. 3, c. 6, st. 1; 9 Hen. 5, c. 4, st. 1; 4 Hen. 6, c. 3; and 8 Hen. 6, cc. 12, 15; the so-called Statutes of Jeofails were the 32 Hen. 8, c. 30, 18 Eliz. c. 14, 24 Jac. 1, c. 13, 16 & 17 Car. 2, c. 8, 4 & 5 Anne, c. 16, and 5 Geo. 1, c. 13. And see generally as to both the case of *Stennel v. Hogg*, 1 Wm. Saund. 260, ed. 1871.

But under recent statutes, being chiefly the C. L. P. Acts, 1852, 1854, and 1860, much larger powers of amendment were conferred, not only in cases of the misjoinder and non-joinder of party-plaintiffs or defendants, but also and principally where a variance appeared between the pleadings and the evidence. And now under the Judicature Acts, 1873-5, and the Orders and rules made thereunder, which are partly declaratory of and partly additional to the common law powers of amendment, it is provided briefly as follows:—A plaintiff may amend his writ, but by leave of the Court only, and such amendment may be either in respect of the parties or in respect of the indorsement of claim; a plaintiff may also amend his statement of claim once without leave, provided he do so before replying to defendant's statement of defence, and otherwise at any time with leave only. A

AMENDMENT—continued.

defendant can amend his statement of defence (being a defence simply) with leave only, and his counter-claim once without leave, provided he do so before pleading to the plaintiff's reply, and otherwise at any time with leave only. Generally amendments may be made with leave, even amendments that are inconsistent or unreasonable, but upon terms. There is no pleading (not even a simple joinder of issue) which may not require to be amended, and that for various reasons. Thus, where formerly there would have been a new assignment in the plaintiff's declaration, there is now to be an amendment merely of the statement of claim (Order XIX, rule 14). Also, various amendments are consequential upon original amendments made by the other side; and where these original amendments are made by leave, the leave given for them is usually (to save expense) made to extend to authorizing the other party to amend consequentially, if and as he shall think fit.

See title PLEADINGS.

Secondly, in *criminal cases*.—It was the opinion of Lord Holt and of the other judges in *R. v. Tucker* (1 Salk. 51), that whatever was amendable at Common Law in civil cases was also amendable at Common Law in criminal cases. The statutes, however, mentioned above, allowing amendments and curing defects in civil cases, did not in general extend to criminal cases at all, except perhaps to cases of misdemeanour. But by the 7 Geo. 4, c. 46, s. 19, if an accused person pleaded a *misnomer*, the indictment was to be amended by inserting the correct orthography. And by the more recent statutes, 11 & 12 Vict. c. 46, s. 4, as to the amendment of *variances*, and 14 & 15 Vict. c. 100, as to errors in the names of counties, cities, &c., and in the allegations of the ownership of property, very large powers of amendment are committed to the judge in criminal trials, where he is of opinion that the defendant cannot be prejudiced thereby in his defence on the merits.

AMENDS, TENDER OF. Under the statute 11 & 12 Vict. c. 44, s. 11, relative to proceedings against justices, the justice may, after the required notice of action has been given, tender such sum of money as he may think fit as amends for the injury complained of in such notice, and he may thereupon pay into Court the money tendered, and may afterwards give in evidence the same; in which case, if the jury assess the injury at no larger amount, judgment shall be given for the defendant, who shall be entitled to deduct

AMENDS, TENDER OF—*continued.*

his costs out of the money so paid in. A like tender of amends may also be made by revenue officers and by special constables, and also in cases of involuntary trespasses, and for wrongful proceedings under Railway Acts. See Arch. Pr. 1372, 1174, and 1273.

AMERCEMENT. See title AMERCIAMENT.

AMERCIAMENT. A pecuniary punishment for some fault or misconduct, differing (in theory at least) from a fine in being less out of leniency (*merci*) than the fault or misconduct deserved. Magna Charta, c. 24, requires a freeman to be amerced only for a great fault, and in proportion only to its greatness, and to the poverty of his estate. See *Griesley's Case*, 8 Co. 38 a.

See title WAINAGE.

AMEUBLISSEMENT. In French Law, under the *régime en communauté* (see that title), when that is of the conventional kind, if the husband or wife, or either of them, make their or either of their present or future immoveable property come into the community either in whole or in part, this is called an *ameublisement*, which may be either determinate or indeterminate.

AMICUS CURIE. When a Court of Justice is in doubt or in error in a matter of law, any of the counsel present may inform the Court upon it, out of a regard for the Court merely.

AMNESTY. An act of pardon or oblivion, such as that of 1660 (Restoration of Charles II.).

AMORTIZE. To alien in mortmain.

AMPLIARE. "*Est boni judicis ampliare jurisdictionem suam,*" i.e., to endeavour to find some ground for assuming jurisdiction in a proper case, not to exceed his admitted jurisdiction.

ANATOMY, SCHOOLS OF. These are regulated by the stats. 2 & 3 Will. 4, c. 75, 4 & 5 Vict. c. 26, 24 & 25 Vict. c. 96, and 34 Vict. c. 15. See also *R. v. Feist*, 8 Cox, C. C. 18.

ANCESTOR. The distinction made between an ancestor and a predecessor in law is, that the former is applied to an individual in his natural capacity, as J. S. and his ancestors, and the latter to a company, body politic, or corporation, as a bishop and his predecessors (Cowel; Co. Litt. 78 b.; Britton, 169). However, this distinction is not attended to in the Succession Duty Act, 1853 (16 & 17 Vict. c. 53).

ANCESTREL. Relating to one's ancestors. Homage ancestrel was where a tenant and his ancestors had time out of mind held by homage of the lord and his ancestors. Also, real actions were either *possessory*, i.e., of a man's own seisin, or *ancestral*, i.e., of the seisin of his ancestors.

ANCIENT DEMESNE, or DOMAIN (*vetus patrimonium domini*). A tenure whereby all manors belonging to the Crown in the days of Edward the Confessor and William the Conqueror were held; the numbers and names of which manors, as of all others belonging to common persons, William the Conqueror caused to be set down in a book called Domesday; and those which appear by that book to have belonged to the Crown, and are there denominated *terræ regis*, are called ancient demesne. Lands in ancient demesne are of a mixed nature, i.e., they partake of the properties both of copyhold and of freehold; they differ from ordinary copyholds in certain privileges, and from freehold by one peculiar feature of villenage, viz., that they cannot be conveyed by the usual common law conveyance, but pass by surrender to the lord or his steward in the manner of copyholds, with the exception that in the surrender the words "to hold at the will of the lord" are not used, but simply the words "to hold according to the custom of the manor." There are three kinds of tenants in ancient demesne. First. Those whose lands are held freely by grant of the King. Secondly. Those who do not hold at the will of the lord, but yet hold of a manor which is ancient demesne, and whose estates pass by surrender, or deed, and admittance, and who are styled customary freeholders. Thirdly. Those who hold of a manor which is ancient demesne, by copy of court roll, at the will of the lord, and are styled copyholders of base tenure (Cowel; Scriven on Copyhold, p. 425; 1 Cruise, Dig. 44). Whether lands are ancient demesne or not must be tried by Domesday Book, F. N. B. 16 D., the authority of which is conclusive (4 Inst. 269); but the question whether lands are parcel of a particular manor which is ancient demesne may be tried by a jury. *Hunt v. Burn*, 1 Salk. 57.

Tenants in ancient demesne used to enjoy certain privileges, e.g., that of being impleaded in the Courts of their own manors only, and of being exempted from serving on the juries of the county; but those privileges have mostly ceased, and provision is made by the stat. 4 & 5 Vict. c. 35, and the Acts amending same, for the general enfranchisement of ancient demesne lands.

See titles COPYHOLDS; VILLEIN SOCAGE; VILLENAGE.

ANCIENT DOCUMENTS. These are received in evidence for certain purposes, and subject to certain restrictions. But ancient grants are not to be received in evidence unless they can be accounted for as coming, *e.g.*, from the hands of some one connected with the estate (*Swinnerton v. Stafford (Marquis)*, 3 Taunt. 91); or from a reasonably probable custodian of them (*Croughton v. Blake*, 12 M. & W. 205). Ancient surveys have in many instances been held inadmissible to prove the extent or rights of a manor (*Evans v. Taylor*, 7 A. & E. 617; *Daniel v. Wilkin*, 7 Exch. 429); but when ancient documents evidence an act of ownership, then they are admissible as evidence of title (*Doe d. William the Fourth v. Roberts*, 13 M. & W. 520); and this is what is meant by the rule that in support of the "*ancient possession*" of lands ancient documents executed simultaneously with the transactions with which they relate are receivable in evidence. Similarly ancient documents are receivable in evidence, when they are in the nature of an inquisition in a public matter (*Carr v. Mostyn*, 5 Exch. 69).

ANCIENT LIGHTS: See titles EASEMENTS, sub-title LIGHT; LIGHTS.

ANCIENT POSSESSION: See titles ANCIENT DOCUMENTS; POSSESSION.

ANDERSON'S CASE: See title HABEAS CORPUS.

ANIMALS. There may be property in wild animals when reclaimed, *e.g.*, in a cat; and in the case of unreclaimed animals, the property in them, according to the law of England, is said to be in the owner of the land upon which they are started and captured (*Blades v. Higgs*, 12 C. B. (N.S.) 501), although by the laws of most countries it is in the captor (See title OCCUPATIO). The owner of animals with a mischievous propensity is liable for the damages they occasion, provided he knows their mischievous propensity. (*Jones v. Perry*, 2 Esp. 482; *Stiles v. Cardiff Steam Navigation Co.*, 12 W. R. 1080.) The stat. 28 & 29 Vict. c. 60, provides for dogs doing damage to cattle or sheep, and dispenses in these cases with the requisite of the owner's *scienter*. The stats. 5 & 6 Will. 4, c. 59 (since repealed), 12 & 13 Vict. c. 92, and 17 & 18 Vict. c. 60, punish cruelty to animals; and the stat. 2 & 3 Vict. c. 47, prohibits bear-baiting and cock-fighting. And as to bequests of personal property to a dog-charity, see *University of London v. Jarrow*, 23 Beav. 159.

ANIMUS ET FACTUM. The combination of the intention with the actual fact. This combination is required for a change

ANIMUS ET FACTUM—*continued.*
of domicile; also, for the efficiency of most other legal acts.

See title DOMICILE.

ANIMUS FURANDI. The felonious intention of stealing. It was a maxim of Roman Law,—*furtum sine affectu furandi non committitur*,—and that is also a maxim of English Law, which, however, judges the intention by the act, until the act is explained.

ANIMUS NON REVERTENDI. Animals accustomed to go and return continue the property of their owner until they lose the *animus revertendi*; and they are said to lose that intention, when they in fact cease for good to return (Just. Inst. ii. 1). This rule of the Roman Law has been adopted without any modification in the English Law.

ANNATES. These were first fruits, and were so called because one year's value of profits was taken as their rate. They were payable to the Pope, but by the stat. 23 Hen. 8, c. 9, enforced by the stat. 25 Hen. 8 c. 20, they ceased to be payable.

ANNUITY. This is a yearly payment of a certain sum of money granted to another in fee, or for life, or for a term of years, and charging the person of the grantor, although it may also be made to charge his real estate, in which latter case it is most commonly called a rent-charge. The remedy was either by writ of annuity or by distress, according as the person or the lands of the grantor were sought to be affected. The Apportionment Act (4 & 5 Will. 4, c. 22) first made annuities apportionable. Under the Annuity Act (53 Geo. 3, c. 141), annuities for lives granted by way of the repayment of money lent, required to be inrolled in Chancery; but now, under the stat. 18 & 19 Vict. c. 15, they require to be merely registered in the Court of Common Pleas. Annuities may also be regarded as legacies payable, not in mass at one time, but by instalments every year or aliquot part of a year; therefore the word *legacies* in general comprises the word *annuities*. *Bolton (Duke) v. Williams*, 4 Bro. C. C. 361; *Mullins v. Smith*, 1 Dr. & Sm. 204.

If an annuity is given *simpliciter*, it is an annuity for the life only of the annuitant (*Kerr v. Middlesex Hospital*, 2 De G. M. & G. 583); or, in the case of joint annuitants, for the life of the longest liver of them (*Wilson v. Maddison*, 2 Y. & C. C. C. 372); and the law is the same since 1 Vict. c. 26 (*Nichols v. Hawkes*, 10 Hare, 342). Where, however, an annuity is given to A. in general terms, and the gift is accom-

ANNUITY—continued.

panied with a direction to provide for the same out of the proceeds of property, that is a perpetual annuity (*Kerr v. Middlessex Hospital, supra*), unless the direction is mere surplusage, *e.g.*, merely directs payment out of the "general effects" of the testator (*Innes v. Mitchell*, 6 Ves. 464); and, of course, the testator may, by express words, give a perpetual annuity (*Stokes v. Heron*, 12 Cl. & F. 161).

Sometimes an annuity is payable only out of income (*Foster v. Smith*, 1 Ph. 629), and sometimes it is a charge on the *corpus* itself of the estate (*Wright v. Callender*, 2 De G. M. & G. 652), in which latter case the annuitant may, if the income is insufficient, require a sale of a sufficient part of the *corpus* (*May v. Bennett*, 1 Russ. 370), and will even be entitled to a prospective order for the necessary successive future sales (*Hodge v. Lewin*, 1 Beav. 431). An indefinite trust to receive rents for payment of an annuity is a charge of the annuity upon the *corpus* (*Phillips v. Gutteridge*, 11 W. R. 12); and a direction to purchase an annuity for A. entitles A. to have the purchase-money paid over to him or her (*Ford v. Batley*, 17 Beav. 303; *Re Brown's Will*, 27 Beav. 324); although the testator may have directed the contrary (*Stokes v. Cheek*, 28 Beav. 620); and if the intended annuitant is dead, his personal representatives will be entitled to the purchase-money (*Day v. Day*, 1 Dr. 569), although the purchase-money is to consist of the proceeds of land sold (*Bayley v. Bishop*, 9 Ves. 6).

An annuity will abate with general legacies (*Carr v. Ingleby*, 1 De G. & Sm. 362), unless the annuity is given as a specific interest in land, when it will only abate with the other specific legacies (*Creed v. Creed*, 11 Cl. & F. 491).

When an annuity is given by will, the first payment thereof is to be made, in the absence of express directions otherwise directing payment, one year after the testator's death (*Gibson v. Bott*, 7 Ves. 96), or if successive interests for life and in remainder are given by way of annuity out of a sum of money directed to be placed out to answer it, then two years from the testator's death (*Gibson v. Bott, supra*).

ANSWER. This was the most usual mode of raising defences to a bill of complaint in the Court of Chancery, being more common than either plea or demurrer: but it has now ceased to be the name of any pleading at all, what used formerly to be called an answer being now called in all the Divisions of the High Court a statement of defence (*see* title DEFENCE, STATEMENT OF). And an answer is now the

ANSWER—continued.

name used to denote the affidavit made in answer to interrogatories administered by either party to the other party in the action touching the subject matter of the action.

See titles DISCOVERY; INTERROGATORIES.

ANTE LITEM MOTAM. As a general rule, hearsay evidence (in the cases where it is admissible) must be of matters that have been done before the litigation arose, in which it is proposed to adduce them as evidence, *e.g.*, pedigrees must have been made long before and without prospect of the said subsequent litigation; and so also declarations of deceased persons against their own interest or in due course of their business. Whatever is *post litem motam* is not admissible; because that would enable people to make evidence for themselves (*see* title EVIDENCE, sub-title HEARSAY). Communications that are privileged from production for professional reasons are so, whether made *ante litem motam* or (*à fortiori*) *post litem motam* or *conspetu litis*.

See titles PRIVILEGED COMMUNICATION; PRIVILEGE OF WITNESSES.

ANTE-NUPTIAL SETTLEMENT: *See* titles MARRIAGE SETTLEMENTS; SETTLEMENT OF REAL ESTATE; SETTLEMENT OF PERSONAL ESTATE.

ANTICHRESE: *See* title NANTISSEMENT.

ANTICHRESIS.—In Roman Law, was a contract of pledge, in which the pledgee-creditor received the produce in lieu of interest.

See titles NANTISSEMENT; WELSH MORTGAGE.

ANTICIPATION. This word is commonly used in Courts of Equity as signifying the alienation of married women. It is a rule of the Common Law that the absolute property given to any one cannot be fettered with any restraints or conditions against alienating (*Tud. L. C. Conv.* 858, *Bradley v. Peizoto*); but Courts of Equity, in the case of property given to the separate use of a married woman, allow the restraint, as tending to render the separate use more perfect and assured (*Tullett v. Armstrong*, 1 Beav. 21). Whence the clause against anticipation is common in gifts of property to females to their separate use.

See title SEPARATE ESTATE.

APICES JURIS NON SUNT JURA. The extremes of law are not law, *scil.* make bad law, according to the cognate maxim *summum jus summa injuria*.

APOLOGY. In the case of a libel being published in a newspaper or other like

APOLOGY—*continued.*

public writing, the 6 & 7 Vict. c. 91, provides that the defendant may plead the inadvertent insertion of same without malice or gross negligence, and the prompt insertion in the same publication of an apology for same; and he may pay into Court at the same time a reasonable sum of money by way of amends. A like provision is made in the case of defendants being private individuals (s. 1), and such apology shall go in mitigation of damages.

APOSTASY. This offence differs from heresy in this, that apostasy is a total renunciation of a religious belief once professed, while heresy consists in denying some one particular doctrine only. At the present day apostasy is punishable under the stat. 9 & 10 Will. 3, c. 32 (Revd. Stats. 9 Will. 3, c. 35), by incapacity for or deprivation of offices of trust or emolument, and by imprisonment for three years without bail. The information must be laid within four days after the outward profession of apostasy, and be followed up within three months, otherwise the accusation falls through. The penalty is also remitted upon an open retraction in Court of the offence. But, *semble*, the whole law is obsolete.

APOTHECARY: See title **MEDICAL PRACTITIONER.**

APPARENT EASEMENTS.—Are those which are visible to the eye; e.g., a drain or pipe conducting water from the dominant over the servient tenement. Unity of possession, so long as it lasts, may extinguish such easements *as easements*; but upon a subsequent severance of that unity of possession, an apparent easement would revive naturally upon the grant of the dominant tenement (*Suffield v. Brown*, 33 L. J. Ch. 345), and should be carefully revived by express words upon a grant of the servient tenement.

See title **EASEMENTS.**

APPARENT POSSESSION. See titles **FRAUDULENT CONVEYANCES; ORDER AND DISPOSITION.**

APPARITOR. This was a messenger of the spiritual Courts, whose duty was to serve the process thereof.

APPEAL, COURT OF: See titles **COURTS OF JUSTICE; COURTS OF APPEAL.**

APPEAL PETITION: See title **PETITION OF APPEAL.**

APPEALS, CIVIL, VARIETIES OF. All appeals (in civil matters) from Petty or Quarter Sessions, from County Courts, and from Inferior Courts generally, are to a Divisional Court of the High Court at

APPEALS, CIVIL, VARIETIES OF—*continued.*

Westminster; so likewise are appeals from the Lord Mayor's Court of the City of London (*Appleford v. Judkins*, 3 C. P. Div. 489; *Le Blanch v. Reuter's Telegraph Co.*, 1 Exch. Div. 408). Every judgment (whether final or interlocutory) and also every order of the High Court of Justice is appealable to the Court of Appeal (being the upper branch of the Supreme Court), unless when the right of appeal is expressly excluded; and further, every judgment (whether final or interlocutory) and also every order of the Court of Appeal is appealable to the House of Lords: but as regards Scotland or Ireland appeals lie to the House of Lords only where such an appeal lay before the Appellate Jurisdiction Act, 1876. But, of course, orders by consent or as to costs merely (where no principle of taxation is involved) are not appealable in any case. From an order made by a Master at Chambers in the Common Law Divisions, an appeal lies to the Judge at Chambers, and then to a Divisional Court, and then to the Court of Appeal, and finally to the House of Lords; and from an order made by the Chief Clerk (or Judge) at Chambers in the Chancery Division, an appeal lies to the Judge in Court, or (with his consent) direct to the Court of Appeal, and thence to the House of Lords. The times for bringing these appeals are variously limited; and the Court is not disposed to extend the time, the multiplicity of appeals being a subject open to great abuse in the hands of a certain class of suitors.

APPEALS, CRIMINAL. Under the stat. 11 & 12 Vict. c. 78, a Court for crown cases reserved was established; and that Court is now constituted of a Divisional Court of the High Court of Justice, consisting of not fewer than five judges (Judic. Act, 1873, s. 47). All cases or points in cases reserved at criminal trials are taken to that Court, and are in the nature of appeals. But appeals proper in criminal cases never lay, excepting for some error in law apparent on the face of the record, and in that case they were (and still are) to the Court of Queen's Bench, and thence to the Court of Appeal (*Bradlaugh v. Reg.* 3 Q. B. Div. 607). But appeals against convictions are intended to be made general.

Prior to 59 Geo. 3, c. 46, there were so-called criminal appeals, which were not appeals at all in the ordinary sense of that word, but proceedings of first instance, in which trial by combat or battle was the right of the defendant (called the appellee). There were five kinds of these latter appeals,

APPEALS, CRIMINAL—continued.

viz., (1.) Appeal of arson; (2.) Appeal of death; (3.) Appeal of rape; (4.) Appeal of robbery; and (5.) Appeal of mayhem. The last instance of such an appeal in English Law was the appeal of rape and death in *Ashford v. Thornton* (1 B. & A. 405); and it was in consequence of that case that the stat. 59 Geo. 3, c. 46 was passed to put an end to all such appeals for the future (see title **BATTLE, TRIAL BY**). The peculiarity of these appeals was, that the private injury was sought to be compensated, not the public wrong avenged; because where the appeller (i.e., prosecutor) was successful, he had the life of the appellee in his hands, and might insist upon what terms of compensation he liked as the ransom of such life.

See title **JURY, TRIAL BY**.

APPEALS, EVIDENCE UPON. When the appeal is to the Court of Appeal, the evidence by affidavits already used in the Court below is produced in a printed form when printed below, and in a written or printed form when written below, and the evidence taken *visà voce* is produced by means of the judge's notes or (sometimes, shorthand-writer's notes). Further evidence is producible as a matter of right upon all interlocutory appeals, but upon other appeals further evidence of facts arisen subsequent to trial below may be adduced without leave, but further evidence of other facts only with leave (Order LVIII., rule 5). When the appeal is to the House of Lords, the evidence is all printed in the Appendices scheduled to the appeal case.

APPEARANCE AT TRIAL: See title **TRIAL, APPEARANCE AT**.

APPEARANCE TO WRIT. The defendant enters his appearance to a writ of summons by leaving a memorandum of appearance at the office out of which the writ issued, and such memorandum is entered in the cause-book. The normal period for appearing is eight days after service of writ. A landlord (whose tenant is defendant in an action of ejectment) can appear only by leave; so likewise a defendant sued under the Summary Procedure on Bills of Exchange Act (see title **BILL OF EXCHANGE**). In a Chancery action, if the defendant fails to appear within the eight days, the plaintiff files an affidavit of service of the writ, and thereafter the action generally proceeds in the usual way. But in some few actions, as well in the Chancery Division as in the Common Law Divisions, immediate judgment may be signed for default of appearance to the writ of summons, e.g.:—

(1.) In an action for recovery of land;

APPEARANCE TO WRIT—continued.

(2.) In an action for pecuniary damages; and

(3.) In an action for debt or liquidated damages when writ is specially indorsed (Order XIII., rule 3), and even when writ is not specially indorsed (Order XIII., rule 5).

A married woman appears by her husband, but may by leave appear alone; an infant and also a lunatic not so found appears by the person with whom he resides (or by his father or general guardian); a lunatic so found appears by his committee. The effect of entering an appearance used to be to waive any irregularity in the writ of summons or in the service thereof (*Forbes v. Smith*, 24 L. J. Exch. 167), and such would seem to be still the case.

APPELLANT. Is the person who carries a decision to the Court of Appeal, the judgment in the Court below having been adverse to him.

APPELLATE COURTS; see title **COURTS OF APPEAL**.

APPENDANT. This word, in its general sense, denotes anything annexed in whatever manner to any other. But as applied to incorporeal hereditaments in the law of real property, it denotes something annexed as an incident to some other and corporeal hereditament, and the annexation of which thereto is of a necessary character, and has therefore existed from the very beginning of time. Thus, that amount of common which from the first, and as of necessity, the lord assigned to his villeins to depasture their beasts of husbandry during such times as their lands (which were all of them arable) were in ear, was called common of pasture appendant; and similarly, the lord from the first, and as of necessity, erected and endowed a church (being the manor or parish church) for the religious education and welfare of his tenants, and the endowment of such church was called an advowson appendant, i.e., to the manor. It is also a characteristic of properly appendant rights, that once they are disannexed, although for ever so short a time, from the principal hereditament, so as to become *in gross*, they can never become appendant again, but may become appurtenant.

See further, the titles **APPURTENANT; IN GROSS; COMMON; and INCORPOREAL HEREDITAMENTS**.

APPOINTMENT TO OFFICES. Where a person acts in a public capacity, his so acting is *prima facie* evidence of the validity of his appointment (*R. v. Winnifred*, 1 Leach, C. C. 515); and this presumption

APPOINTMENT TO OFFICES—contd.

is adopted in the Criminal Law Consolidation Acts of 1861.

APPOINTMENT, POWERS OF. These are either general or special; the former enabling the donee of the power to appoint to any one he pleases, and even to himself (for which reason, the property which is subject to a general power of appointment is liable in case of his bankruptcy: Bankruptcy Act, 1869, s. 15, sub-s. 4); the latter enabling him to appoint among particular individuals only, or not at all. There is also the following distinction between these two kinds of powers, viz., that the general power, when exercised, dates from the exercise thereof, and not earlier; while the special power, when exercised, dates from the creation thereof, which is necessarily an earlier period than that of the exercise.

See titles CONVEYANCES: POWER.

APPORTIONMENT. This word applies to *rents*, *annuities*, and *common*. First, as applied to *rents*, it denotes a division of the rent in certain proportions; and as to *rents-service*, these (although originally and in their own nature indivisible) have been divisible since the stat. *Quia Emptores*, 18 Edw. 1 (Statute of Westminster the Third), c. 1, and as to *rents-seck*, *rents-charge*, &c., these have been made apportionable by the stat. 4 Geo. 2, c. 28; and now also by Lord St. Leonards' Act, 22 & 23 Vict. c. 35, the release of part of land subject to a rent-charge does not release the other part, which the intention was should remain unreleased. By the stat. 11 Geo. 2, c. 19, rents secured on leases are made apportionable between a landlord (tenant for life) deceased and the succeeding remainderman or reversioner—an apportionment which has been made universal by the stats. 4 & 5 Will. 4, c. 22, and the Apportionment Act, 1870 (33 & 34 Vict. c. 35). Secondly, as applied to *annuities*, these were made apportionable by the stat. 4 & 5 Will. 4, c. 22, a provision which has been extended by the stat. 33 & 34 Vict. c. 35, the 2nd section of which enacts as follows: "From and after the passing of this Act [Aug. 1, 1870], all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." Thirdly, as applied to *common*, upon a purchase by the commoner of part of the land over which his right of common exists, the right may be apportioned (Co. Litt. 149 a); and it makes no difference, *semble*, that the right

APPORTIONMENT—continued.

of common is that of common *sans nombre*. *Wild's Case*, 8 Rep. 79; *Bennett v. Reeve*, Willes, 232.

APPORTIONMENT OF RENT. By the Common Law there was no apportionment of rent in respect of *time*, rent not being regarded as accruing due *de die in diem*. *Clun's Case*, 10 Co. 126 a.

Accordingly (1.) If the lessor was owner in fee simple, or (being owner for a limited estate) had a power of leasing, upon his death in the interval between two days of payment, his executors were not entitled to any part of the rent in respect of the accrued portion of the interval, but the rent for the entire interval went to the person who took the reversion (whether as heir-at-law, devisee, or remainderman). *Earl of Strafford v. Lady Wentworth*, 1 P. Wms. 180.

And (2.) If the lessor was tenant for life, or for any other limited estate, and had no power of leasing, upon his death in the interval between two days of payment, his executors were not entitled to any part of the rent in respect of the accrued portion of the interval, and neither was the reversioner entitled to that part of the rent, but that part ceased to be payable at all by the tenant to any one. *Jenner v. Morgan*, 1 P. Wms. 392.

However, by statute, rents have been made apportionable, the principal statutes being the following:—

(a.) By 11 Geo. 2, c. 19, s. 11, when any tenant for life, not having a power of leasing, dies on or before the day on which the rent is payable by his lessee, the executors of such tenant for life are entitled to the whole or a proportion (as the case may be) of the rent in respect of the accrued interval or accrued portion thereof; and it has been held that the statute extends to a tenant in tail (*Whitfield v. Pindar*, 8 Ves. 311). The statute did not, however, extend to land tax or quit rents; neither were such rents apportionable in Equity (*Sutton v. Chaplin*, 10 Ves. 66); and it was doubtful if it extended to tenancies held *pur autre vie*.

Accordingly, (b.) By 4 & 5 Will. 4, c. 22, commonly called the Apportionment Act, it has been enacted that rents reserved and made payable on any demise or lease of lands, tenements, or hereditaments which have been and shall be made, and which leases or demises determined or shall determine on the death of the person making the same (although such person was not strictly tenant for life thereof) or on the death of the life or lives for which such person was entitled to such hereditaments, *shall*, so far as respects the rents reserved by such leases and the recovery of a portion

APPORTIONMENT OF RENT—*contd.*

thereof by the person granting the same, his or her executors or administrators (as the case may be), be considered as within the provisions of the Act 11 Geo. 2, c. 19, s. 11; and that all rent service reserved on any lease by a tenant in fee or for any life interest, or by any lease granted under any power (being in each case a lease granted after the 10th of June, 1834), and all rents-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description in the united kingdom of Great Britain and Ireland made payable or becoming due at fixed periods under any instrument (being an instrument that came into operation after the said 10th of June, 1834), should be apportioned so and in such manner that, on the death of any person interested in the said respective payments, or on the determination otherwise of the interest of such person therein, he or she, and his or her executors, administrators or assigns, should be entitled to a proportion thereof, according to the time which should have elapsed from the commencement or last period of payment thereof respectively (as the case may be) including the day of the death or other determination of the interest of such person, subject nevertheless to all just allowances and deductions in respect of charges thereon respectively, the remedies for the recovery of such proportion to become available when the entire amount is become payable, and not before; such remedies to lie and be directed against the person or persons who (but for this Act) would have been entitled to receive and to retain the entirety of the said respective payments.

(c.) By the Act 14 & 15 Vict. c. 25, s. 1, when the lease or tenancy, being at a rack rent, shall determine by the death or cesser of the interest of the landlord entitled for his life or for any uncertain interest, instead of claims to emblements, the principle of an apportionment of rent is introduced, the tenant being allowed to hold on till the end of the current year of his tenancy, upon the terms of the old holding, whereupon he goes out without any notice to quit either given or received.

(d.) By the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 119, and under the Church Building Acts (17 & 18 Vict. c. 32), the principle of apportionment of rent is also adopted, when part only of the land comprised in the lease or underlease (as the case may be) is required for the purposes of the works authorized by those Acts respectively.

Lastly (e.) By the Apportionment Act, 1870 (33 & 34 Vict. c. 35), the principle of apportionment was extended to the cases of rents, annuities, dividends, and other

APPORTIONMENT OF RENT—*contd.*

periodical payments in the nature of income reserved or made payable otherwise than by an instrument in writing, with the like remedies for the recovery of the proportionate payment. This Act was necessitated by the decision in *Cattley v. Arnold* (1 J. & H. 651), which limited the earlier Acts to payments reserved by instruments in writing only; and since the Act of 1870, there is probably nothing that is not now apportionable, as if it accrued from day to day.

APPRAISE. To set or affix the true price or value on goods. By stat. 11 Edw. 1 (Acton Burnell), appraisements are to be made on oath, and are to be at the true value, under the penalty of the excessive appraiser having to purchase at his own valuation; and by stats. 46 Geo. 3, c. 43, and 8 & 9 Vict. c. 76, appraisers must be licensed, and by the Stamp Act, 1870 (33 & 34 Vict. c. 97), every appraisement is to bear a stamp of 6d. for every £10 of value, and for every value between £5 and £10, and a stamp of 3d. for £5 of value or under. But appraisements made for one side only, and not being obligatory as between the parties, are exempted.

APPREHENSION OF OFFENDERS: See titles CONSTABLE; POLICE; WARRANT.

APPRENTICE. A person in the course of learning any profession is so called in law; but the name is now commonly limited to a person bound by indenture to a tradesman, who thereby undertakes for certain considerations to teach him his trade. See the duties of the master explained in *Couchman v. Siller* (23 L. T. 480); and those of the apprentice in *Cooper v. Simmonds* (7 H. & N. 707). Where, as usually happens, the apprentice is an infant, no action lies against him on his covenant (*Gylbert v. Fletcher*, Cro. Car. 179), unless by special custom (*Whittingham v. Hill*, Cro. Jac. 494); therefore usually the parent covenants for him, but the infant must execute the indenture (*R. v. Arnesley*, 3 B. & A. 585). Under the Stamp Act, 1870, the indenture must be stamped with a 5s. stamp for every £5, or fraction of £5, of premium, and with a 2s. 6d. stamp where there is no premium.

Regarding parish apprentices, see 3 & 4 Will. 4, c. 63, and 7 & 8 Vict. c. 101; and for the jurisdiction of justices of the peace regarding such, see the same statutes, and also *Reg. v. Pround* (Law Rep. 1 C. C. 71).

APPROPRIATION. This word is commonly used in two senses, viz. (1.) the appropriation of benefices, and (2.) the appropriation of payments.

(1.) *An Appropriation of a Benefice.*—

APPROPRIATION—continued.

This is the annexing of a benefice to the use of some religious house, or spiritual corporation, whether sole or aggregate, to enjoy for ever; just as an impropriation is the annexing a benefice to the use of a lay person or corporation. (See title IM-PROPRIATION).

(2.) *Appropriation of a Payment.*—This means the application of a payment to the discharge of a particular debt. Thus, if a creditor has two distinct debts due to him from his debtor, and the latter makes a general payment on account without specifying at the time to which debt he intends the payment to apply, it is optional for the creditor to appropriate (i.e., to apply) the payment to either of the two debts he pleases. The leading case upon the subject is *Clayton's Case* in *Devaynes v. Noble* (1 Mer. 585; Tud. Merc. Ca. 1); from which case and the notes thereto, the following rules may be gathered:—

(1.) The first option to appropriate belongs to the debtor at the time of payment. The appropriation in this case may be either express (*Ex parte Imbert*, 1 De G. & J. 152), or implied (*Shaw v. Picton*, 4 B. & C. 715), or presumed (*Young v. English*, 7 Beav. 10). In the case of several debts, some of which are barred by the Statute of Limitations and some not, the presumption is, that the payment is made on account of the debt or debts not barred (*Nash v. Hodgson*, 6 De G. M. & G. 474, reversing the decision of Wood, V.C., Kay, 650).

(2.) The second option to appropriate belongs to the creditor (Dig. 46, 3, 1), and this appropriation need not be made at the time of payment, but at any time afterwards until the matter comes to trial (*Simson v. Ingham*, 2 B. & C. 65); appropriation can only be made once, at least after notice of the first appropriation has been given to the debtor. But it is competent for a debtor and his creditor to make a new contract varying the appropriation of past payments (*Merriman v. Ward*, 1 J. & H. 371). Where one of two or more debts is barred by the Statute of Limitations, and the other, or others, are not barred, the creditor may appropriate the payment to the debt or debts which are barred, and afterwards pursue his remedy for the recovery of the other or others (*Mills v. Fowkes*, 5 Bing. (N.C.) 455); and similarly in the analogous cases mentioned in *Cruikshanks v. Rose*, 1 Moo. & Rob. 100 (sale of spirits on credit), and *Arnold v. Poole* (Mayor), 4 M. & G. 860 (solicitor to corporation). *Secus*, if the debt is absolutely unlawful, e.g. a gambling debt. And, apparently, the two debts must be of ascertained amount (*Goddard v. Hodges*, 1 C. & M. 33, (unsettled

APPROPRIATION—continued.

partnership accounts); *Goddard v. Cox*, 2 Str. 1194 (assets in administration)).

(3.) Failing any appropriation by the creditor, the law appropriates the payment to the various debts in the order of their respective dates, beginning with the earliest (*Clayton's Case*, *supra*). Of course, however, one man's money will not be appropriated by the law towards payment of another man's debt, e.g. partnership moneys in payment of a single partner's debt (*Thompson v. Brown*, 1 Mood. & Malk. 40). The appropriation by the law is first to interest, and only secondly to principal (*Chase v. Box*, Hov. Freem. 261; *Bower v. Marria*, 1 Cr. & Ph. 351; Code 8, 53, 1; Dig. 46, 3, 5, § 3). But the law will not in the last-mentioned case appropriate any part of the money paid to interest barred by the statute (*In re Fitzmaurice's Minors*, 15 Ir. Ch. Rep. 445); nor will the law appropriate a payment to money illegally due (*Wright v. Laing*, 3 B. & C. 165).

Appropriation of payments must be distinguished from apportionment of same between debts having equal rights to be paid (*Favenc v. Bennett*, 11 East, 36; Dig. 46, 3, 8).

APPROPRIATION OF PAYMENTS: See title APPROPRIATION.

APPROPRIATION OF SECURITIES.

Where a security has been deposited with a creditor generally, and the debtor afterwards becomes bankrupt, owing two or more debts, one or some of which are proveable, and the other or others not proveable, the creditor may appropriate the security to the debt or debts which are not proveable (*Ex parte Hunter*, 6 Ves. 94; *Ex parte Waring*, 19 Ves. 345).

See title WARING, EX PARTE, CASE OF.

APPROPRIATION OF SUPPLIES. The first instance of Parliament appropriating the supplies is in the year 1354, when the subsidy granted on wool was directed to be applied solely for the purposes of the war.

APPROVAL, SALE ON: See titles SALE; SALE ON APPROVAL.

APPROVEMENT. This word has several meanings. It signifies much the same as improvement; thus, approvement of common means the inclosing a part of a common by the lord of the manor for the purpose of cultivating the same, leaving sufficient nevertheless for the commoners. This power in the lord to approve is conferred by the Stat. of Merton (20 Hen. 3, c. 4) and Westminster the Second (13 Edw. 1, stat. 1, c. 46), as extended by the stat. 3 & 4 Edw. 6, c. 3. Secondly, it is also said to signify the profits of a farm

APPROVEMENT—*continued*.

(Cowel). Thirdly, it signifies the act of an approver, who, when indicted of treason or felony, and arraigned for the same, confesses the fact before plea pleaded, and accuses others, his accomplices, of the same crime in order to obtain his own pardon. 3 Cruise, 89; Cowel; 2 T. R. 391.

See title INCLOSURE.

APPROVER. See title APPROVEMENT (3rd meaning).

APPURTENANT. This word denotes annexed or belonging to; but in law it denotes an annexation which is of convenience merely and not of necessity, and which may have had its origin at any time, in both which respects it is distinguished from Appendant (see that title). In conveyances of lands and houses, it is usual to add to the parcels, or else to the *habendum*, or to both, the phrase "with the appurtenances," and to make surer, to add "or reputed as appurtenant or belonging thereto." The term is commonly confined in law to the purely incorporeal hereditaments that are commonly annexed to lands or to houses, and may include as well common, as any other right (*Lister v. Pickford*, 34 Beav. 576).

See title INCORPOREAL HEREDITAMENTS.

AQUAE ET IGNIS INTERDICTION. In Roman Law was banishment,—a person excluded from water and fire (whether physical or sacrificial) being obliged thereby to withdraw himself.

See title DEPORTATIO VEL RELEGATIO.

AQUILIAN STIPULATION: See title STIPULATIO AQUILIANA.

ARBITRATION AND AWARD. All matters in dispute concerning any personal chattel or personal wrong may be referred to the decision of an arbitrator; and although much jealousy was formerly, and some jealousy is still, felt in allowing references of questions regarding real property, yet references have been made and allowed of the following matters,—partition between joint tenants and tenants in common, settlement of disputed boundaries, waste between landlord and tenant, title of devisees, and generally upon title. Parties may even agree to refer to arbitration any future differences between them, although none at present may exist. And under various Acts of Parliament civil matters are compulsorily referred; in particular, matters of account, under the C. L. P. Act, 1854 (17 & 18 Vict. c. 125, ss. 3-6), when they cannot be conveniently tried in the ordinary way; and under the Judicature Acts, 1873-5, by consent of all parties any question or issue of fact in any civil cause or matter may be referred to a referee for

ARBITRATION AND AWARD—*contd.*

him to try same and to report the result of his trial to the Court (Act, 1873, ss. 57, 58); and by compulsory order of the Court or a Judge, any question or issue of fact, or any question of account, in any civil cause or matter requiring either a minute examination of documents or of accounts, or a scientific or local examination, may be referred to a referee for him to try same and to report as before. In either case, the Court may either adopt or set aside the report in whole, and may require any explanation or reasons from the referee, and may remit the report or any part of it for further consideration or for re-trial; or the Court may itself decide the point on the evidence taken before the referee, with or without additional evidence, as the Court may direct (Order xxxvi., rule 34, March, 1879). But with regard to criminal matters, the old rule was, that matters criminal were not arbitrable; and it may be said still that offences of a public nature are not referable. On the other hand it has been said that in all cases where the injured party has a remedy by action as well as by indictment, he may refer same, procuring the consent of the Judge if the indictment has been already commenced, or a conviction upon it obtained.

The persons who may refer matters to arbitration are of a correspondingly various character. Firstly, where the referring parties are interested on their own account in the matters referred, it is a general rule that every one capable of making a disposition or release of his or her right may also make a submission to an award (Com. Dig. Arb. D. 2); and conversely, the incapacity to contract involves the incapacity to refer. But as between partners, one partner cannot bind the other by his sole submission; and it matters not whether the partnership be general or particular, the submission to an award not being within the scope of the partnership or incident to any matters within such scope; and all the partners must execute the submission in order that any of them may be bound by the award (*Antram v. Chase*, 15 East, 209). Secondly, where the referring parties have no personal interest in the award, but act in the capacity of trustees or agents only, it is a general rule that the agent referring must have authority so to do, but such authority, where not express, may be implied from the nature of the agency. Thus, the better opinion is, that a solicitor or attorney retained generally has an implied authority to refer (*Dowse v. Coxe*, 3 Bing. 20), unless, *semble*, he is expressly forbidden to make a reference (*Filmer v. Delber*, 3 Taunt. 486).

See further titles REVOCATION; SUBMIS-

ARBITRATION AND AWARD—contd.

SION; UMPIRE; and for the proceedings incident to a reference, not being in an action, and the form and execution of the award, with the remedies thereon, see generally Russell on Arbitrations; *Pontifex v. Severn*, 3 Q. B. Div. 295.

ARCHBISHOP. The head or chief of the clergy in a whole province. He has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause. The archbishop has his own diocese wherein he exercises *episcopal*, as in his province he exercises *archiepiscopal*, jurisdiction. To him, or to his Court, all appeals are made from inferior ecclesiastical jurisdictions within his province; and as an appeal lies or lay from the bishops in person to him in person, so it also lies from the Consistory Courts of each diocese to his Archiepiscopal Court. 1 Burn's Ec. Law; 2 Roll. Abr.

By the stat. 37 & 38 Vict. c. 85 (Public Worship Regulation Act, 1874), provision was made for the appointment of a judge of the Provincial Courts of Canterbury and York, and such judge (upon a vacancy occurring in the respective offices) is to become *ex officio* the official principal of the Arches Court of Canterbury, and also official principal or auditor of the Chancery Court of York. The office of such judge continues during good behaviour, and so long only as he remains a member of the Church of England.

See also titles ARCHES, COURT OF; CONSISTORIAL COURTS; ECCLESIASTICAL COURTS; and OFFICIAL PRINCIPAL.

ARCHDEACON. A dignitary of the church who has ecclesiastical jurisdiction immediately subordinate to that of the bishop, either throughout the whole of his diocese or in some particular part of it. He is nominally appointed by the bishop himself, and has a kind of episcopal authority originally derived from the bishop, but now independent and distinct. It was formerly his office to grant letters of administration, but that duty is now discharged by the district Probate Courts. He visits the clergy, and has his separate Court for the punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognizance. Com. Dig. Ecclesiastical Persons; Burn's Ec. Law; 1 Lev. 192.

See titles ARCHBISHOP; ECCLESIASTICAL COURTS.

ARCHES, COURT OF. An ecclesiastical Court, so called because originally held in the Church of St. Mary-le-Bow (*de Ar-*

ARCHES, COURT OF—continued.

cubus). It was latterly held in the hall belonging to the College of Civilians, commonly called Doctors' Commons; but in more recent times, the office of the Court of Arches became annexed to, and was commonly discharged by, the judge of the Court of Admiralty, in his Court at Westminster; and now under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), a special judge has been appointed for this portion of the ecclesiastical jurisdiction (see title ARCHBISHOP). The Court as newly re-constituted is under the control of the Court of Queen's Bench, in case it exceeds its jurisdiction, or proceeds to affect the liberty or property of the subject otherwise than in due legal process (*Martin v. Mackonochie*, 3 Q. B. Div. 730; and on app. 4 Q. B. Div. 697).

The Court of Arches is the Court of Appeal of the Archbishop of Canterbury; the judge thereof hears all appeals from bishops or their chancellors, or commissaries, deans and chapters, and archdeacons; and from his decision an appeal lies to the Judicial Committee of the Privy Council. The Court of Arches has also an original jurisdiction over the thirteen peculiar parishes in London which belong to the Archbishop of Canterbury; but upon receiving letters of request from any bishop, he may assume original jurisdiction in any ecclesiastical matter arising elsewhere.

ARCHIVES. This word, which is derived from *arca*, a chest, was originally used to denote a repository for documents, but by a natural transference, has come to denote the documents themselves.

ARGUMENTATIVENESS. A fault in pleading, in respect that the pleading is not a concise and positive statement of facts, but an argumentative expression of the legal doctrine applicable to the facts which are its groundwork. A pleading faulty on this score may be struck out as embarrassing.

ARGUMENTUM AB INCONVENIENTI. This is a good argument in law, as whatever is inconvenient is *prima facie* not law, and certainly ought not to remain law.

ARMIGER: See title ESQUIRE.

ARMORIAL BEARINGS. For the duty on these, see Stamp Act, 1870 (33 & 34 Vict. c. 14), Sch.; see also title HERALDS' COLLEGE.

ARMOUR, or ARMS. In the meaning of the law are anything that a man wears for his defence, or takes into his hands for that purpose, or uses in his wrath to cast at another, or to strike him with. So that the appellations "armour" and "arms," do not in the law simply signify a sword, shield,

ARMOUR, or ARMS—continued.

helmet, or such like; but extend also to stones and other missiles used for the purposes of defence or warfare. *Crompton*. Just. 65; *Cowel*; *Holthouse*.

ARMS: See title **ARMOUR**.

ARMS, RIGHT TO CARRY. Was conceded to Protestants by the Bill of Rights (1 W. & M. sess. 2, c. 2).

ARMY. In ancient times, the English forces were composed of the following varieties of men-at-arms, viz:—

(1.) Persons holding by knight service, and who were required by virtue of their tenure, to serve forty days annually;

(2.) Other persons engaged by contract;

(3.) Freemen or freeholders generally, in virtue of the mere general duty of allegiance.

The first and second of these varieties constituted the *Army Proper*; the third variety was the *Militia*.

I. Army Proper:—The statute 1 Edw. 3, c. 5, enacted that no one should be called upon for service otherwise than as before used and accustomed, and that no one should be sent out of his own county unless in cases of invasion, or other like sudden emergency; but inasmuch as that monarch, notwithstanding the statute, called upon the counties and principal towns to furnish him with forces, therefore the statute 25 Edw. 3, c. 8, further enacted that no unusual services should be required, unless with authority of Parliament.

Upon the accession of the Tudor dynasty, these statutes of Edward III. were entirely disregarded, in particular by Henry VIII. and Elizabeth, who not only compelled the counties to furnish soldiers, but also pressed men into the service as well abroad as at home; and the statute 4 & 5 Ph. & M. c. 3, expressly recognises the right of the sovereign to levy forces.

The nucleus of a standing army appears to have been the 200 yeoman of the guard, maintained by Henry VIII., together with some artillerymen, stationed in the Tower of London, in the Castle of Dover, at the Fort of Tilbury, at Portsmouth, and at Berwick-on-Tweed. Subsequently, upon the split between the sovereign and parliament, in the reign of Charles I., the sovereign maintained his forces, and the parliament theirs; and upon the Restoration of 1660, Charles II. retained 5000 guards as a standing army, and shewed a disposition on several occasions, particularly in 1667, 1673, and 1678, to increase their number to 20,000. James II. maintained a standing army contrary to the wishes of Parliament; and upon the Revolution in 1688, William III. maintained 7000 men as a standing army, a number

ARMY—continued.

which, under Walpole's administration (George II. and III.), was increased to 17,000, exclusive of the forces maintained in Ireland. Since these dates, the army has been very largely increased, to meet the increasing wants of the kingdom and more particularly of the Empire.

Courts martial were established for the first time, in 1718, by a clause in the Mutiny Bill of that year, and have since been continued under the annual Mutiny Act. Under the stat. 42 & 43 Vict. c. 33. (Army Discipline and Regulation Act, 1879), which is made to come into force by an annual Act of Parliament, provisions of a more permanent character have been enacted for the regulation of such Courts.

The stat. of 8 Geo. 2, c. 30, prohibits troops from appearing at elections; and in 1741 a resolution was made in the Commons declaring that it was a high infringement of the liberty of the subject for the troops to have appeared (as they had done) at the Westminster election of that year.

II. Militia:—The freeholders of each county were originally summoned by the earl for self-defence, and were under a general duty to be properly furnished with arms for that purpose. By the Statute of Winchester (13 Edw. 1), in aid of the Common Law, all male persons between the ages of fifteen and sixty were required to keep arms in accordance with their station, and might at any time be called out as a *posse comitatus* by the sheriff, who had by that time taken the place of the earl, at least in matters of mere internal police. But these freeholders, keeping themselves in constant readiness, were capable of being mobilized as a militia for the purposes of the national defence.

The stat. of 1 Jac. 1, c. 25, established magazines of arms in each county, and Mary having previously created the body of lords-lieutenant, the militia was henceforth under the control of these latter officers, and a certain number of freeholders acted as a militia in relief of the general body. The Train Bands of London were a noted regiment of militia, formed in the reign of Henry VIII., and so called in the reign of Elizabeth (1588).

In 1642, the Long Parliament introduced a bill for regulating the militia, and assumed the right of nominating the lords-lieutenant who were to have the command; but in 1660, the sole right over the militia was declared to reside in the Crown, and not in Parliament. In 1757, the militia were re-organised, and placed nearly on their present footing.

There are also the three following varieties of the military forces, of more recent origin or development, viz:—

ARMY—continued.

III. *Yeomanry*:—Local forces raised by some individual or individuals in each county, with the approbation of the sovereign (44 Geo. 3. c. 54).

IV. *Volunteers*:—A branch of the auxiliary forces which appears to have been first established under the Act 16 & 17 Vict. c. 73, but is now principally regulated by the Acts 26 & 27 Vict. c. 65, and 34 & 35 Vict. c. 86; and

V. *Army Reserve*:—A branch of the military forces of the country first constituted under the stat. 30 & 31 Vict. c. 110, and now regulated by that Act and one or two subsequent Acts.

See title **ARMY DISCIPLINE ACT, 1879.**

ARMY DISCIPLINE ACT, 1879. This is the statute 42 & 43 Vict. c. 33, which aims at a permanent regulation of the forces of the Kingdom and Empire, without the necessity of annually enacting the usual Mutiny Act, and at the same time the constitutional principle is preserved, that a standing army cannot exist in this country in time of peace without the consent of Parliament, because the permanent Act is only to come into force by virtue of an Act of Parliament to be passed annually for the purpose, and is to operate only during the time specified in the last-mentioned annual Act (§ 2); and the first instance of such annual Act is the Army Discipline and Regulation (Commencement) Act, 1879 (42 & 43 Vict. c. 42), which in its preamble very fully recognises the constitutional principle. The permanent or principal Act applies to every branch of the military forces of the country, namely, the army proper, the Royal Marines, the army reserve, the militia, the militia reserve, the yeomanry, the volunteers, and also the Indian army, subject (as regards some of these branches) to special restrictions and regulations. The Act provides, **FIRSTLY**, for the discipline of the forces,—that is to say, for the repression and punishment of crimes, whether (1.) Mutiny or insubordination, or (2.) Desertion and fraudulent enlistment, or (3.) Drunkenness and disgraceful conduct generally, or (4.) Offences of military routine,—providing also for the establishment and regulation of courts martial and the mode of trial in such courts of any alleged offence, the commanding officer having also a summary authority over soldiers (as distinguished from officers) in respect of the lesser offences; and there are very sober and guarded rules regarding the carrying into execution of the sentences of courts martial. The Act provides, **SECONDLY**, for enlistment, for re-engagement and prolongation of the period of service, for discharge, for transfer to the

ARMY DISCIPLINE ACT, 1879—contd.

reserve, &c.; and, **THIRDLY**, for the billeting of the forces and for the impressment of carriages as may be necessary when the forces are in route. The Act provides also for the punishment of offences by officers and soldiers that are not strictly of a military character, *e.g.*, treason, murder, rape, and the like, which in the Act are called “civil offences” (§ 41); and also for the punishment of civilians enticing or being part with soldiers into or in the commission of certain felonious acts; such as buying or pawning regimental stores and the like (§ 149). The punishments for the so-called “civil offences” are roughly those which any civilian would be subject to by the general law of the country; the punishment for military offences proper range from death to stoppages out of pay, and comprise corporal punishment (*i.e.* the lash), not exceeding twenty-five lashes, and not to be inflicted upon non-commissioned officers.

ARRAIGN, ARRAIGNMENT (*ad rationem ponere*). To arraign a prisoner is to call him to the bar of the Court to answer the matter charged against him in an indictment.

ARRANGEMENT, SCHEME OF. Under the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), ss. 6–22, a company unable to meet its engagements with its creditors, may prepare a scheme of arrangement with them, and may file same in the High Court of Justice; and thereafter, all actions against the company by creditors will be stayed, and no execution may thereafter be made available against the property of the company without the leave of the High Court. Three-fourths of the holders of mortgages or bonds or of debentures, &c., consenting to the proposed arrangement, bind the others of their own class; the ordinary shareholders assent at an extraordinary general meeting. And after such consents obtained, the company obtains, upon petition to the Court, a confirmation of the scheme, usually within three months of the filing of the scheme. The scheme being confirmed is enrolled in the Court, and notice of such confirmation and enrolment is published in the *Gazette*. And for Joint Stock Companies generally as to such arrangements, see 33 & 34 Vict. c. 104 (*In re D. D. Collieries*, 11 Ch. Div. 605).

ARRANGEMENTS WITH CREDITORS. May be either voluntary where and so far as the creditors consent thereto with the debtor, or may be validated by statute. The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71) provides for such arrangements, and for the enforcement thereof, either by liquidation or by composition.

See titles **COMPOSITION; LIQUIDATION.**

ARRAY. Signifies the ranking or setting forth in order. A *challenge to the array*, as applied to juries and as distinguished from a challenge to the polls, signifies an exception or objection against all the persons arrayed or impaneled on a jury on account of partiality, or some default of the sheriff or his under-officer who arrayed the panel.

ARREARS. From the French *arrière* (behind), denotes money remaining unpaid after it is due. Under the stat. 3 & 4 Will. 4, c. 27, six years is fixed as the amount of arrears of rent, dower, &c., which may be recovered out of the land, in respect of which the right to payment exists; but this does not prevent an action of covenant being brought under the stat. 3 & 3 Will. 4, c. 42, for twenty years' arrears. *Hunter v. Nockolds*, 1 Mac. & G. 640.

ARREST. From the French *arrêter* (to stop), signifies the restraint of a man's person by substituting for his own will the constraints of the law. Arrests may be either in civil or criminal cases.

(1.) Arrests in *civil* cases were either by writ of *capias* or by writ of *attachment*, the former being the more general, the latter issuing only in cases of a contempt of Court. Such arrests were also either on *mesne* process or on *final* process; but arrest on *mesne* process was abolished by the stat. 1 & 2 Vict. c. 110 (with certain exceptions specified in the Act), and more recently arrest on *final* process for debt has been abolished by the stat. 32 & 33 Vict. c. 62 (with certain exceptions specified in the Act).

(2.) Arrests in *criminal* cases may be as follows:—In the case of a breach of the peace actually continuing, or reasonably likely to be renewed, any private person may arrest the offenders, or any of them; but when the affray is over he may not do so, nor even require a policeman, *who has not seen the affray*, to do so (*Baynes v. Brewster*, 2 Q. B. 375). In the case of a felony being actually committed, he may arrest the felon; and in case the felony is completed, he may give the felon in charge to a policeman (*Atkinson v. Warne*, 1 Cr. M. & R. 827). All these things he may do without a warrant, and, *à fortiori* a regular policeman may and ought to do the like. But further, in the case of a felony actually committed, a policeman may, upon probable suspicion merely, arrest the felon without a warrant, and may even break open doors; and, if necessary for his apprehension, kill the felon (*Hogg v. Ward*, 3 H. & N. 417). A warrant for the apprehension is a protection to the constable in all cases, unless where it shews upon the face of it a total

ARREST—continued.

want of jurisdiction, (*The Marshalsea Case*, 10 Rep. 68).

See titles CONSTABLE; POLICE; WARRANT.

ARREST, FREEDOM FROM. Is a privilege of members of Parliament, and which (as regards the Commons) received its first distinct legislative recognition in 1603–4, consequent upon the difficulty in *Shirley's Case*, 1603. There had been numerous earlier assertions of the privilege, which (it was alleged) had existed from time immemorial. The privilege extended to the *personnel* of the members, and continued not only during, but for forty days before and after, the session.

See title PRIVILEGE OF PARLIAMENT.

Certain places, called Sanctuaries, *e.g.*, the Mint, the Savoy, &c., conferred a privilege from arrest; but such privileges were abolished by the stat. 8 & 9 Will. 3, c. 27; 9 Geo. 1, c. 28; and 1 Geo. 4, c. 116.

See titles ATTACHMENT; CAPIAS; POLICE.

ARREST OF JUDGMENT. The withholding or staying of judgment, notwithstanding a verdict has been given, on the ground that there is some error appearing on the face of the record, which vitiates the proceedings (*Steph. on Pleading*, 106, 6th ed.; *Roscorla v. Thomas*, 6 Jur. 929). As a general rule the error must be one of substance, and not merely formal, the Statutes of Amendments and Jeofails excluding it in respect of the latter. The defendant is of course the party who moves in arrest of judgment.

In criminal cases, the accused may at any time between conviction and sentence, but not afterwards, move in arrest of judgment, and the Court will even in certain cases, of its own motion, arrest the judgment. By the stat. 7 Geo. 4, c. 64, s. 20, many formal defects in an indictment are made demurrable only, and are no longer available as a ground of motion to arrest.

ARRESTMENT. The Scotch term for arresting. It is applied either to the person or to the effects. Arrestment of *the person* takes place in cases in which there is reason to apprehend that the person will leave the jurisdiction of the judge, and so deprive the creditor of the means of redress. Arrestment of *the effects* is that process of the law by which a creditor attaches the debt due to him, or the moveables belonging to his debtor in the hands of a third party.

See titles ATTACHMENT: ATTACHMENT OF DEBT.

ARRHA. In Roman law was the earnest in English Law; but in Roman Law, the

ARRHA—continued.

arrha (unlike the earnest) did not constitute any part of the essence of the contract of sale, for that contract was purely conventional. It was forfeited if the purchaser failed to carry out the contract.

See title EARNEST.

ARRIAGE AND CARRIAGE were indefinite services formerly demandable from tenants, but prohibited by 20 Geo. 2, c. 50, ss. 21, 22.

ARROGATIO. In Roman Law was the adoption of a male *sui juris*, i.e., of the head of a familia, i.e., of a paterfamilias. The arrogating father acquired (prior to Justinian) all the property of the arrogated son, and was by Praetorian Law liable to the debts of the latter; in case of his disinheriting the arrogated son, without sufficient cause, he had to restore all his property to him, and add a fourth of his own property to it; and in all cases if the arrogated son died under age, he had to restore the entire property to his haeredes.

See title ADOPTION.

ARSON. From the Latin *ardere* (to burn), is the offence of unlawfully and maliciously setting property on fire. By the ancient Common Law, the offence was of two degrees,—either, (1.) Felony, where the defendant wilfully burnt the house of another, or, (2.) Misdemeanor, where he wilfully burnt his own house, with the intention of burning that of another. By statutes passed at various periods, arson of every kind was made a capital felony, but the severity of the statute law was mitigated by the consolidation statutes 7 & 8 Geo. 4, c. 30, and 7 Will. 4 & 1 Vict. c. 89, according to which certain arsons were made capital felonies, and the rest felonies not capital. The present law is embodied in the stat. 24 & 25 Vict. c. 97. See Arch. Pl. Crim. Cases (17th ed.) pp. 503–520.

ARTICLED CLERK. Is a clerk under articles (i.e., heads and particulars) of an agreement to serve a solicitor in consideration of being initiated into the routine and mystery of the profession. No one solicitor may have more than two articulated clerks at any one time (7 & 8 Vict. c. 73), but a firm of, say, three, partners may have as many as six (3 × 2) such clerks among them, viz., two to each partner, provided each is bound separately to one of the partners only, and not generally to all. Where the clerk is (as usually happens) at the date of the articles under age, his parent or guardian is usually made a party to the articles as well as himself.

See title ATTORNEY.

ARTICLES OF ASSOCIATION. In addition to the memorandum of association, there *may* be in the case of a company limited by shares, and there *must* be in the case of any other joint stock company, articles of association; and the memorandum and articles are both delivered to the Registrar of Joint Stock Companies for registration by him. The articles of association in Table A. to the Companies Act, 1862, are the articles for a company limited by shares and not having any other articles. These articles in the case of all joint stock companies correspond to the clauses in a deed of partnership.

See titles INCORPORATION; PARTNERSHIP.

ARTICLES OF PARTNERSHIP. See title PARTNERSHIP.

ARTICLES OF THE PEACE. See title PEACE, ARTICLES OF THE.

ARTICLES OF RELIGION, THIRTY-NINE. These articles as originally drawn up (1551) were forty-one in number, but were afterwards (1563) reduced to thirty-nine. In 1571 they were made binding on the clergy (13 Eliz. c. 12).

ARTICULI CLERI. The name of an ancient statute 9 Edw. 2, st. 1, concerning the liberties and franchises of the clergy. The petitions presented to the Star Chamber by Archbishop Bancroft, in 1605, being thought to present some analogy to the statute of the 9 Edw. 2, were called by Lord Coke by the same name. 1 Hall. Const. Hist. p. 324.

ARTICULI SUPER CHARTAS. The title of the stat. 28 Edw. 1, confirming Magna Charta and the Charta de Foresta, without the saving clauses which were contained in the Confirmatio Chartarum, 25 Edw. 1.

ASHBY v. WHITE: See titles ELECTION COMMITTEE; ELECTIONS, COMMONS' RIGHTS IN.

ASPORTATIS, DE BONIS: See title TRESPASS.

ASSASSINATION. Properly means murder accomplished with premeditation, or lying in wait. This is the definition of it given by the French Law. (Code Penal iii., 2, 1.) The thing is an abuse frequently resorted to by oppressed subjects against their oppressors, e.g., by the English against the Normans, whence the "Law of Englishry," enacted by William the Conqueror.

See title ENGLISHRY, LAW OF.

ASSAULT AND BATTERY. According to Hawk. P. C. i. c. 62, § 1, an assault is an attempt or offer to do a corporal hurt

ASSAULT AND BATTERY—continued.

to another, as by striking him, or presenting a gun at him at carrying distance, or pointing a pitchfork at him which might reach him, or holding up one's fist at him, or doing any such like act in an angry, threatening manner; and a battery is any injury whatsoever to the person of a man done in an angry, revengeful, rude, or insolent manner. An assault and battery is the combination of both offences. By the Common Law, an assault or battery being a common assault, is only a misdemeanour; but by the stat. 9 Geo. 4, c. 31, s. 23, and subsequently by the stat. 24 & 25 Vict. c. 100, certain aggravated assaults are made felonies, and certain others, although remaining misdemeanours, are visited with severer punishment: and under the Matrimonial Causes Act, 1878 (41 Vict. c. 19), if a husband is convicted of an aggravated assault upon his life, the convicting magistrate may by order exempt the wife from future co-habitation with him.

Either an action at suit of the injured party, or an indictment at suit of the Crown, or both, may be brought or laid for the offence, and the police magistrates have also a summary jurisdiction over the offence.

ASSEMBLY, UNLAWFUL, is defined to be the meeting of three or more persons with the intention of doing an unlawful act.

See also titles RIOT; ROUT; UNLAWFUL ASSEMBLIES ACT.

ASSESS. To fix or settle the amount of a tax or rate.

ASSESSED TAXES. Otherwise called *Queen's taxes*, include taxes on people in respect of inhabited houses (14 & 15 Vict. c. 36, repealing 7 Will. 3, c. 18, which had taxed the *windows*), in respect of servants, carriages, horses, armorial bearings, and such like.

See title TAXATION, VARIETIES OF.

ASSESSIBLE MANORS. Two groups of manors within the Duchy of Cornwall, and belonging to the Duke, are so called. The lands are mostly granted to conventional tenants, subject to the mining rights of the *tinners*.

See title CONVENTIONARY TENEMENTS.

ASSESSMENT COMMITTEE. The local committee is so called which fixes the amount of the poor-rate (and other rates) payable in respect of the occupation of lands, mines, &c. It is constituted under the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103).

ASSESSMENT OF DAMAGES. Where judgment is obtained in an action, subject

ASSESSMENT OF DAMAGES—contd.

to the amount of the damages being ascertained, or where judgment goes by default, subject to the amount of the damages being ascertained, a writ of enquiry is commonly issued in the action returnable before the sheriff or under-sheriff and a jury for the purpose of assessing, that is ascertaining, the damages. Occasionally it is referred to the Master in Common Law actions, and very frequently to the chief clerk in Chancery actions, and sometimes to an arbitrator in both classes of actions, to ascertain the damages.

See titles DAMAGES; WRIT OF ENQUIRY.

ASSESSMENT, UNION, ACT. See titles POOR; POOR-RATE; UNION ASSESSMENT ACT.

ASSESSOR. A person learned in some particular science or industry, who sits beside the judge or other officer of a Court to assist him with his advice in the trial of a case requiring special knowledge, *e.g.*, Nautical Assessors in Admiralty actions and actions for collisions.

ASSETS are the funds or property (real or personal) available for the payment of debts. During the debtor's life, the phrase is practically confined to his estate in bankruptcy or in liquidation; after the debtor's decease, it applies to his estate when being administered in the Court of Chancery or Chancery Division. As being so administered, the assets are said to be either legal or equitable, and certain important differences (now mostly abolished) used to follow from the distinction.

See titles ADMINISTRATION OF ASSETS; EQUITABLE ASSETS; LEGAL ASSETS.

ASSIGN. This word has numerous and distinct meanings, as to which see the following titles respectively.

ASSIGNEES. These are the transferees under an assignment of personal property. They may be either (1.) general assignees, as in the case of bankruptcy, or (2.) particular assignees, as under a bill of sale. In cases of bankruptcy, they were either official assignees or trade, *i.e.*, creditors', assignees; but, under the Bankruptcy Act, 1869, the word *trustee* is substituted for that of assignee, and the registrar is made the official trustee, and the nominee of the creditors is called simply the trustee.

It is a rule of law that assignees of a chose in action take subject to the equities, and that they do so although particular assignees for value and without notice.

ASSIGNMENT ON BANKRUPTCY: See title ASSIGNEES.

ASSIGNMENT OF BREACHES. Where a contract (whether specialty or simple) is

ASSIGNMENT OF BREACHES—*contd.*

broken, and an action is brought upon it, it is necessary to state in what the contract has been broken, and this statement of the breach is called the assignment of the breach; or, if the contract has been broken in more respects than one, then the statement of these respects is called the assignment of breaches. Generally, this assignment should be made in the words of the covenant or promise, negatively or affirmatively, according as the words of the contract are affirmative or negative: and it is not safe or expedient to descend into details, excepting as examples of the prior general assignment. See *Bull & Lake*, Pl., 61-2.

See title **BREACHES**.

ASSIGNMENT OF ERRORS. Upon proceedings in error, where the error is one of *fact*, it is necessary for the plaintiff in error to specify the particular alleged error or errors; and this is called the assignment of errors. The form of doing so used to be regulated by the C. L. P. Act, 1852, s. 158, Sch. A., form No. 12, which furnished a general form of pleading, and also required an affidavit in support, particularising the error or errors.

See title **ERROR**.

ASSIGNMENT ON MARRIAGE: See title **HUSBAND AND WIFE**.

ASSIGNMENT OF PERSONAL PROPERTY. This is the assigning over or transferring to another person the right or interest which one has in some matter or thing.

(1.) As applied to leasehold property or chattels real, see title **CONVEYANCES**. It was the rule of the Common Law, that all certain estates and interests in lands and tenements were assignable, but that mere titles, rights of entry, contingent interests, and possibilities, were not assignable (Co. Litt. 214 a, 266 a). But, under the stat. 8 & 9 Vict. c. 106, all such latter interests have become assignable.

(2.) As applied to pure personal property, and hereunder (a.) *In possession*.—The assignment of that was always permitted by the Common Law, and is effected in the same way as the assignment of leaseholds.

(b.) *Not in possession*.—Personal property not in possession is ordinarily designated a *chose in action*. By the Common Law, no such chose was assignable (Com. Dig. Assignment, c. 1, 2, 3); but in Equity every such chose is, and always has been assignable, the Court requiring the assignor to perfect what he has done towards an assignment, and holding that an imperfect legal assignment is at any rate evidence

ASSIGNMENT OF PERSONAL PROPERTY—*continued.*

of a contract to assign, which contract, when for value, the Court will enforce. But, as the result of gradual approximations on the part of Law to equitable principles—approximations attributable partly (as in the case of bills of exchange) to mercantile usage, partly and chiefly (as in the case of policies of assurance) to statutes, in particular the culminating stat. 36 & 37 Vict. c. 66 (Judicature Act, 1873), s. 25, every chose in action is now become assignable equally in Law as in Equity; and if the assignment is absolute, and not by way of charge only, then it is effected by writing under the hand of the assignor, accompanied with notice in writing to the debtor. But if the assignment is by way of charge only, it should still, *semble*, be effected by deed.

See title **EQUITABLE ASSIGNMENT**.

ASSIGNS. These are the transferees of real (and sometimes of personal) property. The principal question arising in relation to assigns is this,—By what covenants are they bound and by what not? The answer to this question will be found under title **COVENANT**, sub-title **REAL AND PERSONAL COVENANTS**.

ASSISA CADIT IN JURATAM. An assise was taken either "*in modum assise*" or "*in modum juratae*," in which latter case it was said to fall into a jury (*cadere in juratam*.) The difference between the two forms of assise appears to have been this: (1.) In nature,—the very matter alleged by the plaintiff as his ground of claim was traversed in the *assisa*, while in the *jurata* some fresh point was stated which went to destroy that ground of claim; and

(2.) In consequence,—the jury could not be attainted for false verdict in the *jurata*, whereas in the *assisa* they might be attainted.

ASSISA CADIT IN PERAMBULATIONEM. The jury declaring their ignorance of the boundaries in a question of disputed boundaries, the judge would order a perambulation, with a view to ascertain the boundary; whence this phrase.

ASSISA PANIS ET CEREVISIÆ. This was the power of assising (at the time the judges on circuit assised) the weight of bread and the measures of beer. The stat. 51 Hen. 3, for fixing the price of bread and ale, was so called. Cowel; Tomlins.

ASSISE. This word is derived from *assideo*, to sit together; and is usually taken for the Court, place, or time where the judges of the Supreme Court of Jus-

ASSISE—continued.

tice going circuit try all questions of fact issuing out of the High Court that are ready for trial by jury. These assizes are, indeed, neither more nor less than the sittings of the judges at the various places where they visit on their circuits, and which they usually make four times in every year at the times specially fixed for same. The word *assise* also sometimes denoted a *jury*, and sometimes denoted a *writ*.

See title **ASSIZE, JUDGES OF.**

ASSISE DE UTRUM. This writ, which was called also *assisa jurum utrum*, lay for a parson against a layman, or for a layman against a parson, for lands or tenements, as to which it was doubtful *whether* they were lay-fees or free-alms. Cowel.

ASSISE OF DARREIN PRESENTMENT. This was a writ which lay when a man or his ancestor had presented a clerk to a church, and after the church had become void by his death or otherwise a stranger presented his clerk to the church, in disturbance of the patron (F. N. B. 31 F.).

ASSISE OF MORT D'ANCESTOR. A writ that lay when a man's father, sister, mother, brother, &c., died seised of lands, tenements, rents, &c., that were held in fee, and after their death a stranger caused an abatement.

See title **ABATEMENT OF POSSESSION.**

ASSISE OF NOVEL DISSEISIN. A remedy for the recovery of lands or tenements of which the party himself had been disseised.

ASSISE OF NUISANCE. A writ which lay against a man to redress or remove a nuisance which he had created to the freehold of another, which the latter held for life, in tail, or in fee simple. F. N. B. 183, I.

ASSISE RENTS. Are the certain established rents of the ancient freeholders and copyholders of a manor, and are so called precisely because they are assised or certain.

ASSISTANCE : See title **WRIT OF ASSISTANCE.**

ASSIZE, JUDGES OF. All the judges of the High Court, and some few of the judges of the Court of Appeal, are liable to be called upon to act as judges of assize, unless they have been appointed before the Judicature Act, 1873. The first judges of assize were called Justices Itinerant or Justices in Eyre, and were appointed by the Parliament of Northampton in 1176.

See title **CIRCUITS.**

ASSIZE OF ARMS. An ordinance passed in 1181 by Henry 2, whereby he revived the ancient *fyrd* or national militia.

See titles **ARMY ; POLICE ; WATCH AND WARD.**

ASSOCIATE JUDGE. Under the stat. 15 & 16 Vict. c. 73, ss. 1-6, there is an associate in each of the Common Law Courts, appointed by the respective chiefs of these Courts. Each associate appoints two clerks for assisting him in the discharge of his duties, such latter appointments being subject to the approval of the chief of the Court. No associate may act either as a barrister or as a solicitor.

ASSOCIATION, ARTICLES OF : See title **ARTICLES OF ASSOCIATION.**

ASSOCIATION, MEMORANDUM OF : See title **MEMORANDUM OF ASSOCIATION.**

ASSUMPSIT. Is a promise (not being under seal) by which one person assumes or takes upon him to do some act or pay something to another.

ASSUMPSIT, ACTION OF. Was the form of action given by law to recover damages for the non-performance of contracts, either express or implied, and which were neither of record nor under seal. In origin, it was an action *on the case* for non-performance of an agreement; and in *Slade v. Morley*, 4 Rep. 92 b, 44 Eliz., it was settled that assumpsit might even be brought for a sum certain, although *debt* was the more natural form of action.

See also titles **ACTION ; SIMPLE CONTRACT.**

ASSURANCE. This word is the same as Insurance (see title **INSURANCE**). It is also the old name for Conveyance (see title **CONVEYANCE**).

ATHEISM. Is an offence against the English Law, and punishable accordingly; but the offence appears to be incapable of proof. An atheist may, in giving evidence, make a solemn declaration in lieu of taking an oath, which in his case is impossible.

See titles **CHRISTIANITY ; HERESY.**

ATTACHMENT. A taking, apprehending, or seizing by command of a judicial writ, termed a writ of attachment. The process of attachment was frequently resorted to in the Court of Chancery, to enforce the appearance of a party who had been served with a subpoena, and who had taken no notice of it; and under the later practice, the plaintiff might (although it was unusual to) exercise the same process against a defendant refusing to appear to the bill (1 Dan. Ch. Pr. 381-5). But under

ATTACHMENT—*continued*.

the present practice, the writ of summons issued under the Judicature Acts, 1873-5, omits the usual warning that the defendant failing to appear will be liable to attachment. However, generally, an attachment may issue in all cases for a contempt of Court, arising from a refusal to obey or to comply with its process; and in particular under the present practice, a writ of attachment may issue (but only by leave and upon notice) either to enforce the doing or forbearing from any act (other than the payment of money) ordered to be done or forborne (Order XLII., 5), or to enforce an order to pay money into Court, or to enforce the recovery of specific property (not being land or money) ordered to be delivered up (Order XLII., 4). The writ should not be regarded as a penal writ (*Barrett v. Hammond*, 10 Ch. Div. 285).

ATTACHMENT, FOREIGN. This was a peculiar and ancient remedy open to creditors within the jurisdiction of the city of London, Exeter, and some other ancient cities, by which they were enabled to satisfy their own debts by *attaching* or seizing the money or goods of their debtor in the hands of a stranger or third person within the jurisdiction of such city. *McGrath v. Hardy* (4 Bing. N. C. 785) contains a very luminous statement of the proceedings in foreign attachment. The Lord Mayor's Court of the City of London still exercises very extensive powers of this character, and out of this Court the writ may issue immediately after action commenced, and before judgment (*Lery v. Lovell*, 11 Ch. Div. 220).

See also next title.

ATTACHMENT OF DEBTS. Under the stat. 17 & 18 Vict. c. 125, s. 60, a creditor who had obtained a judgment in a superior Court of Law might apply to the Court or a judge for a rule or order that the judgment debtor should be orally examined as to what debts were owing to him, and under s. 61, upon affidavit that the debt or debts were still unsatisfied, and that some third person (to be specified) within the jurisdiction was indebted to the defendants, the judge might order that all debts owing or accruing from such third person (called the garnishee) to the debtor should be attached to answer the judgment debt. The stat. 33 & 34 Vict. c. 30, prohibits the attachment of wages. The present practice is substantially the same.

See title GARNISHEE ORDER.

ATTACHMENT OF THE PERSON: *See title ATTACHMENT.*

ATTAINDER. The taint, stain, or corruption of blood, which the law attached to a criminal who was capitally condemned. He was then called *attaint* (*attinctus*), stained or blackened, and was no longer of any credit or reputation, and was considered already dead in law, and incapable of performing the functions of another man. The effect of an attainder used to be a forfeiture of the party's honours and dignities; he used to become degraded in the eye of the law, so that his children could not be heirs to him nor to any other ancestor through him, and these consequences could only be removed by authority of Parliament (Co. Litt. 891 b, s. 745). But under the Forfeiture for Felony Abolition Act, 1870 (33 & 34 Vict. c. 23), s. 1, no conviction for any treason or felony is to cause any attainder or corruption of blood, or any forfeiture or escheat.

See next title.

ATTAINDER, BILLS OF. Differ from impeachments in this respect, viz., in an impeachment, the Commons are the prosecutors, and the Lords are the sole judges; but a bill of attainder is like any other bill in Parliament. Evidence is not necessary in the latter; but an impeachment must be supported by evidence. The earliest notable instance of a bill of attainder is that in 15 Edw. 2 (1321), banishing the two Despencers, father and son.

See title IMPEACHMENT.

ATTAINT, WRIT OF: *See title JURORS, IMMUNITY OF.*

ATTEMPT. Is defined in jurisprudence as that which, if not prevented, would have resulted in the full consummation of the act attempted. Wherefore there can be no attempt to steal a purse from an empty pocket (*R. v. Collins*, L. & C. 471); but an action of trespass for the assault may lie (*see title ASSAULT*), or a count for the misdemeanour may be framed; and generally attempts to commit a felony, not being murder, which are frustrated may be treated as misdemeanours. And under the stat. 14 & 15 Vict. c. 100, s. 9, it is competent to the Court to convict of the attempt upon an indictment for the felony according to the evidence adduced at the trial, but not *vice versa*.

ATTENDANCE OF WITNESSES. May be enforced by *subpœna ad testificandum*, a refusal to obey which is a contempt of Court, and may be punished by attachment.

ATTENDANT TERMS. Terms of years created by the owner of the inheritance by way of mortgage, or otherwise, used when satisfied to become attendant upon the inheritance, either by operation of law, or by

ATTENDANT TERMS—*continued.*

express declaration, for the protection of the inheritance. But under the Satisfied Terms Act (8 & 9 Vict. c. 112), all such terms are absolutely to cease for all purposes whatsoever, excepting that terms attendant by express declaration on the 31st of December, 1845, are to protect the inheritance as before.

See title **SATISFIED TERMS**.

ATTESTATION. Certain documents require attestation, that is their execution to be witnessed, and certain others require no attestation. Wills, *e.g.*, require two witnesses in all cases, and usually shew also an attestation clause expressing that the witnesses were present at the same time, &c., with the testator when he executed his will. Generally, the attesting witness must be called to prove every document requiring attestation; and if he is dead or cannot be found, then proof of his handwriting may be given. On the other hand, documents not requiring attestation may be admitted (17 & 18 Vict. c. 125, s. 26), or may be proved in various ways.

See titles **EVIDENCE**; **HANDWRITING**; **PROVING A WILL**.

ATTESTING WITNESS: See titles **EVIDENCE**; **ATTESTATION**; **HANDWRITING**, &c.

ATTORNEY. One who is put in the place or stead of another to act for him. There are two kinds of attorneys: one who acts in a private capacity, and is simply called an attorney while his authority to act for such other party is in existence (see title **ATTORNEY, POWER OF**); the other, who acts in a public capacity as an officer in Her Majesty's Courts, and who is called an attorney-at-law or a solicitor, and whose duty consists in transacting and superintending the legal business of his clients, as in carrying on and defending actions at law, in furnishing his clients with legal advice, and in performing various other important matters connected with the practice of the law. Every attorney must have been an articled clerk, and must have been admitted by the Master of the Rolls to the office of attorney; and must also take out annually a certificate to practise, paying the stamp imposed by the Stamp Act, 1870 (33 & 34 Vict. c. 97); and if uncertificated, neither the attorney himself nor his client can recover his costs, even when successful in the action. Under the stat. 23 & 24 Vict. c. 27, being in the Law List is *prima facie* evidence of being duly qualified. Under the stat. 33 & 34 Vict. c. 28, a solicitor or attorney is enabled to make an agreement with respect to future (as he was already able with respect to past)

ATTORNEY—*continued.*

costs; but all such agreements are subject to taxation.

See titles **LIEN**; **RETAINER**; and **TAXATION OF COSTS**.

ATTORNEY-AT-LAW: See title **ATTORNEY**.

ATTORNEY'S BILL OF COSTS: See titles **COSTS**, **SOLICITORS' ACT**, 1813; **SOLICITORS' BILL OF COSTS**.

ATTORNEY-GENERAL. Is the attorney for the Crown in all matters affecting the Crown or the people generally. He is the head of the Bar, and takes precedence of and has *præ*-audience over all serjeants and queen's counsel. He is the informant in all informations; and he is usually a member of Parliament, and there superintends the legal business of the Government. The Prince of Wales has his own Attorney General; likewise, a queen-consort.

ATTORNEY, POWER OF. This is an instrument by which one person empowers another to act in his stead. The donor of the power is called the principal; the donee is called the attorney, or (when appointed by a corporation aggregate to receive administration) the *syndic*. A power of attorney which simply authorizes the attorney to vote is called a proxy; one which simply authorizes the attorney to appear in an action and confess the action or suffer judgment to go by default, is called a warrant of attorney. All other authorities are called simply powers of attorney, the power being *special* if it is to do one particular act, and *general* if to do generally all matters connected with a particular employment. And even where the power of attorney is general, a further special power of attorney is occasionally necessary, even for a matter comprised in the general power, *e.g.*, in a foreclosure action to receive the purchase-money (*Bourdillon v. Roche*, 27 L. J. (Ch.) 681); also, in an action or suit in which money has been paid into Court, to receive that money out of Court (*Middleton v. Younger*, 22 L. J. (Ch.) 1005). And, again, a general power of attorney may be either limited, as when it leaves nothing to the discretion of the attorney; or unlimited, as when it leaves everything to his discretion.

I. Persons incapable of making attorneys.

An *infant* cannot execute a power of attorney, unless to do an act which is for his own benefit, *e.g.*, to receive livery of seisin for him (*Palfryman v. Grobic*, 1 Roll. Abr. 730), not also to make livery for him (*Whittingham's Case*, 8 Rep. 45a.), although at the age of fifteen years he may, under a custom, be able to make a feoffment in his own person. The guardian is able to appoint the infant's attorney (*Graham v.*

ATTORNEY, POWER OF—continued.

Maclean, 2 Curt. 659), and he may even be ordered to do so (*Ruck v. Barworth*, 25 L. T. 242).

A *lunatic* cannot execute a power of attorney; but where a person apparently sane at the time executes a general power of attorney, under which his attorney enters into a fair and *bonâ fide* contract on his behalf, such contract, after it is executed, cannot be set aside, although the principal should be afterwards found to have been a lunatic at the time of the execution of the power (*Ex parte Bradbury*, 1 Mont. & Ch. 625).

A *married woman* cannot execute a power of attorney; and if she join with her husband in executing one, the power of attorney is that of the husband alone, and therefore ceases with his death (*In re Jones*, 5 W. R. 336). But so far as she has separate estate, whether existing by creation of equity, or in virtue of the M. W. P. Act, 1870 (33 & 34 Vict. c. 93), she is fully able to execute a power of attorney; but, *semble*, she has no such capacity in respect of the separate estate created upon judicial separation by the Act 20 & 21 Vict. c. 85 (*Fairthorne v. Blaquiere*, 6 M. & S. 73). And where a married woman is an executrix or administratrix, she must join her husband in the execution of a power of attorney (Wms. Exors, 5th ed. 869). But with reference to a fund in Court belonging to a married woman, she may, after being examined, execute a power of attorney directing a payment out of Court of the fund to her husband (*Allatt v. Bailey*, 1 W. R. 383).

Generally, also, when an act is intended to be personal to the party, he cannot constitute by power of attorney or otherwise, a deputy to perform it for him, *e.g.*, the doing of fealty (*Combes' Case*, 9 Rep. 76 a); the duties of trustees (*Att.-Gen v. Scott*, 1 Ves. Sen. 413); unless indeed, but only with reference to trustees, in a case of moral necessity (*Joy v. Campbell*, 1 Sch. & Lef. 341; *Stuart v. Norton*, 9 W. R. 320; *Hopkinson v. Roe*, 1 Beav. 180). Similarly, railway companies cannot, unless authorized by Parliament, delegate to another company, or to other companies, the statutory powers conferred on themselves (*Winch v. Birkenhead, &c., Ry. Co.* 16 Jur. 1035; *Great Northern Ry. Co. v. Eastern Counties Ry. Co.*, 9 Hare, 306). Also, one joint tenant or tenant in common cannot appoint an attorney for himself and his co-tenants; but one partner may do so for himself and his co-partners in matters usual in the partnership (*Ex parte Mitchell*, 14 Ves. 597), but not in matters beyond what are usual (*Hambridge v. De la Crouce*, 4 D. & L. 466).

ATTORNEY, POWER OF—continued.**II. Instrument constituting attorney.**

An attorney to make or take livery, or to execute a deed, must be constituted by deed; and so also the attorney for a corporation aggregate in all matters of solemnity (*Dumper v. Syms*, Cro. Eliz. 816). But an attorney of a corporation sole, and, generally, any private person who is capable of appointing an attorney at all, may appoint one by deed, writing not under seal, or parol, as he pleases, according as the greater or less solemnity of the occasion requires (*Ex parte Candy*, 5 L. J. (N. S.) Ch. 14).

It is not necessary that the attorney should be a party to the indenture constituting him (*Moyle v. Ewer*, Cro. Eliz. 905).

It is competent to authorize the attorney to appoint a sub-attorney, and the substitute, when appointed, has full capacity (*Blandy v. Price*, 8 Jarm. Conv. 12, n. (s.)).

The attestation of the execution of the deed constituting the attorney is generally by two witnesses, the Bank of England and certain other public bodies insisting upon that number, inasmuch as if a power of attorney is forged, it is a nullity as regards the mis-apparent principal (*Davis v. Bank of England*, 2 Bing. 393; 5 B. & C. 185).

When the power of attorney authorizes the doing of a certain act, it impliedly authorizes the doing also of everything properly incident to that act (*Bayley v. Wilkins*, 7 C. B. 886); *e.g.*, a power to sell goods implies a power to receive payment on the sale (*Capel v. Thornton*, 3 C. & P. 352), and a power to manage a mine is an implied power to incur debts for wages (*Ex parte Chippendale, In re German Mining Company*, 4 De G. M. & G. 19). Nevertheless, the power is to be construed strictly, and therefore the attorney cannot bind his principal by any act beyond the scope of his authority (*Fenn v. Harrison*, 3 T. R. 757), *e.g.*, a power to indorse bills remitted to the principal, or to indorse and negotiate such bills, would not authorize the accepting of bills (*Attwood v. Munings*, 7 B. & C. 278), nor will the general words which are usually thrown in at the end of the power be construed as enlarging the authority beyond matters strictly incident to the principal object of the power (*Esdaile v. La Nauze*, 1 V. & C. 394). However, when the attorney merely exceeds his authority, the excess alone is a nullity (*Perkins*, 189); and where he varies from the power, the variation, being immaterial, will not avoid the act (1 Salk. 96).

A power of attorney is inherently revocable, and words purporting to make it not so are void for repugnancy (*Vynior's*

ATTORNEY, POWER OF—*continued.*

Cuse, 6 Rep. 82 a.); nevertheless, when the power forms part of a security, or is for value, it is irrevocable (*Bromley v. Holland*, 7 Ves. 28). The revocation may be either express or implied; and if express, then by either party or by both, and either by deed, writing not under seal, or word of mouth, no matter in which of these ways it may itself have been created; and if implied, then by the exhaustion of the power, whether in substance or in time, or by the death of the person constituting the attorney. And with reference to death as an implied revocation, this distinction is taken, that when the power is a power simply, it is always revoked both at Law and in Equity; but when it forms part of a security, then it is revoked at Law (*Watson v. King*, 4 Camp. 272), but continues good in Equity (*Brasier v. Hudson*, 9 Sim. 1); and of course it is good both at Law and in Equity as to things already effected under it before the death. And, again, with regard to things effected after the death, but without notice of the death, these are, *semble*, good in Equity (*Hughes v. Walmsley*, 12 Jur. 833); and of course, since the Judicature Act, 1873, at Law also, although formerly they were doubtfully so (*Drew v. Nunn*, 4 Q. B. Div. 661). Lastly, with regard to things done after the death, and with notice of the death, these are necessarily bad when the power is a power simply, but good when the power forms part of a security (*Kiddill v. Farnell*, 3 Sm. & Gif. 428). And see as to trustees and personal representatives, 22 & 24 Vict. c. 35, s. 26.

In executing a deed pursuant to his power, the attorney ought to seal and deliver, in the case of a simple power, in the name of his principal, *e.g.*, "A. B., by his attorney, C. D.;" and in the case of a power forming part of a security, in his own name. Therefore, leases, submissions to an award, and such like, should be in the principal's name.

ATTORNEY, WARRANT OF. Is a power of attorney given for the single purpose of confessing judgment in double the amount of the debt; and on its back is written a defeasance whereby upon payment of the true amount of the debt the warrant is to become void. The warrant must be attested by a solicitor on behalf of the defendant giving it, and such solicitor must also have explained to his client the effect of the warrant. The warrant must also be filed in the Queen's Bench within *twenty-one* days of its execution (3 Geo. 4, c. 39; 32 & 33 Vict. c. 62).

ATTORNMEN. A tenant's acknowledgment of his new landlord on the alienation

ATTORNMEN—*continued.*

of lands by the former landlord. It is of feudal origin, for by the feudal law the feudatory could not aliene or dispose of the feud without the consent of the lord, nor the lord aliene or transfer his seignior without the consent of his feudatory (Bract. 41; Spelman, verb. *Attornamentum*). And generally to the validity of any grant of a seignior, reversion, or remainder, the attornment of the tenant was necessary; insomuch that if two successive grants were made of the same seignior, reversion, or remainder, and the tenant attorned to the second grantee, the first grantee was defeated. Nor was there any legal means of compelling the tenant's attornment; but the grant might be made by fine, which dispensed with the necessity of attornment. However, by stat. 4 Anne, c. 16, ss. 9, 10, the necessity for attornment is dispensed with in all cases, although attornment is still permissible; and by the further stat. 11 Geo. 2, c. 19, s. 11, attornments are deprived of any tortious effect, when made to strangers claiming the land as against the rightful landlord. The payment of rent under a mistake as to the claimant's title is held not to amount to an attornment (*Gregory v. Doidge*, 3 Bing. 474).

ATTORNMEN CLAUSE IN MORTGAGE. That clause in a mortgage deed whereby the mortgagor, as upon a re-demise (and sometimes upon an actual re-demise) of the mortgaged property attorns to and becomes tenant of the mortgagee in respect of his continuing in possession of the mortgaged premises. Such a clause usually reserves a rent equal to the interest on the mortgage debt; and it confers on the mortgagee the right of distraining for such interest. If the attornment clause is not fraudulent, then it is valid under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31) if duly registered thereunder; and so generally (*Ex parte Williams*, 7 Ch. Div. 138; *In re Stockton Iron Furnace Co.*, 10 Ch. Div. 335).

ATTRIBUTIVE JUSTICE. Is a term in jurisprudence, used to denote the duties arising out of imperfect obligations, the performance of which are not legally but only morally enforceable. In this sense it is opposed to the term *expletive* justice, which consists in duties of perfect obligation, and which are legally enforceable.

AUCTION. This consists in the sale of lands or goods in public, as opposed to a sale thereof by private contract.

Sales are variously regulated according to the common law, according to statute, and according to the agreement of the

AUCTION—continued.

parties. The general principles affecting the contract of sale of (1.) *personal* property will be found under the title **SALE**; and some few of the particular rules affecting this contract will be found under the titles **SALE BY SAMPLE**; **SALE ON APPROVAL**; **SALE WITH ALL FAULTS**, &c.

The sale of (2.) *real* estate by auction is now regulated by the 30 & 31 Vict. c. 48, the short contents of which Act are as follows:—

- (1.) No puffer is to be employed, otherwise the sale is void;
- (2.) The conditions of sale are to state whether or not the sale is without reserve; also,
- (3.) Whether or not a right to bid is reserved; and
- (4.) The practice of opening the biddings is abolished.

See also title **CONDITIONS OF SALE**.

AUCTIONEER. Under the stats. 8 & 9 Vict. c. 15, and 27 & 28 Vict. c. 56, must have a licence. In case he have not himself, but through his clerk only (*Bird v. Boulter*, 4 B. & Ad. 443) signed the memorandum of agreement, he may sue the buyer (*Robinson v. Rutter*, 4 E. & B. 954); without prejudice, however, to the purchaser's right to set off any debt due from the principal (the vendor) (*Coppen v. Craig*, 7 Taunt. 243).

AUDITÂ QUERELÂ. A writ which lay for a defendant, against whom judgment had been recovered, and who was therefore in danger of having execution issued against him, to relieve or discharge him upon shewing some good ground for discharge which had arisen since the recovery of such judgment, *e.g.*, a release. This remedy is not now resorted to, inasmuch as the Courts grant the like relief in a summary way upon motion; the Judicature Acts (Order XLII., 22) providing that generally upon the ground of facts which have arisen too late to be pleaded (and which would formerly have been the subject of a proceeding by *auditâ querelâ*), any party liable to execution on any judgment given against him may have an order staying the execution.

The writ of *auditâ querelâ* was a proceeding of common right and *ex debito iustitiæ*; but by the rules of H. T. 1853, r. 79, the writ was not to be allowed unless by rule of Court or judge's order.

By the C. L. P. Act, 1854, s. 84, any pleadable matter which arose after the time for pleading might be set up by way of *auditâ querelâ*; but now there would be a further pleading by leave, provided judgment had not yet been given.

In an *auditâ querelâ* the rule (if any)

AUDITÂ QUERELÂ—continued.

which the Court granted was absolute in the first instance (*Giles v. Hutt*, 1 Exch. 59).

AUGMENTATION, COURT OF. The name of a Court erected in 27 Henry 8, for the purpose that the King might be justly dealt with concerning the profits of such religious houses and their lands as were given to him by Act of Parliament in that year. The Court was so called because the revenues of the Crown were so much augmented by the suppression of such of the said religious houses as the King reserved to the Crown. *Les Termes de la Ley*.

AULA REGIS. Was the King's Court or Curia Regis. From it all the Courts of Justice have emanated; likewise the High Court of Parliament, and the Privy Council.

See titles **COURTS OF JUSTICE**; **CURIA REGIS**.

AUTERFOIS ACQUIT. This is a plea pleaded by a criminal, signifying that he has been formerly acquitted on an indictment for the same alleged offence, it being a maxim of the Common Law of England, that no man's life is to be put in jeopardy more than once for the same offence. Co. 3 Inst.

See also next two titles.

AUTERFOIS ATTAINT. A plea by a criminal that he has been before attainted either for the same or some other offence. For wherever a man is attainted of felony by judgment of death, either upon a verdict or on confession, by outlawry, and formerly by abjuration, he may plead such attainder in bar to any subsequent indictment on appeal for the same or any other felony. The reason of this is, that any proceeding on a second prosecution cannot be to any purpose, as the prisoner is dead in law by the first attainder, his blood is already corrupted, and he has forfeited all that he has.

AUTERFOIS CONVICT. A plea by a criminal that he has been before convicted of the same identical crime; it is similar in its nature to that mentioned in the last title but one.

AUTHORITY AND INTEREST. A mere authority without any interest is revocable at any time; not so an authority coupled with an interest.

See title **ATTORNEY, POWER OF**.

AUTRE DROIT. An executor entitled as such to a leasehold or other personal property, and not in his own right (*i.e.*, in *son droit*), is said to be entitled in *autre droit*, *i.e.*, in right of his testator, or of the beneficiaries entitled under the testator's will.

See title **MERGER**.

AUTRE VIE. A tenant for life is commonly entitled for his own life; if he should be entitled for the life of a third person, he is said to be a tenant *pur autre vie*.

See titles ESTATE; CESTUI QUE VIE.

AUXILIARY JURISDICTION. Was the jurisdiction exercised by equity "in aid" (i.e., *in auxilio*) of the Common Law, principally by helping a plaintiff at law to the evidence necessary to support his action at law. It is completely obsolete since the Judicature Acts.

AVERAGE. Is the contribution that merchants and others make towards the losses of those who have their goods cast into the sea for the safeguard of the ship or of the other goods and of the lives therein; it is called an average because it is proportioned after the rate of every man's goods carried.

Such average is either *general* or *gross* on the one hand, or *particular* or *petty* on the other; as to the former, see title GENERAL AVERAGE; and as to the latter, it arises when any particular damage is done to the cargo or vessel by accident or otherwise, such as the loss of an anchor or cable, the starting of a plank, or such like other particular losses which do not endanger the general safety. All such latter losses rest where they fall.

AVERAGE AND PRIMAGE: See title PRIMAGE.

AVERIIS CAPTIS IN WITHERNAM. A writ once issued for the taking of cattle to a person's use, who had had his own cattle taken by another, and driven out of the county where they were taken, so that they could not be replevied. Reg. Orig. 82; Cowel.

AVERMENT. An allegation in pleading is so called.

AVOIDANCE. Has a general application in law, and denotes setting aside or avoiding or vacating; e.g., the avoidance of a fraudulent conveyance, is the setting such conveyance aside; the avoidance of a benefice is the vacating thereof; and so on.

AVOWRY. The defence to an action of replevin, whereby the defendant insists (admitting the taking of the goods) that he has a right to do so; when this alleged right is as agent for another, this defence is called a cognizance.

See titles COGNIZANCE; REPLEVIN.

AWARD: See title ARBITRATION AND AWARD.

AWAY-GOING CROP. The crop upon the lands and unreaped at the time of the natural determination of the tenancy, or

AWAY-GOING CROP—continued.

where such determination arises through the act of the parties. By special custom (but not otherwise) the tenant may have the right to treat that crop as if it were emblements, and to come back and reap and carry it away when ready for cutting (*Wigglesworth v. Dallison*, Doug. 201.)

See title EMBLEMENTS.

B.

BACKING A WARRANT. The warrant of a justice of the peace cannot be enforced or executed in any other county than that in which he has jurisdiction, unless a justice of such other county wherein it is to be executed indorses or writes on the back of such warrant an authority for that purpose, which is thence termed backing the warrant. Greenwood and Martin's Mag. and Police Guide, 7.

BAIL. The setting at liberty of a person who is arrested in any action, formerly civil or criminal, but now only criminal, on his finding sureties for his re-appearance. It is, however, usually understood for the sureties themselves; as, if A. is arrested and puts in bail, this means that he has found persons who have become sureties for his re-appearance, and who take upon themselves the responsibility of his returning or not returning when required. There are or were several kinds of bail, of which the principal are the following: viz. (1.) *Bail below*, or *Bail to the sheriff*; (2.) *Bail above*, *Special Bail*, or *Bail to the action*; (3.) *Bail in error*; and (4.) *Common Bail*. Now, taking each of these four varieties of bail in order. (1.) *Bail below*, or *to the sheriff*, was such as a defendant put in when arrested upon a writ of *capias*. This he did by entering into a bond to the sheriff with sufficient sureties conditioned for his appearance within the period required by the writ, and which bond the sheriff was compelled by statute to accept, and to discharge the defendant out of custody. (2.) *Bail above*, *special bail*, or *bail to the action*, were persons whom the defendant procured to become his sureties for the ultimate payment of the debt and costs in the action, in the event of judgment passing against him, or as an alternative that he should surrender himself to prison. They were termed *bail to the action* because they were responsible for the defendant's abiding by the event of the action, and obeying the judgment of the Court therein, in contradistinction to *bail to the sheriff*, who only undertook that the defendant should appear according to the exigency of the writ, and provide bail to

BAIL—continued.

the action. The undertaking of the sureties, or bail above, was drawn upon a piece of parchment by the defendant's attorney, and was technically termed the bail piece. (3.) *Bail in error* were sureties whom a party prosecuting a writ of error, commonly called the plaintiff in error, was required to find, and who undertook that the plaintiff in error should prosecute his writ of error with effect, and that in case the plaintiff was *non pros-ed*, or the judgment in the Court below was affirmed, he should pay all the debt, damages, and costs adjudged upon the former judgment, and all costs and damages to be awarded by reason of the delay of execution on such former judgment (3 Jac. 1, c. 8; 3 Car. 1, c. 4, s. 4; 19 Geo. 3, c. 70; 6 Geo. 4, c. 96, ss. 1, 4. (4.) *Common bail* signified an appearance.

See title APPEARANCE TO WRIT.

BAIL À CHEPTEL

BAIL À FERME

BAIL À LOYER

BAIL ABOVE

BAIL BELOW

BAIL, COMMON

BAIL IN ERROR

BAIL, SPECIAL

BAIL TO THE ACTION

BAIL TO THE SHERIFF

} See title LOUAGE.

} See title
BAIL.

BAIL COURT. An auxiliary court of the Court of Queen's Bench, at Westminster, wherein points connected more particularly with pleading and practice were argued and determined. It has now ceased to exist.

See title PRACTICE COURT, QUEEN'S BENCH.

BAIL IN CRIMINAL PROCEEDINGS.

Upon application to the Court of Queen's Bench or Queen's Bench Division, or to a judge thereof, the Court, or division, or judge may, as a favour, admit the prisoner to bail, and that even, *semble*, in non-bailable proceedings. But generally, in all cases of misdemeanour, the accused has an absolute right to be discharged from his interim custody upon finding sufficient bail.

BAIL PIECE: See title BAIL.

BAILIFF. There are various sorts of bailiffs; as bailiffs of liberties, sheriff's bailiffs, bailiffs of lords of manors, &c., &c. Sheriffs are also called the king's bailiffs, and the counties wherein it is their duty to preserve the rights of the king are frequently called their bailiwicks, a word introduced by the Norman princes in imitation of the French, whose territory was divided into bailiwicks, as that of England is into

BAILIFF—continued.

counties. The word "bailiff," however, usually signifies sheriffs' officers, who are either, (1.) Bailiffs of hundreds, or, (2.) Special bailiffs. (1.) *Bailiffs of hundreds* are officers appointed over those respective districts, by the sheriffs, to collect fines therein, to summon juries, to attend the judges and justices at the assizes or quarter sessions, and also to execute writs and processes in the several hundreds. (2.) *Special bailiffs* are that lower class of persons employed by the sheriffs for the express purpose of serving writs and making arrests and executions, &c. (3.) Those persons also who have the custody of the king's castles are called bailiffs, as the bailiff of Dover Castle. (4.) The chief magistrates of particular jurisdictions are also called bailiffs, as the bailiff of Westminster, for example. (5.) There are also bailiffs of courts baron, bailiffs of the forest, &c. Cowel; *Termes de la Ley*.

BAILMENT. This is the most general word in English Law for agency, and comprises the following varieties of agency:—

(1.) Gratuitous bailment,—in which case it is settled that a *misfeasance* on the part of the bailee, *i.e.*, agent, is actionable (*Coggs v. Bernard*, 1 Sm. L. C. 177); but that a mere *non-feasance* is not actionable (*Elsae v. Gatward*, 5 T. R. 143).

(2.) Bailment for reward,—in which case the bailee is of course liable as well for a non-feasance, as for a misfeasance, and cannot recover his recompense until his performance of the duty which he has undertaken.

Again, bailment comprises the following varieties of agency:—

(1.) Bailments in which the trust reposed is exclusively for the benefit of the bailor, and hereunder *Mandatum* and *Depositum*, as to which, see these two titles.

(2.) Bailments in which the trust reposed is exclusively for the benefit of the bailee, and hereunder *Commodatum* (or *Prêt à usage*), and (where gratuitous) *Mutuum* (or *Prêt à consommation*), as to which, see these two titles; and

(3.) Bailments which are for the benefit of both bailor and bailee, and hereunder the following varieties (as to which, see the respective titles), viz.:—

(1.) *Pledge or Pawn*,—PAWNBROKERS.

(2.) *Custody*,—INNKEEPERS; and

(3.) *Carriage*,—CARRIERS.

BAITING ANIMALS. Is a species of cruelty to animals by setting them to fight with each other, *e.g.*, bulls, bears, badgers, dogs, cocks, &c. (12 & 13 Vict. c. 92; 17 & 18 Vict. c. 60). The penalty is fine or imprisonment.

BALLOT, VOTE BY. Under the stat. 35 & 36 Vict. c. 33, all parliamentary and municipal elections are required to be made by ballot; and under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), the elections are similarly required to be by ballot.

This mode of voting was one of the five points advanced by the so-called Chartists, in 1839, as the People's Charter; the four other points were universal suffrage, annual parliaments, payment of members, and the abolition of the property qualification for members of parliament.

See also title REPRESENTATION.

BANC, or BANCO, SITTING IN. The sittings which the respective superior Courts of Common Law used to hold during every term, and on certain appointed days after term, for the purpose of hearing and determining the various matters of LAW argued before them, were so called, in contradistinction to the sittings at Nisi Prius, which were held for the purpose of trying issues of FACT. The former were usually held before four of the judges; at the latter, one judge only presided. The phrase is not yet obsolete, but the thing itself is much altered, not more than two or at the most three judges now sitting together at Westminster in banc, and when so sitting being called also a Divisional Court, and the sitting in banc being now nearly continuous.

BANK OF ENGLAND. A corporation established in 1694 by charters of the Crown granted under the authority of the stat. 5 Will. and Mary, c. 20. The charter was continued by the Bank Charter Act, 1844 (7 & 8 Vict. c. 32), determinable after 1st August, 1855, by giving twelve months' notice upon vote or resolution of the House of Commons. The Bank assists the Government in all the great operations of finance, and is its appointed agent for managing the National Debt. Its advances to the Government are controlled by the stat. 59 Geo. 3, c. 76, which requires the previous authority of Parliament to all advances or loans; but that Act does not affect *purchases* by the Bank of lawfully authorized exchequer bills or bonds, or advances upon such bonds. In 1826, branches of the Bank of England were authorized to be established, and in the same year the Bank's monopoly of banking was broken in upon.

See titles BANK NOTES, ISSUE OF; BANKS, JOINT STOCK; NATIONAL DEBT.

BANK NOTES. These are a legal tender in England for all sums over £5: See title CASH NOTE, 3 & 4 Will. 4, c. 98, s. 6. In case a bank note is lost, or is stolen, or is

BANK NOTES—continued.

otherwise improperly obtained, the Bank of England (upon presentment by a *bonâ fide* holder) is bound to cash it, although to the prejudice of the true owner. *Miller v. Race*, 1 Sm. L. C. 468.

BANK NOTES, ISSUE OF. By the stat. 7 Geo. 4, c. 46, any banking corporation (or partnership, although consisting of more than six members) was enabled to issue its own bills or notes, payable on demand or otherwise, at any places in England exceeding sixty-five miles from London; and this provision was continued under the stat. 3 & 4 Will. 4, c. 98, but no note was to be for a less sum than £5, and within London and the sixty-five miles' radius banks of deposit (but not of issue) might be established. And by the Act of 1844 (7 & 8 Vict. c. 32), it was provided that in future it should not be lawful for any banker to draw, accept, make, or issue any bill or note payable to bearer on demand, subject to this proviso, viz., that any banker who, on the 6th of May, 1844, was lawfully issuing his own notes might continue to issue same, but if he once thereafter discontinued doing so, his right should be incapable of revival and subsequent exercise; and the amount of his note issue was not to be increased. The last-mentioned proviso applies only to bills or notes payable to bearer on demand. By the stat. 20 & 21 Vict. c. 49, s. 12, partnerships for banking might be constituted of any number of persons not exceeding ten (formerly six). Under the Companies Act, 1862 (25 & 26 Vict. c. 89), no banking company claiming to issue notes can be registered with limited liability as regards the amount of such issue.

BANKERS. According to the decision in *Foley v. Hill* (2 H. L. C. 28), the relation between a banker and a customer who pays money into the bank, is the ordinary relation of debtor and creditor, with a super-added obligation arising out of the custom of bankers to honour the drafts of customers, and that relation is not altered by an agreement by the banker to allow interest on the balances in the bank. The relation does not partake of a fiduciary relation, and therefore, as a general rule, no bill in equity will lie against a banker for an account.

See also titles BILLS OF EXCHANGE; CASH NOTES; CHEQUES; CIRCULAR NOTES; and LETTERS OF CREDIT.

BANKERS' BOOKS EVIDENCE. By the Bankers Books Evidence Act, 1879 (42 Vict. c. 11), repealing the like Act of 1876 (39 & 40 Vict. c. 43), a copy of any entry in a banker's book is made evidence of the

BANKERS' BOOKS EVIDENCE—contd.

contents of the entry and of the entry, the book being first proved to have been a banker's book at the time of the entry being made therein, the proof thereof being the affidavit or oath of some partner in, or officer of, the bank (ss. 3, 4); and the copy being first proved to be correct, such latter proof being by the affidavit or oath of some person who has examined the copy with the entry (s. 5); and henceforward the bank cannot be compelled to produce its books in Court (s. 6); but the Court may order inspection thereof by any party to an action (s. 7), or to a prosecution or an arbitration (s. 10). And this order may be made either by the High Court of Justice (or any judge thereof) or by the County Court judge.

See titles **DISCOVERY**; **DUCES TECUM**; **PRODUCTION OF DOCUMENTS**.

BANKERS' CASE. This case was a case extending between the years 1690 and 1700, and which arose out of the following circumstances:—It had been a frequent practice after the Restoration in 1660 for the king to borrow money upon the security of the public funds, orders being given on the Exchequer for payment of the principal and interest. By 19 Car. 2, c. 12, these orders were made transferable. In 1677 the king granted the bankers annuities out of the hereditary excise equal to 6 per cent. interest on their debts, redeemable on payment of the principal. The interest was paid till 1683, when it became in arrear, and so continued until the Revolution in 1688, when suits by way of petition to the Barons of the Exchequer were instituted to enforce payment. The principal question in these suits (including the *Bankers' Case*) was, whether the grant of the king was good so as to bind his successors, and continue a charge upon the revenue? The decision was practically in favour of the bankers; but they derived no good from it, until Parliament afterwards made provision for them, by granting them £3 per cent. in lieu of the £6 per cent.; and this provision of Parliament was the origin of the Three Per Cent. Consolidated Bank Annuities.

See titles **CONSOLS**; **NATIONAL DEBT**.

BANKS, JOINT STOCK. By the 39 & 40 Geo. 3, c. 28, s. 15, it was forbidden to establish any corporate bank whatever, or any bank where the number of partners exceeded six, so as to borrow, owe, or take up any sum or sums of money on their bills or notes payable on demand, or at any less time than six months, during such time as the Bank of England enjoyed the rights conferred by former Acts. But in 1826, the 7 Geo. 4, c. 46, was passed

BANKS, JOINT STOCK—continued.

legalizing the formation under deeds of settlement, of banking co-partnerships consisting of more than six persons, provided they did not carry on business in, or within sixty-five miles of, London. Afterwards, in 1845, was passed the 7 & 8 Vict. c. 113, which for a short time enabled joint-stock banks to be established under letters patent of incorporation. And latterly, the Joint Stock Banking Companies Act, 1857 (21 & 22 Vict. c. 49), and Companies Acts, 1862 (25 & 26 Vict. c. 89), and 1867 (30 & 31 Vict. c. 131), have afforded every facility for constituting joint stock banks in every part of England, subject to the provisions of these Acts.

See title **JOINT STOCK COMPANIES**.

BANKS OF ISSUE: See title **BANK NOTES, ISSUE OF**.

BANKRUPTCY. Under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), which commenced as from the 1st of January, 1870, but which does not extend to Scotland or Ireland, any one, whether a trader or not, and whether a member of Parliament or not, may be adjudicated a bankrupt (s. 6) upon the petition of his creditor or creditors, upon any one or other of the following six grounds,—commonly designated “acts of bankruptcy:”—

- (1.) Making a conveyance or assignment of all his property for the benefit of his creditors generally;
- (2.) Making any fraudulent conveyance or assignment of his property;
- (3.) Doing, with intent to defeat or delay his creditors, any of the following acts, viz.,—
 - (a.) Departed or remained out of England,
 - (b.) Being a trader, departed from his dwelling house,
 - (c.) Begun to keep house, or
 - (d.) Suffered outlawry;
- (4.) Filing a declaration of insolvency;
- (5.) Being a trader, having execution levied by seizure and sale of his goods for a debt of £50, or upwards; or
- (6.) Having, if a trader for seven days, and if a non-trader for twenty-one days, after service of a debtor's summons for a debt of not less than £50, neglected to pay or satisfy same.

The petition grounded upon any one of such acts must be presented within six months from the commission of the act.

The Act constitutes two distinct jurisdictions, viz.:—

- (1.) The London district,—which comprises the City of London and its

BANKRUPTCY—continued.

liberties, and all places situated within the districts of the metropolitan County Courts; and

- (2.) The country district.—which comprises the rest of England.

The Court of the London Bankruptcy District has all the powers and jurisdictions of the superior Courts of Common Law and Equity (*In re Anderson*, L. R. 5 Ch. App. 473); the Judge may also reverse, vary, or affirm any order of a local Bankruptcy Court, in respect of a matter either of law or of fact.

When a person is adjudicated a bankrupt, all his property, whether real or personal, vests in his trustee, who has the following powers:—

- (1.) Receiving and deciding upon proof of debts.
- (2.) Carrying on the business of the bankrupt.
- (3.) Bringing or defending actions.
- (4.) Selling the property of the bankrupt, either by public auction or by private contract; and
- (5.) Giving effectual receipts for money received.

Upon the close of the bankruptcy, or (but only with the assent of his creditors), during its continuance, the bankrupt may apply to the Court for an *order of discharge*, which he will obtain if he have paid 10s. in the pound, and not otherwise, excepting as a special indulgence of the creditors; also, if undischarged, he is protected for three years from the close of the bankruptcy proceedings, and if he should during that period have paid up to 10s. in the pound, he then obtains his discharge; but otherwise, the unpaid balance becomes a judgment debt against him, and may be levied against his property, real or personal, in the usual way, by leave of the Court.

BANNERET, or BANRENT. A banneret, or banrent, is said to have been a knight made in the field, with the ceremony of cutting off the point of his standard, and so making it like a banner. They were accounted so honourable that they were permitted to display their arms in a banner in the field like barons. See Selden's Tit. of Hon.

BAR, PLEA IN. Is a defence put forward to an action (or in fact to any prior substantive pleading), and which is based upon the merits and goes to the root of the case. It is opposed to a plea in abatement (now abolished). In Roman Law, it was called *peremptoria vel perpetua*; while a plea in abatement was called *dilatoria vel temporalis*.

See title ABATEMENT, PLEA IN.

BARE TRUSTEE. Is a trustee all whose duties have determined, but through some negligence or other cause the legal estate in the trust property has been left to remain in him. His administrator (when the bare trustee dies intestate) and not his heir-at-law takes the fee simple corporeal or incorporeal trust property (Vendor and Purchasers Act, 1874, 37 & 38 Vict. c. 78; and Amendment Act, 1875, 38 & 39 Vict. c. 87).

BARGAIN: See titles AGREEMENT; SALE.

BARGAIN AND SALE: See title CONVEYANCES.

BARNARDISTON v. SOAME. A case in election law, 26 Car. 2 (1674), in which the plaintiff recovered £800 in damages against the defendant (who was sheriff of Suffolk) for making a double return of members elected to serve in Parliament; but the judgment was afterwards reversed. The principle of the original decision was, however, afterwards affirmed by the stat. 7 & 8 Will. 3, c. 7. And under the stat. 11 & 12 Vict. c. 98, if any returning officer wilfully delays or neglects or refuses duly to return the elected member, the latter may have his action against the returning officer for damages.

See title RETURN.

BARON. A term of very wide signification originally, including all free tenants in chief, and *quære*, all frecholders even. It was not originally a title of honour at all, all the citizens of London (*e.g.*) being designated barons. Eventually, the greater barons developed into, and became identified with, the House of Lords, and the lesser barons became absorbed in the mass of the commonalty, and were represented (along with the burghs) in the House of Commons.

BARON AND FEME: See title HUSBAND AND WIFE.

BARONY. The tenure of lands by barony was one of the titles to peerage. The precise character of the tenure has been a matter of dispute, and is hardly yet settled. The question in its first aspect was this,—whether all holding lands *in capite* were barons; for it is admitted that in early times all barons held lands, in other words, that in early times all baronies were territorial. Selden's opinion was, that all holding lands *in capite* were barons, and that in fact barony or tenure by barony was the same as tenure of lands of the king *in capite* by knight service; also that the distinction between greater and lesser barons which afterwards grew up, and the ultimate reference of the title of baron to the former class of barons alone was the work of time, beginning prior to

BARONY—continued.

Magna Charta and becoming confirmed by the last mentioned Act in the distinction which that Act introduced in the mode of summons of barons,—the eminent tenants *in capite* being summoned by particular writs, the lesser ones by a general writ. On the other hand, the opinion of Maddox was, that barony or tenure per baroniam was intrinsically different from tenure of lands of the king *in capite*. He bases his opinion upon the circumstance that in the charter of Henry I. tenants in chief are enumerated distinctively from earls and barons, and upon the further circumstance that the like distinctive enumeration occurs in the list of the members present at the parliament of Northampton in the years 1165 and 1176. He does not, however, state what the precise nature of barony was, otherwise than negatively, for he points out that the distinction did not consist in the number of fees (Balliol having thirty and yet being only a knight, while Hwayton was a baron and had only three), nor yet in the privilege or service of attending parliament, for that was a duty on the part of all tenants *in capite*. The question in more modern times has been,—what was the effect of the writ of summons to a baron, and was a barony ever disjoined from territorial possessions? Now it appears that the ancient barons, *i.e.* peers holding in barony, may claim as a matter of right their writ of summons, and the sovereign may not deny it them; but barons of new creation, although they are in all other respects upon a level with the ancient barons, derive their title under their *writ*, or, as the case may be, their *patent*, and their title is not more extensive than their writ or patent. If, therefore, words of inheritance were entered in the writ, the title was descendible (De Vesci, 27 Hen. 6), if not then not; although, indeed, this latter statement has been controverted, and a writ, if it has been acted upon by the party, is now held, even without words of inheritance, to confer an inheritable dignity, a patent differing from a writ of nobility in this, that the patent operates *proprio vigore*, or without added entry, and according only to the words of limitation in the patent.

A title of nobility has now become purely *personal*, and not territorial. It may therefore be (and indeed frequently is) held apart from or without lands. It became personal as early as 1295 (23 Edw. 1), according to Lord Cranworth in *Berkeley Peerage Case*, 8 H. L. 21.

BARRATRY. Any act of the master or of the mariners of a ship which is of a criminal or fraudulent nature, tending to the

BARRATRY—continued.

prejudice of the owners of the ship, without their consent or privity; as by running away with the ship, sinking her, deserting her, or embezzling the cargo. *Park on Ins.* 137, 138; *Kay's Shipmasters and Seamen*, 210–217; *Knight v. Cambridge*, 1 Str. 581; *Vallejo and Another v. Wheeler*, Cowp. 143.

BARRIERS, TRESPASS TO: See title BOUNDS, WORKING OUT OF.

BARRING ESTATE TAIL. Formerly an estate tail could only be barred by levying a fine or suffering a common recovery (*see* these titles). At the present day, it can only be barred (1) in the case of freeholds, by a disentailing deed, and (2), in the case of copyholds, by surrender, or (but only if the estate is equitable) by a disentailing deed executed in accordance with the stat. 3 & 4 Will. 4, c. 74. Therefore neither a will, nor a contract of sale, nor any other deed or instrument in writing whatsoever, not being a special Act of Parliament, is of any force or efficacy whatsoever, unless preceded by the proper statutory mode of bar, to pass or to convey an estate tail to the devisee or contractee, or other person whatsoever; nor may the Courts of Equity, in favour of a purchaser for value, execute the contract by decreeing the heir in tail to carry out the act which his ancestor has left incomplete; and it need scarcely be added that the Courts of Equity would not, even if they might, decree a disentailing deed in favour of the devisee, who is a mere volunteer.

BARRISTER. A counsellor learned in the law who pleads at the bar of the Courts, and takes upon himself the advocacy or defence of causes. His professional conduct is under the control of the Benchers of his Inn (*Hudson v. Slade*, 3 F. & F. 390). His fees are an *honorarium*, and no action lies to recover them, nor can any security be taken for them (*Brown v. Kennedy*, 13 C. B. 677). But it is otherwise with the fees of conveyancers or special pleaders below the bar, who may maintain such action, or take such security (*Steadman v. Hockley*, 15 M. & W. 553). A barrister is not liable for negligence or non-attendance (*Fell v. Brown, Peake*, 96). He enjoys numerous privileges (which, however, he is assumed to exercise only for the benefit of his client), *e.g.*, he may compromise the case (*Swinfen v. Swinfen*, 1 C. B. (N.S.) 364; 2 De G. & J. 381); nor is he exposed to any action for libel or slander, in consequence of words written or spoken by him in the conduct of his case (*Hodgson v. Scarlet*, 1 B. & A. 232); nevertheless it seems that he is liable to be punished for contempt of Court even for words pro-

BARRISTER—*continued.*

fessedly spoken in the discharge of his functions as advocate (*Ex parte Pater*, 5 B. & S. 299). He is privileged from arrest while attending Court or going circuit.

BARTER: See titles EXCHANGE; PERMUTATION.

BASE FEE. A base or qualified fee is an estate which hath some qualification subjoined thereto, and which must cease or be determined whenever such qualification is at an end. As in the case of a grant to A. and his heirs, *tenants of the manor of Dale*; in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. So when Henry VI. granted to John Talbot, *lord of the manor of Kingston-Lisle, in Berks*, that he and his heirs, *lords of the said manor*, should be peers of the realm by the title of Barons of Lisle; here John Talbot had a base or qualified fee in that dignity, and the instant he or his heirs quitted the seigniorship of that manor, the dignity was at an end. These estates are fees, because it is possible that they may endure for ever in a man and his heirs; yet as that duration depends on certain collateral circumstances which qualify and debase the purity of the donation, it is therefore called a base or qualified fee. In a more limited sense, a base fee is used to denote a fee simple derived out of a fee tail, which has been barred by one whose power extends only to bar his own issue heirs in tail; in this case, so long as such heirs in tail or their issue endure, the fee simple endures, but determines when they become extinct.

BASTARD. A child born out of wedlock. He is not legitimized by the subsequent marriage of his parents (*Doe d. Birt-whistle v. Vardell*, 6 Bing. N. C. 385). Upon an order of affiliation, the putative father becomes liable to a limited extent to support his child; but otherwise the mother must support it. The custody of the child belongs also of right to the mother, notwithstanding the father is able and willing to maintain it better (*Ex parte Knee*, 1 N. R. 148); but it seems that the wishes of the child itself will be consulted (*In re Lloyd*, 3 Man. & G. 547).

A child born under the cloak of wedlock is a bastard, notwithstanding the maxim *Pater est quem nuptiæ demonstrant*, if it is proved that the husband of the mother had no access or possibility of access to her during the required period of generation.

See title AFFILIATION ORDER.

BASTARD EIGNÉ: See title EIGNÉ.

BATES'S CASE. Decided that a Turkey merchant importing currants into England

BATES'S CASE—*continued.*

from the Levant was liable to a tax or imposition laid on by the King (Jac. I.) without the sanction of Parliament, the restraints of the early statutes and ordinances on the King's taxation not extending to foreign commerce. This case is sometimes called the *Case of Impositions*.

See title BILL OF RIGHTS.

BATTEL. The trial by wager of battle was a species of trial introduced into England, among other Norman customs, by William the Conqueror, in which the person accused fought with his accuser, under the apprehension that Heaven would give the victory to him who was in the right.

See titles JURY, TRIAL BY, HISTORY OF; WAGER OF BATTLE.

BATTERY: See title ASSAULT AND BATTERY.

BATTLE, TRIAL BY. A mode of trial in Anglo-Saxon times, which became obsolete after trial by jury was introduced (Hen. II.); the last instance of it (*Ashford v. Thornton*, 1817-1818) was the occasion of its express abolition by statute (59 Geo. 3, c. 46). Taswell-Langmead, 122.

See title JURY, TRIAL BY, HISTORY OF.

BAWDY-HOUSE: See title BROTHEL.

BEDCHAMBER QUESTION. This was a question raised for the first time in 1839, upon the accession of Sir Robert Peel's administration, in succession to that of Lord Melbourne; and the question was simply this,—whether the ladies of the royal household (where the sovereign more especially was a queen) were to go out with the out-going ministry, upon the ground that their near relationship to that ministry was likely to thwart or render insecure, or unstable, the acts of the incoming ministry. The Queen herself was opposed to the change, and Sir Robert Peel refused to accept office in consequence; but in 1841, upon Sir Robert Peel's return to office, the question was decided in the way he had contended for in 1839.

BEER HOUSE: See titles ALE AND BEER HOUSES; LICENSING ACTS.

BEGIN, RIGHT TO. The right to begin, or duty of beginning, when an action comes on for trial, usually rests with the plaintiff, and does so in all cases in which any of the issues rest upon him to prove; but this rule is subject to the control of the judge. Even where it is only the amount of damage that requires to be proved on the plaintiff's part, he has the right to begin (*Carter v. Jones*, 6 C. & P. 64; *Mercer v. Whale*, 5 Q. B. 447). An erroneous ruling of the Court as to the right to begin used

BEGIN, RIGHT TO—*continued.*

to be a ground for a new trial, but always in the discretion of the Court.

See title **RIGHT TO BEGIN.**

BELLIGERENCY : *See* title **REBEL OR BELLIGERENT.**

BENCH WARRANT. When an indictment has been found for a misdemeanour during the assizes or sessions, it is the practice for the judge attending the assizes, or for two of the justices attending the sessions, to issue a bench warrant, signed by him or them, to apprehend the defendant. It is otherwise like an ordinary warrant issued by a justice or police magistrate. *Haw. Pl. Cr.*; *Harris's Crim. Law*, 374.

BENCHER. A dignitary of the Inns of Court is so termed. Each Inn of Court is presided over by a certain number of benchers, who exercise the right of admitting candidates as members of their society, and also of ultimately calling them to the bar. They are usually selected from those of their members who have distinguished themselves in their profession; and it is the ordinary practice, but subject to a discretion in the body of benchers, for each Inn of Court to select its member a bencher as soon as he has attained the rank or degree of queen's counsel. They also exercise a general supervision over the professional conduct of all counsel that are members of the Inn.

BÉNÉFICE D'INVENTAIRE. This in French Law corresponds to the *Beneficium Inventarii* of Roman Law, and substantially to the English Law doctrine, that the executor properly accounting is only liable to the extent of the assets received by him.

BENEFICES. Generally taken for any ecclesiastical livings or church preferments, whether dignities or not. King John having conceded to the pope the right of nominating to benefices, and Magna Charta having secured the exercise of popular nominations, but subject, nevertheless, to the sanction of the pope, and the papal right being greatly abused by being made a channel for drawing English money abroad, eventually, after other checks failing, the Statute of Provisions (25 Edw. 3) was passed forbidding the pope's nomination to benefices, and superseding his control of the popular nominations.

See titles **ADVOWSON**; **PROVISORS**, **STATUTES OF.**

BENEFICIARIES. The *cestuis que trustent*, or persons entitled beneficially to property held by a trustee are so called.

BENEFICIUM CEDENDARUM ACTIONUM : *See* title **SURETYSHIP.**

BENEFICIUM DIVISIONIS : *See* title **SURETYSHIP.**

BENEFICIUM EXCUSSIONIS VEL ORDINIS : *See* title **SURETYSHIP.**

BENEFICIUM INVENTARII : *See* title **BÉNÉFICE D'INVENTAIRE.**

BENEFIT BUILDING SOCIETY : *See* title **BUILDING SOCIETIES.**

BENEFIT OF CLERGY : *See* title **CLERGY**, **BENEFIT OF.**

BENEVOLENCES. Were a mode of early taxation, falling principally, if not exclusively, on the wealthier classes; they took the place of the ancient *loans*, but were in fact forced contributions, not intended to be repaid. Strong sovereigns resorted to them (e.g. Edward I., III., and IV.); but Richard III. declared them illegal,—a concession to the powerful feeling of the people against them. They were again resorted to by Henry VII., Bishop Morton, his chancellor, arguing people into their ability to pay by means of his impudent dilemma (Morton's Fork). Benevolences were afterwards attempted to be levied as an anticipation of the lawful revenue, i.e. subject to a promise of repayment out of the next or some other subsequent subsidy. The stat. of Richard III. had been declared illegal by Henry VII.'s lawyers, as being that of a usurper. Eventually, by the Bill of Rights, the stat. of Richard III. was in effect restored.

See titles **TAXATION**, **HISTORY OF**; **BILL OF RIGHTS.**

BEQUEATH OR REQUEST : *See* title **DEVISE.**

BEST EVIDENCE. Primary evidence, if obtainable, renders secondary evidence inadmissible; but this is only one application of the rule requiring the best evidence to be given. Because even in secondary evidence, and also in circumstantial evidence, that evidence is to be used which is the best obtainable, having regard to the nature of the case.

BESTIALITY : *See* title **SODOMY.**

BETTING HOUSES. These were suppressed in England by the 16 & 17 Vict. c. 119; and in Scotland by the 37 & 38 Vict. c. 15.

BEYOND THE SEAS. No part of the United Kingdom of Great Britain and Ireland, nor the Isle of Man, Guernsey, Jersey, Alderney, or Sark, nor any islands adjacent to any of them (being part of the dominions of Her Majesty), are deemed, as regards plaintiffs, beyond the seas within

BEYOND THE SEAS—*continued.*

the meaning of the stat. 3 & 4 Wm. 4, c. 27, amended by the Real Property Limitations Act, 1874 (37 & 38 Vict. c. 57); and although it appears to have been held that Dublin, or any place in Ireland, was beyond the seas within the meaning of the Statute of Limitations, 21 Jac." 1, c. 16 (*King v. Walker*, 1 Bl. Rep. 286; *Nightingale v. Adams*, Show. 91), still it is no longer so (19 & 20 Vict. c. 97) as regards plaintiffs.

BIDDINGS, OPENING OF. *See* title AUCTION.

BIGAMY. A criminal offence which consists in going through the ceremony of marriage with another, while a former husband or wife is still alive and not divorced, knowing at the time, or reasonably believing, that such former consort is still alive. The offence amounts to a felony, and is punishable with penal servitude for not more than seven nor fewer than five years, or with imprisonment with or without hard labour for any period not exceeding two years.

BILATERAL CONTRACTS: *See* title UNILATERAL CONTRACTS.

BILL has various significations in law proceedings. In civil matters it used to denote the bill of complaint in the Court of Chancery, which has now been superseded by the statement of claim introduced by the Judicature Acts.

See title BILL IN CHANCERY.

In criminal matters, when a grand jury, upon any presentment or indictment, consider the same to be probably true, they write on it two words, *billa vera*, in other words, they are said to *find a true bill*, and thereupon the accused party is said to stand indicted of the crime, and is bound to make answer to it.

See also the following titles.

BILL FOR DISCOVERY: *See* title DISCOVERY.

BILL IN CHANCERY. The method of instituting a suit in the Court of Chancery used to be by addressing a bill, in the nature of a petition, to the Lord Chancellor. This bill was neither more nor less than a statement of all the circumstances which gave rise to the complaint, and a prayer or petition for particular relief, according to the case made by the bill, or for general relief, according as the nature of the case might require. When this bill was drawn up or prepared, it was left with the proper officer of the Court in order to be filed, and this was what is termed filing a bill in Equity.

Until the 1st of November, 1875, in cases

BILL IN CHANCERY—*continued.*

where the summary—*i.e.*, statutory—proceeding by petition or summons was not available, the bill was the only process, but at the same time a universal process, of initiating Chancery proceedings. However, now, under the Judicature Act, 1873, all actions and suits are to be commenced by a writ of summons, which is usually, in due course, followed up by a statement of claim (in the nature of the old bill), and other pleadings.

See titles PLEADINGS; STATEMENT OF CLAIM; STATEMENT OF DEFENCE.

BILL OF COSTS: *See* title ATTORNEY'S BILL OF COSTS.

BILL OF EXCEPTIONS. If during a trial a judge, in his direction to the jury, or in his decision, mistook the law, either through ignorance, inadvertence, or design, the counsel on either side might require him publicly to seal a bill of exceptions, which was a statement in writing of the point wherein he had committed the error, and which statement, by fixing his seal thereto, he thus acknowledged (*Smith's Action at Law*, p. 82). This statement had to be put in writing while the Court was sitting, and in the presence of the judge who tried the cause, and signed by the counsel on each side; after which it was formally drawn up and tendered to the judge to be sealed. A bill of exceptions was said to be in the nature of an appeal from the judgment or decision of the Court below to a Court of error. (*Wright v. Sharp*, 1 Salk. 288; *Gardner v. Bailey*, 1 Bos. & P. 32; *Wright v. Tatham*, 7 A. & E. 331). By the Judicature Act, 1873, bills of exception are abolished, and an appeal to the Court of Appeal substituted for them; but under Order LVIII. 13, and s. 22 of the Judicature Act, 1875, when there is a motion for a new trial made upon the ground that the judge at the trial has not submitted or left the issues to the jury, and directed the jury as to the law and the evidence applicable to the case, the motion is to be made upon an *exception* (*i.e.* objection) taken at the trial and entered upon or annexed to the record (if any).

See title EXCEPTION TO JUDGE'S DIRECTION.

BILL OF EXCHANGE. A bill of exchange is defined by Blackstone to be an "open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account." The person who draws or makes the bill is called the drawer; the person to whom it is addressed is called the drawee; and when the drawee has undertaken to pay the amount (which undertaking he signifies by

BILL OF EXCHANGE—continued.

writing across the bill of exchange the word "accepted" together with his name, or his name simply, with or without adding the place where the money is to be paid), then he is called the acceptor; the person to whom the money is ordered to be paid is called the payee; and if the payee transfers it over to another (which he does by simply writing his name across the back), he is called the indorser, and the person to whom he thus transfers it is called the indorsee, which latter person may also, if he pleases, in his turn transfer it to another party (by the same process of signing his name on the back, or indorsing it, as it is termed), and sometimes by mere delivery; thus it may be transferred from one person to another *ad infinitum*, the party transferring it always being called the indorser, and the party to whom it is transferred the indorsee. The acceptor is the person primarily liable; and it is his duty in general to run after the bill when it falls due, and to find out the holder and pay him, being, however, allowed the usual three days of grace, unless the bill is payable on demand, or (since 34 & 35 Vict. c. 74) on presentation, or at sight; but if the acceptor should have accepted in a form specifying a place of payment upon the bill falling due, then the holder must either present the bill at the place specified, or himself find out the acceptor; and if the bill should be accepted payable at a specified place, "*and not elsewhere*," then the holder must present it at that place and no other place, and the acceptor ought, before the expiration of the three days of grace, to have funds provided there to meet the bill. Bills of exchange are usually given by way of payment for goods purchased on credit; when they are given without any valuable consideration, they are called accommodation bills; but these latter bills, excepting as between the drawer and the acceptor, do not differ from other bills of exchange. Should the acceptor fail to pay the bill, the holder may either sue him or have recourse to any of the parties whose names are indorsed on the bill, such parties being (unless when they have indorsed *sans recours*) liable secondarily, or as sureties for the acceptor, in a manner; but if the holder intends to have such recourse to any of the indorsees, he must, immediately after the acceptor's refusal to pay, give each of them notice that the bill was duly presented for payment and was dishonoured, and this is called giving notice of dishonour. Even the drawer (unless the bill is an accommodation one) is entitled to receive this notice. When a bill of exchange is transferred by indorsement and delivery, or by delivery only before it is due, it is a fully negoti-

BILL OF EXCHANGE—continued.

able instrument, and the indorsee takes free from all (if any) equities that may affect the bill; but when the bill is transferred after it is due by indorsement and delivery (but *semble*, not when by delivery only), the indorser takes subject to the equities (if any) affecting the bill. For payment of a forged bill, the paying person or bank is the sufferer; but if the bill is a banker's order or cheque, payable on demand, and the indorsement only is forged, the paying bank is not the sufferer. Lost bills may be safely paid on an indemnity and an affidavit of the loss; destroyed bills upon an affidavit of the destruction.

See title PROMISSORY NOTE.

BILL OF EXCHANGE, ACTION ON.

Under the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), when an action is commenced on a bill of exchange or promissory note within six months after due, the writ of summons (with which the action commences) directs (in effect) the defendant to obtain leave to appear, and also to appear, to the writ within twelve days after service thereof upon him (Form, Schedule A to Act, 1855). Unless the defendant can shew some defence to the action on the merits, he will not get leave to appear, and so final judgment may be entered against him after the twelve days; but if he succeed in obtaining (within the twelve days) leave to appear (upon showing some such defence as aforesaid), and if he do also thereupon appear within the time limited for his appearance to the writ, then in its other stages, the action proceeds like any other action in the High Court. The application for leave to appear is made at chambers (to the chief clerk or judge in Chancery, or to the master in the Common Law Divisions) or in the district registry, when writ of summons issued thereout (Order 54, rule 2; Order 35, rule 4; *Oger v. Bradnum*, L. R. 1 C. P. Div. 334).

BILL OF EXCLUSION; See title EXCLUSION, BILL OF.

BILL OF HEALTH. Is a certificate given by consul to master of vessel, regarding state of the port of starting. The bill may be either clean, suspected, or foul; if foul, the vessel will be subjected to quarantine on its arrival at port of destination. *Kay's Ship. and Seamen*, 133.

BILL OF LADING. This is a document which is signed and delivered by the shipowner, or master as his agent, to the shippers in a general ship on the goods being shipped; or, speaking more practically, upon the goods being shipped, the mate gives the shipper an acknowledgment

BILL OF LADING—continued.

thereof, which is called the "mate's receipt," and the shipper takes that to the broker or captain of the ship, who exchanges it for the bill of lading.

Form of Bill of Lading:—A bill of lading is commonly made out in parts. One or more of these parts are sent by the shipper to the consignee of the goods, one is retained by the shipper in his own custody, and another is given to the master, shipowner, or captain. The bill, after mentioning the shipping of the goods in good order and condition, and their destination, undertakes to deliver same in like order and condition to the consignee or his assigns, upon payment by the latter of the agreed freight.

Incidents of Bill of Lading:—A bill of lading may be indorsed, and thereafter, upon being delivered, it passes to the indorsee the property in the goods to which it relates; and since the Act 18 & 19 Vict. c. 111, the indorsee may sue thereon in contract in his own name, and not, as heretofore, in the name of the indorser only. The actual holder of a bill of lading, although insolvent, may even defeat by a *bonâ fide* indorsement, accompanied with delivery of the bill of lading, the right of the unpaid consignor or vendor to stop the goods *in transitu*; and for this purpose it is not material that the indorsee knows that the consignor has not been paid for the goods in money, if he does not know that the consignee is insolvent, or that the bills given in payment are bad (*Cuming v. Brown*, 9 East, 506). No property, however, passes by the indorsement if there is fraud in the transfer, or if there is notice by the previous indorsement that the earlier transfer is conditional only, or if the indorsee knows of the insolvency of the consignee (*Vertue v. Jewell*, 4 Camp. 31). Nor can the *bonâ fide* indorsee for value interfere by virtue of the indorsement to him with the stoppage *in transitu*, if the person through whom the bill of lading came to him had no authority from the shipper or consignee to put it in circulation (*Gurney v. Behrend*, 3 E. & B. 622), the bill of lading being in this respect like an overdue bill of exchange. And it is expressly provided by the 18 & 19 Vict. c. 111, s. 2, that the extension which that Act gives to the rights and liabilities of the indorsee shall not affect in any way the right of stoppage *in transitu*. Where the bill of lading is negotiated by way of pledge, the right to stop *in transitu* may be gone at Law (and the better opinion seems that it is); but it remains in Equity, subject to the pledgee's rights in respect of his specific advance (*In re Westzinthus*, 5 B. & Ad. 817).

BILL OF LADING—continued.

A bill of lading, after indorsement, is countermandable before actual delivery thereof or of the goods to the indorsee; but, after an indorsement and delivery of the bill of lading and invoice of the goods as a security against bills which are to be drawn by the indorsers on the indorsee, the indorsers cannot, after having obtained the acceptances, and whilst the balance of accounts is in favour of the indorsee, countermand the delivery of the goods, and the master of a ship would be liable in trover if he acted under any such order (*Haille v. Smith*, 1 B. & P. 563). But, *semble*, it would be otherwise if the balance of accounts were the other way.

BILL OF MIDDLESEX. A species of process by which actions were formerly commenced in the Court of Queen's Bench. It was a kind of precept directed to the sheriff of the county, commanding him to take the body of the defendant and have it, on a certain day therein-mentioned, in Court, wheresoever the lord the king should be in England (*Boote's Suit at Law*, 38). This mode of proceeding was abolished by the Uniformity of Process Act, 2 Will. 4. c. 39.

BILL OF PARTICULARS. A bill of particulars, or, as it was frequently termed, a particular of plaintiff's demand, was a statement in writing of what the plaintiff sought to recover in his action. Its object was to furnish the defendant with a better or more specific statement of the plaintiff's cause of action than was to be collected from the declaration or summons. The bill of particulars "differed from the declaration, inasmuch as the one disclosed the nature and legal effect of the plaintiff's claim, the other its component ingredients" (*Lush's Pr.* 374; *Pylie v. Stevens*, 6 Mee. & W. 814). Under the present practice, a party may obtain particulars of the plaintiff's demand or of a defendant's set-off upon summons (Rules of Hilary Term, 1853, r. 17); and under Order XIII. 5, to a writ not specially indorsed if defendant fails to appear, the plaintiff files a statement of the particulars if the debt is a liquidated demand sought to be recovered, and signs judgment for same after eight days.

See title PARTICULARS OF DEMAND.

BILL OF PEACE. These are bills in the nature of bills *quia timet*, but which are most commonly brought after the right has been tried at Law. The bill is brought for the purpose of establishing and perpetuating a right claimed by the plaintiff, the right being of a nature to be controverted by the different persons, at different

BILL OF PEACE—*continued*.

times, and by different actions. The design of the bill is to secure repose from perpetual litigation, or the fear thereof, and is justified by the doctrine of public policy that there should be an end to litigation. Thus, the lord of a manor may bring such a bill against his tenants in regard of an encroachment (*Sheffield Waterworks Co. v. Yeomans*, L. R. 2 Ch. App. 8; *Earl of Bath v. Sherwin*, Prec. Ch. 26).

BILL OF REVIEW: See titles REHEARING; REVIEW, BILL OF.

BILL OF REVIVOR: See title REVIVOR.

BILL OF RIGHTS. The statute 1 Will. & Mary, stat. 2, c. 2, is so termed because it declares the true rights of British subjects. The short contents of it are as follows: After reciting the various unconstitutional and illegal acts of the preceding Stuart reigns, it goes on to enact as follows:—

- (1.) The suspending power, when exercised by the Crown without the assent of Parliament, is illegal;
- (2.) The dispensing power, *as of late exercised*, is illegal;
- (3.) Levying money by prerogative is illegal;
- (4.) The subjects have a right to petition the Crown, and all commitments for so petitioning are illegal;
- (5.) Raising or maintaining a standing army within the kingdom in time of peace is illegal, if done without the assent of Parliament;
- (6.) Freedom of speech in Parliament secured; and
- (7.) Excessive bail, excessive fines, &c., &c., discouraged.

BILL OF SALE. Is an instrument whereby one person called the assignor assigns, or purports to assign, to another person called the assignee, personal property or chattels, either conditionally, *i.e.*, by way of mortgage, or absolutely, *i.e.*, by way of sale or gift outright.

Under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), every bill of sale requires to be registered within seven days from the making thereof, otherwise the same is void as against execution creditors, the trustee in bankruptcy, and others; it requires to be re-registered every five years. And even then, without possession taken prior to an act of bankruptcy, it used to be void as against the trustee in bankruptcy (*Badger v. Shaw*, 2 El. & El. 472, following *Stansfield v. Cubitt*, 27 L.J. (Ch.) 266), but is not now so (Act 1878, s. 20).

This strictness of the law is due to the fact that fictitious bills of sale are often given for the purpose of effectuating a

BILL OF SALE—*continued*.

fraud. In *Edwards v. Harben* (2 T. R. 587), following *Twyne's Case* (1 Sm. L. C. 1), the retention of possession by the maker was accepted as an index of fraud. The bill of sale is, however, in all cases good as between the parties, even although unregistered (*Bessey v. Windham*, 6 Q. B. 166).

See title FRAUDULENT CONVEYANCES.

BILL, PARLIAMENTARY. A parliamentary bill has been described as the "draft or skeleton of a statute." Bills are divided into two classes, *viz.*, public and private bills. The former are such as involve the interests of the public at large, and when passed by all the three branches of the Legislature, become a portion of the public statutes of the realm: the latter are such as have reference to the interests of private individuals, and are frequently introduced to enable them to undertake works of public utility at their own risk; such, for instance, are the various bills introduced for the purpose of establishing railway companies; such also used to be those of naturalization, for change of name, for divorce, &c., although all, or the majority, of these latter purposes, are now partly accomplished in virtue of public or general statutes.

BILL QUIA TIMET.—Was a proceeding in the Court of Chancery,—and which would now be called an action in the nature of a *Bill quia Timet*,—brought for the purpose of anticipating and providing against an apprehended liability, or for the purpose of anticipating and preventing an apprehended wrongful act.

BILL TO ESTABLISH WILL.—Was a proceeding in the Court of Chancery, having for its object to establish the validity of wills (of real estate). The devisee was plaintiff, and with his consent the heir-at-law might have been plaintiff. This kind of proceeding became very infrequent after the Court of Probate Act, 1857 (20 & 21 Vict. c. 77) enacted that where a will is proved in solemn form, the probate shall be conclusive proof of the validity of the will.

See title PROVING A WILL.

BILLETING.—Of soldiers and marines on private persons was one of the alleged unconstitutional acts of the king complained of in the Petition of Rights (3 Car. 1); and no such billeting is now legal. But under the Annual Mutiny Act and the stat. 4 & 5 Will. 4, c. 85, s. 5, soldiers and marines may be billeted on innkeepers, licensed victuallers, &c.

BIRDS, PROTECTION OF WILD. Under the stats. 35 & 36 Vict. c. 78, and 39 &

BIRDS, PROTECTION OF WILD—contd.

40 Vict. c. 29, provision has been made for the protection of wild birds, chiefly by prohibiting their sale during certain parts of the year; and these Acts apply to any sale or exposure for sale within the United Kingdom of birds purchased without the United Kingdom (*Whithead v. Smithers*, 2 C. P. Div. 558).

BIRTH. By the statute 6 & 7 Will. 4, c. 86, it is provided that the certified copies of entries, purporting to be sealed with the seal of the Registrar-General's office, shall be evidence of the birth [death, or marriage], to which the same relate, without any further or other proof of such entry. An affidavit of identity must, however, accompany the extract as proof of the birth [death, or marriage]. *Parkinson v. Francis*, 15 Sim. 160.

BIRTH, CONCEALMENT OF. The concealment of a birth is, under 24 & 25 Vict. c. 100, s. 60, a misdemeanour; and as such is punishable with imprisonment for any term not exceeding two years, with or without hard labour.

BISHOP. A dignitary of the church who has episcopal jurisdiction within his diocese, but which jurisdiction he commonly exercises through his chancellor or commissary. A bishop is a Peer of Parliament (See title PEERS, QUALITY OF SPIRITUAL). Successive attempts have been made in recent times to deprive bishops of their seats in the House of Lords, principally those of 1834, 1836, and 1837. In 1869, the Irish bishops lost their seats in Parliament. And in 1847, when the new bishopric of Manchester was created, it was provided (10 & 11 Vict. c. 108), that no increase in the spiritual peers should take place. The two Archbishops and the Bishops of London, Durham, and Winchester have always a right to sit in Parliament, but the bishop last elected to any other see (except that of Sodor and Man, whose bishop is in no case a lord spiritual of Parliament) cannot have a seat until the next vacancy. *Taswell-Langmead*, 668.

See titles ARCHBISHOP; ECCLESIASTICAL COURTS.

BISHOPS, CASE OF THE SEVEN. A celebrated trial in the reign of Jac. II. (1688) of Archbishop Sancroft and six bishops, which arose out of the accused petitioning the king against an order of his directing to be read in all the churches a certain declaration of indulgence—previously declared illegal in parliament. The action resulted in the acquittal of the bishops, and established the right of the subject to petition, and the right of the jury

BISHOPS, CASE OF THE SEVEN—continued.

to return a general verdict in actions of libel.

See titles PETITION, SUBJECT'S RIGHT TO; PRESS, LIBERTY OF.

BLASPHEMY. To revile at or to deny the truth of Christianity as by law established is a blasphemy, and as such is punishable by the common law. Under the stat. 9 & 10 Will. 3, c. 32, cited in the Stats. Rev. as 9 Will. 3, c. 35, any professed Christian who denies the Holy Trinity, or generally the Christian religion, may be indicted for the same, and upon conviction is liable to be deprived of office and incapacitated for holding future office; but the prosecution requires to be commenced within four days of the blasphemy spoken; and is to be desisted from, and all the penalties are to be removed, upon the defendant's renunciation of his heretical opinions.

BLENDED FUND. Is a fund consisting partly of the proceeds of real estate or of the sale thereof, and partly of the proceeds of the conversion of personal estate or of personal estate. The fund has usually to be resolved again into its component parts or proportions, in questions of conversion and in an action for administration in the Chancery Division, at least where there are charitable legacies to pay.

See titles CONVERSION; LEGACIES; TRUSTS, sub-title CHARITABLE TRUSTS.

BLOCKADE. A blockade in law must be an actual or effective blockade, and not a paper blockade merely; in other words, a port is blockaded when a squadron is in the vicinity of it for the purpose of preventing ingress into and egress from it, and not when it is merely declared to be under blockade. A violation of blockade requires three things—(1.) That the blockade be effective; (2.) That the accused had notice thereof; and (3.), That he made ingress or egress in disregard of the blockade.

BOARDING-HOUSE. The keeper of such a house is bound to take ordinary care of the goods of his guest therein, and will be liable for negligence occasioning loss (*Dancey v. Richardson*, 2 El. & Bl. 144); but his liability is not so extensive as that of an innkeeper (*Holden v. Soulby*, 8 W. R. 438). A contract for board and lodging is not a contract regarding land within the meaning of the Statute of Frauds (*Wright v. Stavart*, 8 W. R. 413).

BOARD OF HEALTH. Under the stats. 11 & 12 Vict. c. 63 (*Public Health Act*, 1848), 21 & 22 Vict. c. 98 (*Local Government Act*, 1858), and other Acts amending

BOARD OF HEALTH—*continued.*

same, local boards are constituted for the better securing the public health, and who for that purpose exercise certain powers as to sewers, drains, buildings, slaughter-houses, &c.

BOARD OF TRADE. One of the administrative departments of the Government, constituted by the Acts 22 Geo. 3, c. 82, and 24 & 25 Vict. cc. 45 & 47, and possessing under various statutes a very general jurisdiction and superintendence over railways, merchant shipping and seamen, harbours, fisheries, &c.

BOARD OF WORKS. The name of a board of officers appointed for the better local management of the metropolis, and constituted and authorized under the stat. 18 & 19 Vict. c. 120, and very numerous subsequent Acts. They have the care and management of all grounds and gardens dedicated to the use of the inhabitants in the metropolis; also, the superintendence of the drainage; also, the regulation of the street traffic, and generally of the buildings of the metropolis.

BOCKLAND (Sax. for bookland). An inheritance or possession held by the evidence of written instruments. It was one of the titles by which the Saxons held their lands, and, being always in writing, was hence called bookland, which signifies deed land or charter land. It was the same as *allodium*, being descendible according to the common course of nature and nations, and devisable by will. It was opposed to the common land called folcland.

BONÂ FIDE POSSESSIO.—In Roman Law, was that possession which was acquired *bonâ fide* by one claiming to be or to become the owner of the property. It was therefore always a *possessio civilis* as opposed to a *possessio naturalis*. Upon this *possessio* as its basis *usucapio* might be built up, and in that way when the *usucapio* was completed, the *bonâ fide possessio* became transmuted into *dominium*.

See titles DOMINIUM; USUCAPIO.

BONA FIDES. Is the opposite of *mala fides*, and denotes good faith as opposed to bad faith or fraud. It is one of the chief essentials in the case of every plaintiff coming to the equity jurisdiction.

See titles NOTICE; PURCHASERS FOR VALUE; TACKING; TRUSTS.

BONA NOTABILIA. Such goods amounting at the least to £5, as a party dying had in another diocese than that wherein he died; his will had to be proved before the archbishop of that province as well. If, however, a person happened to die in another diocese than that wherein he lived,

BONA NOTABILIA—*continued.*

while on a journey, what he had about him of the value of £5 was not *bona notabilia* (Book of Canons, 1 Jac. Can. 92, 93; Cunningham). But now, under the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 3-4, the distinction of goods as *bona notabilia* has been abolished (1 Wms. Exors. 279-280, 6th ed.).

BONA VACANTIA. Goods in which no one claims a property but the king; such as royal fish, shipwrecks, treasure trove, waifs, strays, &c. Where a person dies possessed of personal property, intestate, and leaving no next of kin, the Crown becomes entitled (upon office found) to all such property. This title of the Crown is in virtue of its prerogative, and in this respect differs from the title of the Crown to land by escheat. See *Middleton v. Spicer*, 1 Bro. C. C. 201; *Burgess v. Wheate*, 1 Eden, 177.

BOND. Is a contract by specialty to pay a certain sum of money. It is either *single*, i.e., simple, in which case the money is absolutely to be paid; or double, i.e., *conditional*, in which case the money is only conditionally payable, and ceases to be payable or becomes absolutely payable according to the event which is expressed in the condition. If the condition is entire and unlawful, the bond is void (*Collins v. Blanton*, 1 Sm. L. C. 325); but if the condition is severable, and part of it is good, the bond is valid to that extent (*Yale v. Rex* (in error), 6 Bro. C. P. 61). In the case of alternative conditions, if one becomes impossible, the other, as a general rule, becomes absolute (*Da Costa v. Davis*, 1 B. & P. 242). The chief varieties of bonds are the following:—Bonds of Indemnity, Post Obit Bonds, Voluntary Bonds, Administration Bonds, Bail Bonds, Bottomry Bonds, Debentures, Guaranties, Replevin Bonds, Bonds in Restraint of Trade, Resignation Bonds, and Lloyd's Bonds, all of which will be found explained under the appropriate titles.

See also title OBLIGATION.

BONI JUDICIS EST AMPLIARE JURISDICTIONEM. It is the part of a good judge to find grounds for assuming and extending his jurisdiction, so as to punish wrong.

BONORUM POSSESSIO.—In Roman Law, was that possession which the praetor conferred by virtue of his edict. It sometimes went along with the *Haereditas*, that is to say, in all those cases in which the praetor agreed with the civil law, and that either under a will or under an intestacy. At other times, it went to some person or persons different from the person or persons to whom the civil law carried the *Haereditas*,—the praetor (even contrary to

BONORUM POSSESSIO—*continued.*

the will) giving the *bonorum possessio* as nearly as might be to the persons who would have been entitled thereto if the deceased testator had died intestate, viz., (1.) to the *sui haeredes* (and those who were ranked with them by Praetorian equity or Imperial legislation); (2.) to the *agnati* (and those who were ranked with them by Imperial legislation); (3.) to the *cognati*. If the *bonorum possessor* could not be deprived by the owner at civil law (i.e., *Haeres*) he had the *bonorum possessio cum re*; but if he might be deprived, he had only the *bonorum possessio sine re*.

BONUS. Is a sum of money (in the nature of profit) accruing on, e.g., a policy of life assurance, and being usually in respect of some determinate period of years. Sometimes a bonus is added to and forms part of the principal trust fund; but where it would be dealt with as income, it is apportionable under the Apportionment Act, 1870 (33 & 34 Vict. c. 35), *Weekly Notes*, 1879, p. 144 (*Carr v. Griffith*).

See title APPORTIONMENT.

BOOK OF COMMON PRAYER. Contains the order of divine worship as settled by a committee of divines appointed for the purpose, and which (and no other) was directed to be used in all the churches (2 & 3 Edw. 6. c. 1). The Act of Uniformity, 1662 (13 & 14 Car. 2, c. 4) re-enacting the Uniformity Act (1 Eliz. c. 2) further secured the exclusive use of this book in the churches.

BOROUGH. See titles ELECTORAL FRANCHISE; REPRESENTATION IN PARLIAMENT.

BOROUGH ENGLISH. The custom which prevails in certain ancient boroughs and copyhold manors, of lands descending to the youngest son instead of to the eldest. The reason of this custom seems to be, that in these boroughs, people chiefly maintain and support themselves by trade and industry; and the elder children, being provided for out of their father's goods, and introduced into his trade in his lifetime, were able to subsist of themselves without any land provision, and therefore the land descended to the youngest son, he being in most danger of being left destitute. It is called borough English, because, as some hold, it first prevailed in England. Unlike Gavelkind, the mode of descent in borough English is confined to lineal descendants, and does not extend to collaterals.

See titles GAVELKIND; TENURES.

BOROUGH RATES. Are rates made and levied under the authority of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76),

BOROUGH RATES—*continued.*

for the purposes of the borough, such as the payment of constables, &c., officers of the borough, the construction and maintenance of the borough gaol and other buildings of the borough, and such like things, and when the borough has a recorder, the payment of the costs of prosecutions at the assizes.

See titles COUNTY RATES; CORPORATIONS, MUNICIPAL; RATING.

BORROWING POWERS. Public companies and joint stock companies may have powers to borrow money, the former class of companies under their special Act, the latter by special resolution (3 De Gex & Jo. 123). Under the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), being the general Act and which is usually incorporated with the special Act, the public company may borrow on mortgage or bond (i.e. on debentures) such sum or sums as may be sanctioned by a general meeting of the company, always keeping within the provisions of the special Act; and for securing the repayment of such borrowed moneys, the company may mortgage the undertaking of the company, and the future calls (s. 38); and the company may also re-borrow (s. 39). Under the Companies Clauses Act, 1863 (26 & 27 c. 118), the company may create debenture stock (s. 22); and to that extent it extinguishes its borrowing or re-borrowing powers (s. 34).

BOTTOMRY. Is in the nature of a mortgage of a ship, when the master takes up money upon it to enable him to carry on his voyage, and pledges the keel or bottom of the ship (*partem pro toto*), as a security for the repayment thereof. In which case it is understood, that if the ship be lost, the lender loses also his whole money; but if it return in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed what was once the legal rate of interest. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender; and in this case, the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for money lent. *Kay on Shipmasters and Seamen*, pp. 508-515.

See also titles CARGO; HYPOTHECATION; RESPONDENTIA.

BOUGHT AND SOLD NOTES. These are the notes which a broker of stock or goods sends respectively to the vendor and purchaser for whom he has been engaged in the particular sale. They furnish the

BOUGHT AND SOLD NOTES—contd.

evidence of the contract, and, if they agree, bind the principals, the broker having authority to sign for both (*Fisenden v. Levy*, 3 F. & F. 477). In case of a discrepancy in the terms of the two notes, there is a want of that *assensus ad idem* which is necessary to a binding contract.

See title **CONTRACTS**.

BOUNDARIES. The boundaries of boroughs are at present regulated by the stats. 2 & 3 Will. 4, c. 64, and 6 & 7 Will. 4, c. 103. Upon a question of boundaries, evidence of reputation, although in the nature of hearsay, is receivable, but not to prove the boundaries between two private estates.

See titles **FENCES AND DITCHES**:
HEARSAY EVIDENCE.

BOUNDARIES, CONFUSION OF. Where a tenant holds lands as a lessee or copyhold tenant and also lands of his own, either in feudal freehold tenure or in ancient freehold tenure, it is his duty to keep the boundaries between them distinguished during all the period of his holding; and if he fail in that duty, the landlord may even before the expiration of the term (*Spike v. Harding*, 7 Ch. Div. 871) and the lord of the copyholds may at any time commence an action against him for the ascertainment of the boundaries which have been confused (*Lord Abergavenny v. Thomas*, 3 Anst. 668, note (a); *Attorney-General v. Fullerton*, 2 Ves. & B. 263; *Scriv. on Copyholds*, 387-388).

BOUNDS, WORKING OUT OF. An action in the nature of an action of trespass lies by a mineral owner against an adjoining mineral owner for the latter's working beyond his own proper bounds; and the Court will also readily grant an inspection of these workings for the purpose of ascertaining the fact or the extent or both the fact and the extent of such workings; and the plaintiff will recover damages for the amount of mineral abstracted by the trespass. Such damages when the wrongful workings are dishonest, i.e., have been made with knowledge of the trespass, amount to the full value of the minerals abstracted without deducting the cost of working them (*Martin v. Porter*, 5 M. & W. 351); but when the trespass has resulted from a simple and *bonâ fide* mistake, the cost of working will be allowed (*Powell v. Aiken*, 4 Kay & John. 343); and where the mistake arises from a difficulty of title, the Court will allow (in addition) the cost of bringing the mineral to bank (*Ashton v. Stock*, 6 Ch. Div. 619). Every working out of bounds involves also a trespass to the neighbour's barriers, for which an injunction may be obtained.

See title **BARRIERS, TRESPASS TO**.

BOURSE DE COMMERCE. In French Law, is an aggregation sanctioned by Government of merchants, captains of vessels, exchange-agents, and officials, the two latter being nominated by the Government in each city which has a *bourse*.

BOVILL'S ACT. Is the statute 28 & 29 Vict. c. 86, whereby it was enacted that a person should not be liable as a partner merely from his or her participating in the partnership profits, in the four following cases, viz. :—

- (1.) A manager receiving his salary out of profits;
- (2.) A widow or child of any deceased partner receiving a share of profits by way of annuity in respect of her late husband's share in the partnership;
- (3.) A lender of money receiving (per agreement in writing) a share of profits in lieu of interest; and
- (4.) A vendor of goodwill receiving his purchase-money by instalments.

See title **PARTNERSHIP**.

BRAWLING. Under the 27 Geo. 3, c. 44, any suit for this offence was to be brought in the Ecclesiastical Court within eight months; but under the stat. 23 & 24 Vict. c. 32, the Ecclesiastical Courts were deprived of all their jurisdiction in the matter in the case of lay persons, and the justices of the peace were invested with authority to punish the offence as a misdemeanour.

BREACH OF CONTRACT. See title **CONTRACTS**.

BREACH OF COVENANT. See title **COVENANTS**.

BREACH OF PRIVILEGE. A breach of privilege is a contempt of the High Court of Parliament, whether relating to the House of Lords or to the House of Commons. Both branches of the Legislature act on the same grounds, both declare what are and what are not breaches of their privileges, when the question is raised, and both punish, by commitment or otherwise, as the Courts of Law and Equity do for contempt of Court. Resistance to the officers of the Houses of Parliament has, in almost all cases, been treated as a breach of the privileges of Parliament. The presence of strangers is a breach of privilege, though permitted on sufferance; and, formerly, to take a note of any of the proceedings was a high act of contempt, although now the representatives of the press are not only allowed to be present for that purpose, but have a gallery to themselves in each House, and every accommodation is afforded them.

See title **PRIVILEGE OF PARLIAMENT**.

BREACH OF PROMISE OF MARRIAGE.

Under the stat. 14 & 15 Vict. c. 99, rendering the parties to a civil action competent to give evidence, the parties to a breach of promise case were expressly left to remain incompetent; but under the stat. 32 & 33 Vict. c. 68, that incompetency has been removed, but corroborative evidence is required.

It is a defence to an action of this sort, that the defendant has since his promise discovered the plaintiff to be unchaste (*Irving v. Greenwood*, 1 C. & P. 350), or to have had a bastard by some one (*Young v. Murphy*, 3 Bing. N. C. 54), although ten or more years ago.

BREACH OF TRUST. Is any misappropriation of the trust-fund by a trustee, or any deviation from his duties whereby damage is sustained by the trust. For breach of an express trust, time is no bar to the action (36 & 37 Vict. c. 66); but for breach of a merely constructive trust, time is a bar (*Knox v. Gye*, L. R. 5 H. L. 656).

See title TRUSTS.

BREACHES. Respects or particulars in which any contract is broken are so called.

See title ASSIGNMENT OF BREACHES.

BRIBERY. The crime of offering any undue reward or remuneration to any public officer of the Crown, or other person entrusted with a public duty, with a view to influence his behaviour in the discharge of that duty. The taking such reward is as much bribery as the offering it. *Bribery* at elections vitiates the same (31 & 32 Vict. c. 125, Parliamentary Elections Act, 1868). The earliest extant instance of bribery at elections is in the year 1571, Borough of Westbury, *Long's Case*. The bribe was ordered to be refunded, and in addition a fine was imposed on the borough, but the member appears to have retained his seat. *Taswell-Langmead*, 455-6.

BROKERS. These are agents of various kinds, but principally agents on the Stock Exchange. By the stat. 6 Anne, c. 16, a broker on the Stock Exchange is required to be admitted by the Court of the Lord Mayor and Aldermen, and to pay 40s. yearly for the use of the City, under a penalty of £25, increased by the stat. 57 Geo. 3, c. lx. (local and personal) to £100. But under the stat. 33 & 34 Vict. c. 60 (London Brokers Relief Act, 1870), the jurisdiction of the Court of Aldermen over brokers has been made to cease, saving existing rights; and brokers guilty of a fraud are disqualified from acting as brokers. It is the duty of a broker of the City of London to charge his principal only with the cost price of articles pur-

BROKERS—continued.

chased by him, in addition to his commission (*Procter v. Brain*, 2 M. & P. 284). A broker (unlike a banker) is in a fiduciary relation to his customer (*Ex parte Cooke, in re Strachan*, 4 Ch. Div. 123).

See titles FACTOR; JOBBER.

BROTHEL. The statutes for the repression or regulation of houses of this character are 25 Geo. 2, c. 36, 28 Geo. 3, c. 19, and 58 Geo. 3, c. 70. Any inhabitant of the parish may give information thereof to the parish constable, and the overseers of the parish are to pay to the informant upon conviction a reward of £10.

BUGGERY: See title SODOMY.

BUILDER'S RENT. The rent (usually small) which is reserved in a building lease in consideration that the lessee shall erect houses on the land, is so called.

See title GROUND RENT.

BUILDING SOCIETIES. A benefit building society is constituted upon its adoption of the rules prescribed by the stats. 6 & 7 Will. 4, c. 32, and 12 & 13 Vict. c. 106, and which rules must be certified. It is within the jurisdiction of the Court of Chancery under the Companies Act, 1862, as to winding up (*In re Midland Counties Benefit Building Society*, 13 W. R. 399); but not within the provisions of the Acts regulating friendly societies or industrial and provident societies (25 & 26 Vict. c. 87). A building society may now obtain a certificate of incorporation under the Building Societies Act, 1874 (37 & 38 Vict. c. 42), and be thereafter regulated thereby; and all future building societies are now regulated by that Act.

BURDEN OF PROOF. This rests on the party who affirms,—*ei incumbit probatio qui dicit*; therefore, on the plaintiff in general, and only on the defendant so far as he alleges any new fact in his defence or other pleading.

See title ONUS PROBANDI.

BURGAGE TENURE. Tenure in burgage is described by Glanvil, and is expressly laid down by Littleton, to be but tenure in socage; and it is where the king or other person is lord of an ancient borough in which the tenements are held by a rent certain. It is, indeed, only a kind of town socage, by which other lands are holden, and is usually of a rural nature. A borough is usually distinguished from other towns by the right of sending members to Parliament; and where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. It is, therefore, a tenure proper

BURGAGE TENURE—*continued.*

to boroughs, whereby the inhabitants, by ancient custom, hold their lands or tenements of the king or other lord of the borough at a certain yearly rent. 3 Bl. 82.

See titles **FEUDAL SYSTEM**; **TENURE**.

BURGLARY. A criminal offence which consists in entering a dwelling-house with intent to commit any felony therein, or being in such dwelling-house committing any felony therein, and in either case breaking out of the same dwelling-house, in the night, *i.e.*, between the hours of 9 P.M. and 6 A.M. (24 & 25 Vict. c. 96, ss. 1, 51). The punishment is penal servitude for life, or for any term not less than five years, or imprisonment with or without hard labour, or with or without solitary confinement, for any term not exceeding two years.

BURIALS. Burial in the parish churchyard is a Common Law right inherent in the parishioners, only the mode of burial being of ecclesiastical cognisance; and under the stat. 4 Geo. 4, c. 52, the remains of persons against whom a finding of *felo de se* is had, are to be privately interred in the churchyard of the parish, but no Christian rites of burial are to be performed over them. All burials require to be registered, 27 & 28 Vict. c. 97, extending the Act 6 & 7 Will. 4, c. 86. Under the stat. 20 & 21 Vict. c. 81, provision is made for the constitution of a burial board in every parish; and where two parishes, each maintaining its own poor, are united together for ecclesiastical purposes, a burial board for the whole district appointed by the vote of the vestry, or meeting in the nature of a vestry, is properly constituted (18 & 19 Vict. c. 128); and the last-mentioned statute forbids burials in new burial grounds within 100 yards of any dwelling-house (*Lord Cowley v. Byas*, 5 Ch. Div. 944). No burial fee is due at Common Law, but it may be due by custom (*Andrews v. Cawthorn*, Willes, 536), or (as is the usual case) in virtue of particular statutes.

See titles **BIRTH**; **REGISTRATION OF BIRTHS**, &c.

BUSHELL'S CASE: See title **JURORS**, **IMMUNITY OF**.

BYE-LAWS. Private laws or statutes made for the government of any corporation, which are binding upon themselves, unless contrary to the laws of the land, in which latter case they are void. By the stat. 5 & 6 Will. 4, c. 76, s. 1, all laws, statutes, and usages inconsistent with that Act are thereby annulled and repealed in regard to municipal corporations.

See title **CORPORATIONS**, **MUNICIPAL**.

C.

CAB: See title **HACKNEY CARRIAGES**.

CABAL MINISTRY. The cabinet of 1671 was so called, the term in itself importing abuse of the ministry; the ministers were Clifford, Ashley, Buckingham, Arlington, and Lauderdale—it being observed that the initials of their names make up the word *CABAL*. The alleged fault of this cabinet was that it was uncontrolled by the Privy Council; the like fault would now be imputable to a cabinet not controlled by Parliament.

CABINET COUNCIL: See title **CABINET MINISTRY**.

CABINET MINISTRY. Owing to the alleged inconveniences of long debates in the Privy Council before great affairs were resolved upon, Charles II. formed a small select committee of that council for his guidance in such affairs; and this select committee is the modern Cabinet in its first distinctive phase, although in fact analogous committees had long previously existed for various purposes. (See title **PRIVY COUNCIL**.) The first cabinet was the Cabal Ministry. (See title **CABAL MINISTRY**.) In 1679, Temple carried out a scheme for the restoration of the Privy Council (reduced in numbers) to its former position of guide and controller of the king's executive; but the success of the scheme was very short-lived. Charles II. shortly afterwards resorted anew to a cabinet of ministers within the Privy Council; and cabinet government, at first distrusted, is now perceived to be more efficient than government through the Privy Council, and its constitutional propriety is kept in check (where necessary) by the control of Parliament. The modern cabinet is in fact a committee of Parliament itself, although the sovereign theoretically appoints it.

CADUCA. Are lapsed bequests and devises, either through the legatee or devisee refusing to take or dying in the lifetime of the testator, or through the legatee or devisee labouring under either a partial or a total incapacity under the *Leges Julia et Papia* to acquire the bequest or devise, lapses through such latter incapacity being more properly described as *in causâ caducorum*. Thus under the specified statutes, unmarried persons (of a marriageable age) could not acquire at all; and married persons who were childless (*orbi*) could acquire only one-half part. These lapses went by a kind of accrual to the other legatees and devisees enjoying full capacity.

See title **JUS ACCRESCENDI**.

CALLING THE PLAINTIFF. It was once usual for a plaintiff, when he or his counsel perceived that he had not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or to withdraw himself, whereupon the crier was ordered to call the plaintiff: and if neither he nor any body for him appeared, he was nonsuited, the jurors were discharged, the action was at an end, and the defendant recovered his costs. The phrase was synonymous with nonsuiting the plaintiff.

CALLS. Are the payments (or demands therefor) of the amounts unpaid on the shares of companies, or of any part or parts of such amounts. They are recoverable as a debt due from the shareholder or member of the company to the company, the Companies Act, 1862, s. 16, so enacting; but at Common Law there was a difficulty in recovering calls as debts, at least from transferees of the shares, by reason of the want of privity. Calls are specialties.

See titles CONTRIBUTORIES; JOINT STOCK COMPANIES; LIMITED LIABILITY.

CALVIN'S CASE. Is the case of *Calvin v. Smith* (7 Rep. 1) decided in 6 James I, and settling that persons born in Scotland after the accession of James I. to the throne of England are natural born subjects for all purposes of descent, inheritance, &c.

See title ALLEGIANCE.

CAMERÂ, HEARING IN: See title HEARING IN CAMERÂ.

CAMPBELL'S (LORD) ACT. Under this Act (9 & 10 Vict. c. 93), and the Act amending same (27 & 28 Vict. c. 95), provision is made for compensating the families of persons killed by accident. For the purposes of these Acts, the death must have resulted from the act, neglect, or default of the defendant or his servants, such act, neglect, or default being of a kind which, if death had not ensued, would at Common Law have entitled the injured person to recover damages in respect thereof. The action is for the benefit of the wife, husband, parent, or child of the deceased person, and may be instituted by his or her executor or administrator; but in case the executor or administrator does not, within six months of the death, institute the necessary action, then any of the persons beneficially interested, whether legally, or even morally only, in the result of the action, may institute the same. Under the 31 & 32 Vict. c. 119, s. 5, the Board of Trade may appoint an arbitrator in the matter. The damages recoverable are strictly com-

CAMPBELL'S (LORD) ACT—continued. pensatory, and nothing is recoverable as a solatium.

See title ACTIO PERSONALIS MORITUR CUM PERSONÂ.

CANALS. Are in general the property of companies, and the shares in them are pure personalty (*Edwards v. Hall*, 6 Do G. M. & G. 74). By the stat. 8 & 9 Vict. c. 42, canal companies were enabled to become carriers on their canals, or to lease the same, or to take leases of other canals; and by the subsequent Act, 17 & 18 Vict. c. 31, the traffic and tolls over canals were regulated. It seems that, subject to the payment of tolls and the rules as to traffic, the public have a right of using the canal (*Case v. Midland Ry. Co.* 5 Jur. (N.S.) 1017); and that a canal company cannot grant an exclusive right to let boats for hire over their water, so as to give the grantee a right to sue a third party for the infringement of his right (*Hill v. Tupper*, 9 Jur. (N.S.) 725).

See title CARRIERS.

CANCELLATION OF DEEDS, &c. This means the rescission of any contract or instrument, whether negotiable or not. There can be no cancellation of course without the intention of doing so (*De Bernardy v. Harding*, 8 Exch. 822). Bonds and deeds are cancelled by tearing off the seals; but this cancellation does not extend to divesting any estate or interest which has already vested under the deed (*Ward v. Lumley*, 29 L. J. (Ex) 322).

CANCELLATION IN EQUITY. Where an instrument has been obtained through fraud (either actual or constructive), the High Court of Justice, Chancery Division, will decree it to be set aside and cancelled, —in all cases where the fraud does not appear on the face of the instrument, and, *semble*, even where it does so appear (Snell's Principles of Equity, 5th ed., 611-616).

See titles FRAUD; VOID OR VOIDABLE.

CANCELLATION OF WILL: See title WILLS.

CANON LAW. Is a body of Roman Ecclesiastical Law compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the Holy See. It was first digested in 1151 by Gratian into the *Decretum Gratiani*, or *Concordia Discordantium Canonum*; subsequently added to and continued by, or at the request of, Gregory IX. in 1230, in the *Decretalia Gregorii Noni*; subsequently still further added to by Boniface VIII., in 1298, in the *Sextus Decretalium*; afterwards by

CANON LAW—continued.

Clement V., in 1317, in the *Clementine Constitutions*; and completed by John XXII. in the *Extravagantes*, i.e., Riders. In addition to the Canon Law properly so called, there exists also a large compilation of Legatine and Provincial Constitutions, which are roughly considered as forming part of the Canon Law.

Upon the Reformation of Religion in England in the reign of Henry VIII., the authority of the Pope having been destroyed, all those canons which derived their force from that authority, of necessity ceased to have any force or efficacy; but by the stat. 25 Henry 8, c. 19, which was afterwards confirmed by the stat. 1 Eliz. c. 1, such of the then existing canons as were not repugnant to law or morality, or to the king's prerogative, were to continue in force until new canons were devised; and in effect no new canons (in lieu of these old canons) have ever been made.

Upon the construction of this statute it was decided in *Cawdry's Case* (5 Rep. 1, 33 Eliz.), that not only the clergy but also the laity were bound by the then existing canons; and in *Middleton v. Croft* (2 Atk. 669), that the Canons of 1603 (and generally all canons subsequently made), never having been confirmed in Parliament, do not *proprio vigore* bind the laity, but the clergy only. (See also *Exeter, Bp. v. Marshall*, L. R. 3 H. L. 17.)

The accepted English version of the Canon Law is Lyndwode's Domestic Ecclesiastical Law (*Martin v. Mackonochie*, L. R. 2 Adm. & Eccl. 116, 153; Brice's Public Worship).

CANONS OF DESCENT: See title DESCENTS.

CAPACITY, LEGAL. Idiots and lunatics, even although not so found, are wholly devoid of legal capacity, and their contracts are therefore void and not voidable merely. A person labouring under one or more delusions is not, however, a lunatic under this rule, and may be able to make a will. An infant's contracts prior to the Infants' Relief Act, 1874, were usually voidable only, but are now void, if for non-necessaries, and this is so, *semble*, without reference to the infant's benefit; *secus*, as regards leaseholds or shares coming to the infant and carrying liability with them, as to which the infant may elect when he is of age. Under seven years of age, an infant is wholly without criminal capacity; between seven and fourteen years of age, his criminal capacity may be proved according to the maxim, *malitia supplet aetatem*, excepting when the alleged offence is rape. A married woman (excepting as regards

CAPACITY, LEGAL—continued.

her separate estate) has no contractual capacity, excepting as agent for her husband, or generally as an agent.

CAPIAS AD AUDIENDUM JUDICIUM.

In case a defendant be found guilty of a misdemeanor (the trial of which may happen in his absence), a writ so called (if necessary) is awarded and issued to bring him up to receive judgment.

CAPIAS AD SATISFACIENDUM.

A writ of execution (commonly called a *Ca. Sa.*) which a plaintiff takes out after having recovered judgment against the defendant; it is directed to the sheriff, and commands him to take the defendant and safely keep him, in order that he may have his body at Westminster on a day mentioned in the writ to make the plaintiff satisfaction for his demand. The writ is now issuable in a very limited class of cases, viz., where imprisonment for debt or final judgment is still permitted. This writ is to be distinguished from the writ of *Attachment*.

See titles ATTACHMENT; IMPRISONMENT FOR DEBT.

CAPIAS IN WITHERNAM.

A writ which lay where a distress taken was driven out of the county, so that the sheriff could not make deliverance in replevin, commanding the sheriff to take as many beasts of the distrainer, &c.

See titles ELOIGNMENT; REPLEVIN; RETORNO HABENDO, WRIT OF.

CAPIAS UTLAGATUM: See title OUTLAWRY.

CAPIAS, WRIT OF. Under the stat. 1 & 2 Vict. c. 110, the writ of *capias* might have issued after commencement of an action (although not as a means of commencing it), by leave of the judge, in cases where the cause of action amounted to £20, and the defendant was threatening to quit England; and under the Debtors Act, 1869, the £20 has been raised to £50.

See titles ABSCONDING DEBTOR; ARREST; EXECUTION.

CAPITA, DISTRIBUTION PER. In the distribution of the personal estate of a person dying intestate, the claimants, or the persons who, by law, are entitled to such personal estate, are said to take *per capita* when they claim in their own rights as in equal degree of kindred, in contradistinction to claiming by right of representation, or *per stirpes*, as it is termed. As if the next of kin be the intestate's three brothers, A., B., and C., here his effects are divided into three equal portions and distributed *per capita*, one to each; but if A. (one of these brothers) had been dead and had left three children, and B. (another of these

CAPITA, DISTRIBUTION PER—contd.

brothers) had been dead and had left two; then the distribution would have been by representation, or *per stirpes*, as it is termed, and one-third of the property would have gone to A.'s three children, another third to B.'s two children, and the remaining third to C., the surviving brother.

See title *STIRPES*.

CAPITA TRIA: See title *CAPITIS DEMINUTIO*.

CAPITAL. The punishment of death is frequently termed capital punishment; and those offences are called capital offences for which death is the penalty allotted by law. The use of the term may probably have arisen from the decapitation, which in former times was a common mode of executing the sentence of death, and which is prescribed in some of the statutes against traitors even now remaining in force. The extreme sentence of the law, however, has for many years been carried into effect against all offenders by hanging them by the neck. The offences which are still capital offences have, by the humane spirit of modern legislation, been recently much diminished, and latterly only included high treason, murder, rape, and unnatural offences, setting fire to any king's ship or stores, the causing injury to life with intent to commit murder, burglary accompanied with an attempt at murder, robbery accompanied with stabbing or wounding, setting fire to a dwelling-house any person being therein, setting fire to or otherwise destroying ships with intent to murder any person, exhibiting false lights with intent to bring ships into danger, piracy accompanied by stabbing, and riotous destruction of buildings. But at the present day, the only capital offences punishable with death are treason and murder, all other offences formerly capital being now punishable with penal servitude for life or years, or some term of imprisonment.

CAPITAL OR INCOME. Where residuary estate is given to one for life with remainder to another or others, it becomes necessary to ascertain what is income, and what is *corpus* or capital. And again, sometimes an annuity is payable out of income, and sometimes it is payable out of *corpus* or capital. And again income is to be apportioned, but capital of course is not. These and other similar reasons oblige the Court to distinguish carefully between what is capital and what is income, in actions for the administration of estates and in actions for the execution of the trusts of a deed. The distinction is one which depends upon circumstances and common sense in all cases; and the Courts

CAPITAL OR INCOME—continued.

have accordingly held, that where the testator has intended the tenant for life to have the actual income until conversion of his estate, then he takes the whole of such income as income properly so called; also, that in the absence of such expressed intention, the tenant for life is not entitled to the actual income (arising from investments other than those authorized by the will), but only as from the testator's death to such income as would have arisen on £3 per cent. Consolidated Bank Annuities purchased with the capital as estimated at one year after the testator's death; or, in the case of capital coming in by instalments and bearing 5 per cent. interest, then to 4 per cent. interest from the death of the testator on the value as taken one year after his death; also, that where there is a direction to accumulate the actual income during such year, the tenant for life takes no part of such income, but the accumulations constitute capital (Lewin on Trusts, 5th ed. pp. 246-249).

CAPITIS DEMINUTIO. In Roman Law there were three *capita* (called the *Tria Capita*), viz., *libertas*, *civitas*, and *familia*, these three constituting full civil capacity. In case a Roman lost his *familia* (e.g., upon acquiring another) he suffered a *minima capitis deminutio*: in case he lost his *civitas* (e.g., upon a *relegatio*) he suffered a *minor* or *media capitis deminutio*; in case he lost his *libertas* (and with it of course his *civitas* and *familia* also), he suffered a *maxima capitis deminutio* (e.g., upon being made a slave either by the *civil law* or by the *jus gentium*).

CAPTION. This word has several significations. When used with reference to an indictment, it signifies the style or preamble or commencement of the indictment; when used with reference to a commission, it signifies the certificate to which the commissioners' names are subscribed, declaring when and where it was executed. The act of arresting a man is also termed a caption.

CAPUT AND STATUS. In Roman Law *caput* was more eminent than *status*, there being only three *capita* (called the *Tria Capita*), viz., *civitas*, *libertas*, and *familia*, whereas the varieties of *status* were infinite, according to the different circumstances in which people might find themselves. Usually also the possession of the *tria capita* was a preliminary and condition precedent to the possession of *status*; but, this was not an invariable (although a general) rule; because we find that a slave had *status* for some purposes at all events, i.e., as being liable to legal duties (and so

CAPUT AND STATUS—continued.

amenable to the criminal law), and also as enjoying certain civil rights, *e.g.*, a right to protection, &c.

See title STATUS.

CAPUT BARONIE. The castle or chief seat of a nobleman, which, if there be no son, must not be divided amongst the daughters as in the case of lands, but descends to the eldest daughter. Cowel.

CARE AND DILIGENCE. The amount of care and diligence required in law of persons in different legal relations varies from the lowest to the highest degree; and the liability of such persons for damages arising from their negligence is inversely proportionate to the degree of care and diligence that is legally required of them. Trustees are required to discharge their duties with the extremest diligence, so much so that nothing but strict compliance therewith will protect them; and they are required to exercise such matters as are left to their discretion with as much care and diligence as they apply in their own businesses. But with the exception of trustees, voluntary and gratuitous agents are required to shew a less degree of diligence, the depositary least of all; and, on the other hand, paid agents are required to shew the utmost diligence, and persons incidentally interested (like pledgees) a medium degree of diligence.

CARGO. Goods shipped for carriage. The master of the vessel is the agent of the shipowner for the purpose of conveying the cargo safely to its port of destination, and so earning freight; but he is the agent of the owner of the cargo, where the latter cannot practically be communicated with, for the purpose of taking care of goods, checking their deterioration, and generally doing (under circumstances of danger to the goods) whatever their owner would prudently do (Kay's Shipmasters, 256-267). He may, as agent of the owner of the cargo, hypothecate same, as a means of preserving the cargo and furthering it to its port of destination; and he may, as agent of the shipowner, do the like whenever he would be authorized to hypothecate the ship (See titles BOTTOMRY; RESPONDENTIA; HYPOTHECATION), but in the latter case the cargo is only an indemnity, and the ship and freight, as being the primary liability, are compellable to reimburse the cargo any damages sustained by its owner from the hypothecation (Kay's Shipmasters, 561, 562). Upon arrival of the goods at their port of destination, the carrier or master delivers same to the consignee or to his order, being first paid freight, and not having sooner received notice of stoppage *in transitu*; in case the

CARGO—continued.

master has received such last-mentioned notice, his duty is to refuse delivery to any one but the consignor, the latter paying freight. Both the consignor and the master are (severally) liable for a wrongful stoppage *in transitu*; hence the master should in a proper case interplead.

See title INTERPLEADER.

CARGO, ABANDONMENT OF: See title ABANDONMENT OF CARGO.

CARNALLY KNOWING: See titles ABDUCTION; BUGGERY; RAPE; SODOMY.

CARRIER. A common carrier is one who undertakes to transport from place to place for hire the goods of such persons as think fit to employ him (*Palmer v. Grand Junction Ry. Co.*, 4 M. & W. 749). Such is a proprietor of waggons, barges, lighters, merchant ships, or other instruments for the public conveyance of goods (1 Smith's L. C. in notes to *Coggs v. Bernard*, 101). A person who conveys passengers only is not a common carrier (*Aston v. Beaven*, 2 Esp. 533; *Christie v. Griggs*, 2 Camp. 79). The liability of carriers is limited by 11 Geo. 4 & 1 Will. 4, c. 68, to 10*l.*, provided they have put up notices as required by the Act, and such notices have come to the knowledge of their customer (*Kerr v. Willan*, 6 M. & S. 150). Railway and canal companies are common carriers, but their contracts of carriage are required by statute to contain no conditions but what are reasonable (17 & 18 Vict. c. 31). Excepting as otherwise expressed in the special contract, or as protected by statute, a carrier is liable as an insurer of the goods carried, *i.e.*, for their absolute safe delivery.

See also title BAILMENT.

CARRYING COSTS. A verdict is said to carry costs when the party for whom the verdict is given becomes entitled to the payment of his costs as incident to such verdict. Where the damages given by a verdict were under forty shillings, the party obtaining such verdict was usually not entitled to his costs, and such a verdict was therefore said not to carry costs; but the judge might certify for costs. And now under the Judicature Acts, 1873-75, every verdict carries costs, unless the judge certifies refusing the successful party his costs; and this rule holds good even when only farthing damages are recovered in an action for libel or slander (*Garnett v. Bradley*, 3 App. Cas. 944).

CARTA DE FORESTA. A charter of the forest (confirmed in Parliament, Hen. 3), by which many forests unlawfully made, or at least precincts added by unlawful encroachments, were disafforested. 3 Hallam's Mid. Ag. 222; Reeves, 254.

CA. SA.: See title **CAPIAS AD SATISFACIENDUM**.

CASE. Is the name of an action, which used to lie failing any other more appropriate form of action. Thus, for assaults or trespasses to the person, case would always lie when trespass would not; and again for injuries to the reputation, case was the proper remedy. Similarly, for injuries to property,—(1.) If the property was *real*, and neither ejectment nor trespass *quare clausum fregit* would lie, case lay; and (2.) If the property was personal, and neither trover nor trespass *de bonis asportatis* would lie, case lay. And under the new practice, case is in fact the universal remedy, all particular species and forms of action being now abolished, at least in theory. An action in which points of law are involved and there is little or no dispute as to the facts, frequently resolves itself into a special case, either by agreement of the parties or by compulsory order of the Court.

See titles **SPECIAL CASE**; **TRESPASS**; **TRESPASS ON THE CASE**; **TROVER**.

CASE OF COMMENDAMS: See title **COMMENDAM**.

CASE OF IMPOSITIONS: See title **BATES'S CASE**.

CASE, SPECIAL: See title **SPECIAL CASE**.

CASH NOTE. Is simply a bank note of a provincial bank or of the Bank of England. It is considered as cash for all purposes, a Bank of England note being, since 3 & 4 Wm. 4, c. 98, s. 6, a legal tender even for all sums above 5*l.*, excepting of course at the Bank of England itself or its branch banks.

CASSETUR BREVE. A judgment was so termed which commanded the plaintiff's writ to be quashed. An entry of a *cassetur breve* was usually made by the plaintiff in an action after the defendant had pleaded a plea in abatement which the plaintiff was unable to answer, and therefore wished his informal writ to be quashed in order that he might sue out a better. (See *Tidd's Forms*; 3 Chit. Plead. 1063, 6th ed.) This heroic remedy need not now be resorted to, because pleadings in abatement are abolished, and the defect would now be cured (if curable) upon a summons at chambers to amend.

CASU CONSIMILI. A writ of entry granted where a tenant by the curtesy or tenant for life aliened in fee or in tail, or for another's life. It was brought by the person entitled to the reversion against the party to whom such tenant had so aliened to his prejudice. It derived its name from the circumstance of the clerks in Chancery

CASU CONSIMILI—continued.

having by common consent framed it after the likeness of a writ termed *casu proviso*, in pursuance of the authority given them by the stat. 13 Edw. 1, and which also empowered them generally to frame new forms of writs (as much like the former as possible) whenever any new case arose resembling a previous one, yet not adapted to any of the writs then in existence. *Les Termes de la Ley*.

CASUAL EJECTOR. The nominal defendant, Richard Roe, in an action of ejectment was so called, because by a legal fiction he was supposed casually, or by accident, to come upon the land or premises and turn out the lawful possessors.

See title **EJECTMENT**.

CASUAL EVIDENCE is a phrase used to denote (in contradistinction to *pre-appointed evidence*) all such evidence as happens to be adduceable of a fact or event, but which was not prescribed by statute, or otherwise arranged beforehand to be the evidence of the fact or event.

See title **PRE-APPOINTED EVIDENCE**.

CATONIANA REGULA, in Roman Law, was the rule which is commonly expressed in the maxim, *Quod ab initio non valet tractu temporis non convalebit*, meaning that what is at the beginning void by reason of some technical (or other) legal defect will not become valid merely by length of time. The rule applied to the institution of *Haeredes*, the bequest of legacies, and such like. The rule is not without its application also in English law; e.g., a married woman's will (being void when made) is not made valid merely because she lives to become a widow.

CATTLE. Selling diseased cattle is a misdemeanour, if they are intended to be used for meat; and selling diseased cattle to a cattle-rearer, with knowledge of the contagious character of the disease is a tort, for which the purchaser may recover full damages from the vendor (*Mullet v. Mason*, L. R. 1 C. P. 559). There are also the following Acts regulating the treatment of cattle afflicted with contagious diseases:—29 & 30 Vict. cc. 2, 5, 15; 30 & 31 Vict. cc. 35, 125; 32 & 33 Vict. c. 70.

CAUSÂ, EVIDENCE IN. Means evidence that is relevant and pertinent to the issue,—not collateral, irrelevant or, *extra causam*.

CAUSAM, EVIDENCE EXTRA: See title **CAUSÂ, EVIDENCE IN**.

CAUTIO. Was a stipulatio entered into by way of bond or security (*satisfactio*),

CAUTIO—continued.

against some possible loss, or some possible failure of the party.

See title SATISDATIO.

CAUTIONE ADMITTENDÂ. A writ which lay against a bishop for holding an excommunicated person in prison for his contempt, notwithstanding his having offered sufficient pledges to obey the orders of the church for the future. Cowel.

CAUTIONNEMENT. In French Law is the becoming *surety* in English Law.

See title SURETYSHIP.

CAVEAT. A process formerly used in the Spiritual Court and now used in the Court of Probate, to prevent or stay the proving of a will, or the granting of administration. When a caveat is entered against proving a will, or granting administration, a suit usually follows to determine either the validity of the testament, or who has a right to administer. A *caveat* might also be lodged in the Court of Chancery against inrolling a decree which it was intended to appeal to the Lords Justices, inasmuch as after inrolment the only appeal was to the House of Lords; but since the Judicature Act, 1873, this inrolment is now a useless formality (*Hastie v. Hastie*, 2 Ch. Div. 304).

CAVEAT EMPTOR (*let the buyer beware*). A maxim of law applicable to the sale of goods and chattels, under or according to which a vendor is not bound to answer for the goodness of the wares he sells, unless he expressly warrants them to be sound and good, or unless he knows them to be otherwise, and uses any art to disguise them; and this is so, although the price is such as is usually given for a sound commodity. Every affirmation, however, at the time of sale, is a *warranty*, if it appears to have been so intended.

CEMETERIES: See title BURIALS.

CENTRAL CRIMINAL COURT. This Court was constituted by the Acts 4 & 5 Will. 4, c. 36, and 19 & 20 Vict. c. 16, for the trial of offences committed in the Metropolis and certain parts of Essex, Kent, and Sussex adjoining thereto, and of such other offences as the Court of Queen's Bench in term, or a judge thereof in vacation, might direct to be removed thither, although committed out of the proper jurisdiction of the Court. And under the Winter Assizes Act (1876), Her Majesty may by Order in Council extend the jurisdiction of the Court at any session of the Court in November, December, or January, to any neighbouring county or part of a county not included in the proper district of the Court.

CENTRAL OFFICE (SUPREME COURT).

Under the Supreme Court of Judicature (Officers) Act, 1879 (42 & 43 Vict. c. 78), a central office has been established in and with which are amalgamated the following offices, together with their respective businesses, viz.:—

- (1.) The Record and Writ Clerks Office;
- (2.) The Enrolment Office;
- (3.) The Report Office;
- (4.) The Offices of the Masters of the Queen's Bench, Common Pleas, and Exchequer Divisions;
- (5.) The Offices of the Associates in the same three Divisions;
- (6.) The Crown Office of the Queen's Bench Division;
- (7.) The Queen's Remembrancer's Office;
- (8.) The Office of the Registrar of Certificates of Acknowledgements of Deeds by Married Women;
- (9.) The Office of the Registrar of Judgments; &c.

And the central office is put under the control and superintendence of certain officers called Masters of the Supreme Court of Judicature, the first Masters being the existing Masters of the three Common Law Divisions, the existing Queen's Coroner and Attorney, the existing Master of the Crown Office, the existing Record and Writ Clerks, and the existing Associates in the three Common Law Divisions.

CEORL. A poor freeholder or freeman in Anglo-Saxon times; he might become a *theyn*, and therefore practically an *eorl*, by possessing six hides of land (600 acres) with a church and mansion of his own.

See title CHURLE.

CEPI CORPUS. When a writ of *capias* is directed to the sheriff to execute it, he is commanded to return it within a certain time, together with the manner in which he has executed it. If the sheriff has taken the defendant, and has him in custody, he returns the writ, together with an indorsement on the back stating that he has taken him, which is technically called a return of *Cepi Corpus*.

CERTAINTY IN PLEADING. The word is used in pleading in the two different senses of distinctness and particularity. When, in pleading, it is said that the issue must be certain, it means that it must be particular or specific, as opposed to undue generality. Steph. Pl. 143, 4th ed. See also *Rez v. Horne*, Cowp. 682.

CERTIFICATE FOR COSTS: See title CARRYING COSTS.

CERTIFICATE OF DISCHARGE. In liquidation, corresponds with the order of

CERTIFICATE OF DISCHARGE—contd.

discharge in bankruptcy. The certificate is based upon a special resolution of the creditors of the liquidating debtor granting him his discharge; but the certificate itself is given by the Registrar of the Court of Bankruptcy.

CERTIFICATE OF SHARES: See title SHARE-CERTIFICATES.

CERTIFICATE, TRIAL BY. This is a mode of trial now little in use; it is resorted to in cases where the fact in issue lies out of the cognizance of the Court, and the judges, in order to determine the question, are obliged to rely upon the solemn averment or information of persons in such a station as affords them the clearest and most competent knowledge of the truth. Thus, when a custom of the City of London is in issue, it is tried by the certificate of the mayor and aldermen certified by the mouth of their recorder. So, in the action of dower, when the tenant pleaded in bar that the demandant was never *accoupled* to her alleged husband in *lawful matrimony*, and issue was joined upon that, the Court used to award that it should be tried by the diocesan of the place where the parish church in which the marriage was alleged to have been had was situated, and that the result should be certified to them by the ordinary at a given day; but probably an issue would now be directed merely, and tried by a jury in the ordinary way.

CERTIORARI. An original writ, issuing sometimes out of the Court of King's Bench, and sometimes out of Chancery. It is usually resorted to shortly before the trial, to certify and remove any matter or cause, with all the proceedings thereon, from some inferior Court into the Court of King's Bench, when it is surmised that a partial or insufficient trial will probably be had in the Court below (4 Vin. Abr. 329). It lies either for the verification of errors, or for the removal of plaintiffs in replevin, or (most generally) for the removal of criminal proceedings.

CERTUM EST QUOD CERTUM REDDI POTEST. That is deemed certain in law and therefore valid, which is capable of being made certain, *i.e.*, ascertained.

See titles CERTAINTY IN PLEADING; TRUSTS, sub-title THE THREE CERTAINTIES.

CESSAT EXECUTIO. The suspending or stopping of execution. If in an action of trespass against two persons, judgment was given against one, and the plaintiff took out execution against him, the writ would abate as to the other, because there

CESSAT EXECUTIO—continued.

must have been *cessat executio* until it was tried against the other defendant; but that is not now the case (Order XIII., 4; XXIX., 3; XIV., 5); however, the execution against one defendant might in a proper case be stayed until the action was fully tried (Order XIV., 4).

CESSANTE RATIONE LEGIS, CESSAT ET IPSA LEX. Is a maxim of law which says, that when the reason of a law ceases to exist, the law itself also ceases. It is a good principle; but it is not altogether without exceptions. Arguments constructed upon the analogy of the principle carry great force.

CESSAVIT. A writ that formerly lay in various cases. It was generally sued out against a person for having neglected for two years to perform such service, or to pay such rent, as he was bound to by his tenure, and at the same time had not upon his premises sufficient goods or cattle to be distrained (Cowel). It also lay where a religious house had lands given to it on condition of performing some certain spiritual service, as reading prayers, giving alms, and which service it had neglected; and in either of the above cases if the *cesser* or neglect had continued for two years, the lord or donor and his heirs had a writ of *cessavit* to recover the land itself, *eo quod tenens in faciendis servitiis per biennium jam cessavit*. Somewhat similar to the effect of this writ is the provision in the modern Acts regulating gifts of lands for popular education and amusement, that when the same lands cease to be so used they shall revert to the donor; in order to decide the fact of the *cesser* of their appointed use, a writ of summons in *cessavit*, or something analogous thereto, would, probably, have to issue.

CESSER OF ANNUITY. An annuity will cease upon any event limited for its duration; *e.g.*, upon the marriage of one entitled to £50 per annum until she marries; similarly under a proviso for *cesser* upon bankruptcy (*In re Throckmorton*, 7 Ch. Div. 145).

See titles ANNUITY; LEGACIES.

CESSER OF TERM. Long terms of years (*e.g.*, for 200, 500, or even 1000 years) are frequently created in wills and settlements, and less frequently in mortgage deeds, for the purpose of securing the money thereby made payable to the persons and at the times therein expressed. Usually the instrument itself contains an express proviso, that the term shall cease when the money is fully raised and paid; and under the Satisfied Terms Act, 1845

CESSER OF TERM—*continued.*

(8 & 9 Vict. c. 112), there is an implied cesser of the term.

See titles **ATTENDANT TERMS**; **SATISFIED TERMS**; **TERMS OF YEARS, OUTSTANDING.**

CESSIO BONORUM: *See* title **CESSION DES BIENS.**

CESSIO, IN JURE: *See* title **IN JURE CESSIO.**

CESSION. Ceding or yielding up. (1.) By stat. 21 Hen. 8, c. 73, if any one having a benefice of £8 per annum or upwards, according to the then present valuation in the king's books, accept any other, the first shall be adjudged void unless he obtains a dispensation, which no one is entitled to have but the chaplains of the king and others therein mentioned, the brethren and sons of lords and knights, the doctors and bachelors of divinity and law admitted by the universities of this realm; and a vacancy thus made, for want of a dispensation, is called a *cession*. (2.) Territory is sometimes acquired by cession, as distinguished from conquest and occupation; and when so acquired, it is customary by some public instrument to define the new allegiance and also the laws under which the territory is henceforward to be governed. The old laws remain until altered by the new sovereign authority.

CESSION DES BIENS. This in French Law is the surrender which a debtor makes of all his goods to his creditors, when he finds himself in insolvent circumstances. It is of two kinds, either voluntary or compulsory (*judiciaire*) corresponding very nearly to liquidation by arrangement and bankruptcy in English Law, and to *Cessio Bonorum* in Scotch Law.

CESTUI QUE TRUST. He for whose use or benefit another is invested or seised of lands or tenements; or in other words, he who is the real, substantial, and beneficial owner of lands which are held in trust.

See title **TRUSTS.**

CESTUI QUE USE. He for whose use lands or tenements are held by another.

See title **USES.**

CESTUI QUE VIE. He for whose life lands or tenements are granted. Thus, if A. grants lands to B., during the life of C., here C. is termed the *cestui que vie*.

CHAIRMAN OF COMMITTEES OF THE WHOLE HOUSE. At the commencement of every new Parliament, each of the two Houses respectively selects from its own body a member to preside over its proceedings whilst the House is in committee. The officer so appointed is called "The

CHAIRMAN OF COMMITTEES OF THE WHOLE HOUSE—*continued.*

Chairman of Committees of the whole House," and exercises the same authority in a committee of the whole House as does the Speaker on ordinary occasions. May's Parl. Pr.

CHALLENGE OF JURORS. There are two kinds of challenge of jurors—either (1) to the *array*, by which is meant the whole jury as it stands arraigned in the panel; or (2) to the *polls*, by which is meant one or more of the several particular persons or heads in the array. A challenge to the array is at once an exception to the whole panel in which the jury are arrayed; and it may be made upon account of partiality, or some default in the sheriff or his under-officer, who arrayed the panel; as where the panel was arrayed at the nomination or under the direction of either the plaintiff or defendant in the cause, &c., this would be a good ground for a challenge to the array. Challenges to the polls are exceptions to particular jurors; and seem to answer to the *recusatio judicis* in the Civil and Canon Laws. Challenges to the polls of the jury (who are judges of fact) are by Sir Edward Coke reduced to four heads, viz., *propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum*.

CHALLENGE TO FIGHT. Is an indictable offence, punishable with fine or imprisonment, or both. It has been decided that no words of provocation, however aggravating, can justify it (*R. v. Rice*, 3 East, 581).

CHALLENGE TO THE ARRAY.

CHALLENGE TO THE POLLS.

See title **CHALLENGE OF JURORS.**

CHAMBERS. Both in the Common Law and in the Chancery Division a very large amount of business is transacted in chambers by the judges, and their subordinate officers, whether masters (as they are called at Common Law), or chief clerks (as they are called in Chancery). The jurisdiction at chambers is defined by the Judicature Acts, 1873-5, and the orders and rules thereunder, and may be expressed as follows:—

Any judge of the High Court may (subject to any rules of Court) exercise in chambers all or any part of the jurisdiction by the Judicature Act, vested in the High Court in respect of all such causes and matters, and in respect of all such proceedings in any causes and matters, as before the Judicature Act he might have heard in chambers, or as he is or may be directed or authorized by any rules of

CHAMBERS—continued.

Court to hear in chambers (Act, 1873, s. 39).

Under this general heading would fall the following applications:—

(1.) Generally all matters which (without detriment to the public advantage) can be heard in chambers (Master in Chancery Abolition Act, 1852, s. 11; and Despatch of Business Act, 1867); and as (in Chancery) there is no distinction between the judge and his chief clerk like to that which exists (at Common Law) between the judge and a master, but every applicant in chambers has a right to see the judge himself upon no matter how trivial or how important an occasion, it is unnecessary to distinguish in the Chancery Division between matters to be transacted at chambers before a chief clerk and those to be transacted there before the judge; but, on the contrary, every proceeding in chambers may, in the first instance, be taken before the chief clerk, and thereupon, either immediately or ultimately (if necessary), be referred to the judge.

(2.) Particularly the following applications:—

- (a.) For extensions of time to plead, or to do any other act for which time is extendible;
- (b.) For leave to amend the writ or pleadings;
- (c.) For orders for production and inspection of documents, and for inspection of property;
- (d.) For appointment of guardians *ad litem* in the case of infants and lunatics not so found being defendants;
- (e.) For leave to issue and to serve writ of summons out of jurisdiction;
- (f.) For order to take ordinary account (xv., 2), where writ is expressly indorsed (under III., 8) with claim for account;
- (g.) For final judgment where writ is specially indorsed with particulars of debt or liquidated demand.

But, in the Common Law Divisions, there exists a real distinction between the master and the judge at chambers, and an appeal properly so called lies (within four days) from the master to the judge, besides an immediate or ultimate reference; and under the Judicature Acts, 1873-5, it is provided that the master shall not have

CHAMBERS—continued.

jurisdiction in the following particular matters, that is to say,—

- (1.) Matters relating to criminal proceedings or to the liberty of the subject;
- (2.) Removal of actions from one division or judge to another division or judge;
- (3.) The settlement of issues;
- (4.) Discovery by way of inspection of property (LIV., 2, and 2a of November, 1878);
- (5.) Appeals from district registrars;
- (6.) Interpleader, where judgment is to be final and summary by consent, or where the matter being of less value than £50 the judgment is to be final and summary at the request of one of the parties (LIV., and 2nd of November, 1878);
- (7.) Prohibitions;
- (8.) Injunctions and other like interim orders;
- (9.) Awarding of costs;
- (10.) Reviewing taxation of costs; and
- (11.) Acknowledgments of married women.

Nota Bene.—By consent of the parties, the master may settle issues (LIV., 2), and may also grant discovery by way of inspection of property, and may exercise the summary final jurisdiction in interpleader (LIV., 2nd November, 1878); and without any such consent, he undertakes ordinary practice matters in interpleader (LIV., 2), and may make orders *nisi* charging stock or shares (LIV., 2nd November, 1878), and may grant discovery otherwise than by inspection of property (LIV., 2nd November, 1878.)]

And the jurisdiction in the Chancery Chambers extends under the stat. 18 & 19 Vict. c. 134, and General Order xxxvi. to the following further matters, viz.:—

- (1.) Applications for payment of dividends on funds in Court;
- (2.) Applications under Legacy Duty Act;
- (3.) Applications under Trustee Relief Acts;
- (4.) Applications for vesting order under Trustee Acts;

and the jurisdiction under further Acts and Orders extends to the following further matters:—

- (5.) Special orders for taxation or review of taxation;
- (6.) Applications for new trustees of charities;
- (7.) Applications under Mortgage Debenture Act, 1865;
- (8.) Applications in arbitrations under C. L. P. Act, 1854; and

CHAMBERS—continued.

(9.) Transfer of causes from County Court to High Court, and *vice versa*.

And generally, all decrees and inquiries are prosecuted in chambers.

CHAMPARTY, or CHAMPERTY. This is a species of maintenance which consists in the purchasing of an interest in the thing in dispute, with the object of maintaining and taking part in the litigation (2 Inst. 484, 562, 563; *Stanley v. Jones*, 7 Bing. 378; *Stevens v. Bagwell*, 15 Ves. jun. 139.) It is not champerty if the parties have a common interest, and a moral interest, as that of a parent in a child, suffices: nor is it champerty to simply mortgage the property in litigation with a view to raising the requisite funds (*Cockell v. Taylor*, 15 Beav. 103).

CHANCEL. Is that portion of the fabric of the church (*Rippon v. Bastin*, L. R. 2 A. & E. 386), which the incumbent is bound to keep in repair, the other parts of the church being kept in repair by the churchwardens (*Veley v. Burder*, 12 Ad. & El. 233). In rectories, the chancel is the freehold of the rector; in vicarages, of the impropriator. Brice's Public Worship. See title CHURCH.

CHANCELLOR. There are many officers bearing this title; those, however, which it will be necessary to mention here, are: 1st. The Lord Chancellor. 2ndly, the Chancellor of the Duchy of Lancaster. 3dly, the Chancellor of a Diocese; and 4thly, the Chancellor of the Exchequer. (1.) *The Lord Chancellor* is created by the mere delivery of the great seal into his custody; whereby without writ or patent, he becomes an officer of the greatest weight and power of any in the kingdom, and superior in point of precedency to every temporal lord. He is a privy councillor by his office, and prolocutor of the House of Lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom, besides other very extensive legal patronage. Being formerly usually an ecclesiastic, and presiding over the royal chapel, he became keeper of the king's conscience, visitor in right of the king of all hospitals and colleges of the king's foundation, and patron of all the king's livings under the value of twenty marks per annum, in the king's books. He is the general guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom. And having been head of the old Court of Chancery, and as such superior as a judicial officer even to the Lord Chief Justice of England, the Lord

CHANCELLOR—continued.

Chancellor exercises under the new procedure a general control of all the divisions of the Supreme Court, and is President of the Chancery Division of the High Court (Judicature Act, 1873, s. 31), and also of the Court of Appeal (Judicature Act, 1875, s. 6); and he presides in the Supreme Appellate Court of the House of Lords. All writs of summons for commencing actions in the High Court are tested in the name of the Lord Chancellor. (2.) *The Chancellor of the Duchy of Lancaster* is the Chief Judge of the Duchy Court, who in difficult points of law used to be assisted by two judges of the Common Law, to decide the matter in question. This Court used to be held in Westminster Hall, and was, formerly, much used in relation to suits between tenants of Duchy lands, and against accountants and others for the rents and profits of the said lands. It is now held in Manchester and Liverpool, the chief cities of the Duchy, and is presided over by a Vice-Chancellor, who decides all judicial questions, with an appeal to the Court of Appeal in London (Judicature Act, 1873, s. 18). (3.) *The Chancellor of a Diocese*, or of a bishop, is an officer appointed to hold the bishop's Courts for him, and to assist him in matters of Ecclesiastical Law; who as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law, so created in some University. (4.) *The Chancellor of the Exchequer*, is also a high officer of the Crown, who used to sit sometimes in Court, and sometimes in the Exchequer Chamber; and, together with the regular judges of the Court, saw that things were conducted to the king's benefit. His principal duties, however, are not of a judicial character, but concern the management of the royal revenue; and under the Judicature Act, 1873, he is deprived altogether of his strictly judicial functions.

**CHANCELLOR OF
DIOCESE.**

**CHANCELLOR OF
DUCHY OF LAN-
CASTER.**

See title CHAN-
CELLOR.

**CHANCELLOR OF
THE EXCHEQUER.**

CHANCE-MEDLEY. The accidentally killing a man in self-defence is so termed.

CHANCERY. The High Court of Chancery was the highest Court of Judicature in the kingdom next to the Parliament, and was of very ancient institution. The jurisdiction of this Court was of two kinds: (1) ordinary, and (2) extraordinary. (1.) The ordinary jurisdiction was that wherein

CHANCERY—continued.

the Lord Chancellor, Lord Keeper, &c., in his proceedings and judgments, was bound to observe the order and method of the Common Law; and (2.) the extraordinary jurisdiction was that which the Court exercised in cases of equity, i.e., "of grace."

The ordinary Court held plea of recognizances acknowledged in the Chancery: of writs of *scire facias* for the repeal of letters patent, &c.; and also of all personal actions by or against any officer of the Court; and by Acts of Parliament, of several other causes. All original writs, commissions of bankruptcy, of charitable uses, and other commissions, as idiots, lunacy, &c., used to issue out of this Court, for which purpose the Chancery was said to be always open; and sometimes a *supersedeas* or writ of privilege has been here granted to discharge a person out of prison. A *habeas corpus*, prohibition, &c., might be had from this Court in the vacation; also a *subpœna*, to force witnesses to appear in other Courts, where these latter Courts had no power to call them (4 Inst. 79; 1 Danv. Abr. 779).

The extraordinary Court, or Court of Equity, proceeded by the rules of equity and conscience, and moderated the rigour of the Common Law, considering the intention rather than the words of the law, Equity being the correction of that wherein the Law by reason of its universalities was deficient. On this ground therefore, to maintain a suit in Chancery, it was ordinarily alleged that the plaintiff was incapable of obtaining relief at Common Law, and that without any fault of his own, as by having lost his bond, &c., Chancery never acting against but in assistance of the Common Law, supplying its deficiencies, not contradicting its rules. Under the Judicature Act, 1873, the Court of Chancery is to be known as the Chancery Division of the High Court of Justice, and is to retain exclusively to itself (subject, nevertheless, to the more general provisions of the Act) all its extraordinary jurisdiction as above defined (sect. 34), and is invested with a concurrent jurisdiction in all other matters.

See title COURTS OF JUSTICE

CHANCERY DIVISION: See titles CHANCERY; HIGH COURT.

CHANCERY JURISDICTION ACT, 1852.

Is the stat. 15 & 16 Vict. c. 86, whereby the procedure in the Court of Chancery was regulated, prior to the Judicature Acts, 1873-5, and most of the provisions of the Act are retained in the present procedure (Order xvl. 11). In the same year was passed the Master in Chancery Abolition Act, 1852 (15 & 16 Vict. c. 80); and for

CHANCERY JURISDICTION ACT, 1852

—continued.

improving the procedure at Westminster the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76).

CHANNEL: See title WATER AND WATERCOURSE.

CHAPELRY. The same thing to a chapel as a parish is to a church, i.e., the precincts and limits of it (*Les Termes de la Ley*; Cowel; 6 Jur. 608).

CHAPELS. There are five principal varieties of chapels, viz.:—

(1.) *Private Chapels.*—Being such as gentlemen occasionally build in or near their own houses for the use of themselves and their families and dependents; they are maintained by their founder; and the licentiate or chaplain acquires no freehold interest in them (4 B. & C. 573).

(2.) *Chapels of Ease.*—Being such as are built within the precincts of a parish and belong to the parish church and the parson thereof (2 Roll. Abr. 340, 1, 51), who may accordingly nominate and present.

(3.) *Endowed Chapels.*—Being, e.g., such as have been erected and endowed under the provisions of the stat. 14 & 15 Vict. c. 97; the freehold in such chapels is usually vested in the Ecclesiastical Commissioners, who also in general control and declare to whom the right of nomination shall belong (*MacAllister v. Rochester (Bp.)*, W. N. 1879, p. 183).

(4.) *Free Chapels.*—Being such as are of royal foundation, or which have been founded by private individuals under and by virtue of the licence or grant of the Crown. This fourth variety of chapel is most usually found upon the manors and ancient demesne lands of the Crown, and (it may be assumed) was originally intended for the use of the king and his retainers (Godolphin, Abr. 146).

(5.) *Proprietary Chapels.*—Being such as have been built by private individuals, without any licence from the Crown, and merely for the encouragement of piety among the masses.

CHAPELS OF EASE: See title CHAPELS.

CHAPTER. The assembly of clerks in a church cathedral; and in another signification, the place wherein the members of that community treat of their common affairs. It not only rules or governs the diocese during a vacancy of the see, but also in many things advises the bishop, when the see is full (*Les Termes de la Ley*).

CHARACTER, EVIDENCE AS TO. In Anglo-Saxon times, this species of evidence, so far as it regarded the parties

CHARACTER, EVIDENCE AS TO—continued.

themselves to an action or suit, was almost the only evidence regarded (*see* title **COMPURGATION**); but with the introduction of the Norman procedure by inquest or recognition, evidence of witnesses as to facts came to be received, and also to be principally attended to, and evidence as to the character of the parties gradually sank to the secondary position which it at present occupies. The law as it exists at the present day may be thus stated:—

(1.) As to parties,—Character-evidence, as a general rule, is not receivable at all; excepting, of course, when the character of the party is directly in issue, and excepting in criminal prosecutions, when the character of the party has some bearing upon the offence with which he stands charged, (*Best on Evidence*, pp. 355-357); and

(2.) As to witnesses,—Character-evidence, as a general rule, is always receivable, the evidence being, however, of a general character (as distinguished from particular circumstances), and going to affect the credibility of the witness only.

CHARGING ORDER. Under the stat. 1 & 2 Vict. c. 110, ss. 14-16, aided by the stat. 3 & 4 Viet. c. 82, s. 1, when a judgment debtor shall have any Government stock, funds, or annuities, or any stock or shares of or in any public company in England, a judge at chambers may, on the *ex parte* application of the creditor, grant an order *nisi* charging the property in question with the judgment debt, the order becoming absolute unless the debtor take proceedings according to the statute to discharge it, but the realization of the security is to be postponed for six months (*Brown v. Bamford*, 9 M. & W. 42). In case the order is erroneous, the Court may discharge it (*Fowler v. Churchill*, 11 M. & W. 57). In the case of a fund in the Court of Chancery, if the charging order was in aid of a judgment of a Common Law judge, then the latter judge, and not a judge of the Court of Chancery, was to make the order; but a Vice-Chancellor would grant a stop-order in such a case in aid of the charging order. On the other hand, if the charging order was sought in aid of a decree of the Court of Chancery itself, then, whether the fund was in Court or not, the Court would issue it, together with a stop-order, upon the petition of the creditor, who need not have entitled his petition in the Act 1 & 2 Vict. c. 110.

Under the present practice, the procedure is not changed, excepting that the charging order may now be made by a master at chambers, and also by a Divisional Court;

CHARGING ORDER—continued.

and there is now no real distinction between the Common Law and the Chancery Divisions. (*Brown's Snell's Practice*, 5th ed.)

See titles **STOP-ORDER**; **GARNISHEE ORDER**.

CHARGING PART OF A BILL. The plaintiff in a suit in Equity, after setting forth the subject of complaint, used to add such circumstances by way of allegation as were calculated to corroborate his statement, or to anticipate and controvert the claim of his adversary; and such allegations were technically called charges, and the part of the bill in which they occurred was termed the charging part of the bill. Under the present practice of pleading, the statement of claim is not (in the general case) to contain any such charges, but to state facts merely.

See titles **BILL IN CHANCERY**; **STATING PART OF A BILL**.

CHARITABLE INFORMATION. The procedure of the Court of Chancery, with respect to charities under its ordinary jurisdiction independently of statute, is by an information in the name of the Attorney-General, either *ex officio*, as the officer of the Crown, or *ex relatione*; but informations are now rarely resorted to, except in contentious cases where no other mode of procedure can be so advantageously adopted. Under the Charitable Trusts Act, 1853, the certificate of the Board of Commissioners must be obtained authorizing a suit by information except in those cases where the Attorney-General institutes the proceeding *ex officio*. The objects of the information are various, comprising generally the establishment and management of the charity, and including thereunder the putting of the true construction upon the instruments creating the trusts, the framing of schemes, the removing or the appointing of trustees, enforcing the due performance of the trusts, and repairing breaches thereof, and setting aside improper transactions, such as fraudulent or improvident sales or leases of the charity estates. Since the Act of Toleration, all Protestant Dissenters are entitled to sue by the Attorney-General to carry out trusts relating to their charities; and since Roman Catholics and Jews have also been put upon the same footing as Protestant Dissenters, an information may be filed in the name of the Attorney-General in respect of such Roman Catholic and Jewish charities also.

See title **CHARITABLE PETITION**.

CHARITABLE PETITION. In lieu of the formal proceeding by information, and in order to obviate the expense and delay

CHARITABLE PETITION—*continued.*

occasioned thereby, a summary remedy has been provided by Sir Samuel Romilly's Act (52 Geo. 3, c. 101), for the correction of abuses in and the better administration of trusts created for charitable purposes. And by the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), the Attorney-General, acting *ex officio*, may be a petitioner under the Act; and the stats. 3 & 4 Vict. c. 77 (Grammar Schools Act), and 8 & 9 Vict. c. 70 (Church Buildings Acts Amendment Act), have further extended the availability of the principal Act. However, the general operation of the Act has been cut down to cases which arise between the trustees and *cetuis que trust* of the charity, and even in cases of this latter description the Court exercises a discretion as to whether the Act can be applied with advantage to the charity or not; consequently the Act has been held not to apply to cases where there were adverse claims or disputes as to who were the objects of the charity, or whether certain persons called governors or trustees had a certain authority, or where persons put in adverse claims to the right to administer the charity property, and the like. But the Court may under the Act consider a scheme for the management of the charity, or of the charity estate, and may appoint new trustees, reinstate a schoolmaster if improperly dismissed, declare the proportions in which the charitable objects are entitled, and the like.

See title CHARITABLE INFORMATION.

CHARITABLE TRUSTS : See title TRUSTS, sub-title CHARITABLE TRUST.

CHARITABLE TRUSTS ACTS. Under these Acts, being principally the Act of 1853 (16 & 17 Vict. c. 137), the Act of 1855 (18 & 19 Vict. c. 124), and the Act of 1860 (23 & 24 Vict. c. 136), the management of the properties of charities has been regulated and facilitated. A board, entitled the Charity Commissioners, is constituted, having the entire control of the administration of the charity properties, and notice to whom must be given before any application regarding such administration is made to the Court of Chancery under the Acts touching the affairs of the charities; but it seems that such an application may be made after such notice is given, although the Charity Commissioners refuse their sanction to the objects of the application (*Watford Burial Board, Ex parte*, 2 Jur. (N.S.) 1045). No notice need be given to the Commissioners, before commencing such an action as one of ejectment (to recover the charity property) or generally as would fall in the Common Law Division (*Holme v. Guy*, 5 Ch. Div. 901).

CHARITABLE USES. Those objects and purposes are considered charitable, firstly, which are expressly enumerated in the stat. 43 Eliz. c. 4; and, secondly, which by analogy are deemed within its spirit and intendment. The charitable objects enumerated by the stat. of Elizabeth are as follows: "Relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners' schools of learning, free schools, and scholars in universities; repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; relief, stock, or maintenance for houses of correction; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed: relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxa."

The classes of gifts which have been held to be within the spirit and intendment of the statute, although not expressly enumerated therein, are principally the following:—

Gifts for the advancement of religion, or connected with religious services or places, *e.g.*, bequests for the ornaments of a parish church, for the stipend of a minister or curate, or for the augmentation thereof, for the distribution of bibles, for keeping in repair the church chimes; also, in assistance of the poor, as of unsuccessful literary men; and generally all purposes which are of a public and legal nature. And since the Toleration Act (1 W. & M. c. 18), a gift of any of these sorts in favour of dissenters or nonconformists is equally legal, provided it be not for a purpose deemed *superstitious* (see title SUPERSTITIOUS USES); and since the stat. 2 & 3 Will. 4, c. 115, Roman Catholics have been put upon the same footing as Protestant Dissenters.

CHARITIES : See titles CHARITABLE TRUSTS ACTS; CHARITABLE USES; MORTMAIN ACTS; SCHEME FOR CHARITIES.

CHARITY COMMISSIONERS : See title CHARITABLE TRUSTS ACTS.

CHARTA, MAGNA : See title MAGNA CHARTA.

CHARTER. One of the early modes of legislation: it consisted of a grant of liberties, usually to the boroughs, in return for moneys paid into the Exchequer by the boroughs. Latterly, it has been a mode of establishing corporations, enjoying certain privileges, *e.g.* banking corporations. (*Brice on Ultra Vires.*)

CHARTERPARTY. This is an agreement in writing (not necessarily nor even

CHARTERPARTY—*continued.*

usually under seal), whereby a shipowner lets an entire ship, or part of a ship, to a merchant for the conveyance of goods, and the merchant in consideration thereof, and of the conveyance of the goods to be thereunder effected, promises to pay to the shipowner an agreed sum by way of freight for their carriage. A charterparty is in general effected through a broker acting for the shipowner. A ship chartered in this manner is opposed to a general ship.

Construction of Charterparty.—The agreement is construed liberally, upon the maxim *ut res magis valeat quam pereat*; but if the words are clear the Court will not reject or explain away a stipulation, however harsh or oppressive in the event (*Studhard v. Lee*, 3 B. & S. 364). Also, usage is admissible to explain mercantile terms and phrases, but not to contradict or vary the written instrument itself. However, a custom not repugnant to anything in the writing may be annexed to it. And with reference to what mistakes shall avoid the contract and what stipulations amount to conditions precedent, and generally as to all other matters of construction, the rules applicable to other contracts apply to charterparties also.

Dissolution of Charterparty.—The agreement may be dissolved—

(1.) By consent before breach without any new consideration, and after breach upon terms. If the original agreement is by deed, the agreement for dissolution must be by deed also; on the other hand, if the original agreement is in writing not under seal, the agreement for dissolution may be either in like writing or by word of mouth, and that notwithstanding the original contract may require by statute to be in writing. *Taylor v. Hillary*, 1 Cr. M. & R. 741;

Also (2.) By an unreasonable delay in the commencement of the voyage, at least when a particular day is fixed for the sailing, and time is (as it usually is) of the essence of the contract;

Also (3.) By act of law, rendering the performance impossible, without any fault of the parties; *e.g.*, by the outbreak of a war or a general interdiction of commerce, but not by a mere embargo, nor even by a blockade, although duly notified.

Remedies on Charterparty.—The remedy, if the contract is under seal, is by action of debt or covenant, but if in writing not under seal, by action of assumpsit. With reference to the parties to sue and be sued, the same rules apply as are applicable to ordinary contracts, *e.g.*, to charge the undiscovered principal without discharging the agent; and if the contract is under seal, the like rules apply.

CHASE. This word has two significations in the Common Law. First, it signifies a driving of cattle to or from any place, as to chase a distress to a castle or fortlet. Secondly, it signifies a place for the reception of deer and wild beasts of the chase generally, as the buck, doe, fox, marten, and roe, &c. A chase is not the same as a forest, or a park, but is of a nature between the two, being commonly less than a forest and not having so many liberties and privileges incident to it, and yet of larger extent than a park, and stored with a greater diversity of game, and having more keepers to superintend it. And it is said by Crompton in his Jurisdiction, 148, that a forest is no sooner in the hands of a subject than it loses its name, and at once becomes a chase: so that a chase is distinguished from a forest on the one hand in this respect, that the latter cannot be in the hands of a subject, and the former may be so: and from a park, on the other hand, in this respect, that the chase is not enclosed, and has not only a larger compass and more game, but also a greater number of keepers and officers. (*Manwood's Forest Laws*; 4 Inst. 314).

See titles **PARK**; **WARREN**.

CHATELS. All things which are usually comprehended under the name of goods, come under the general name of chattels. Chattels are divided into two kinds, real and personal. *Chattels real*, are such as concern real estates, or landed property, and are so called because they are interests issuing out of such kind of property, as the next presentation to a church, terms for years, estates by statute merchant, statute staple, elegit, &c. *Chattels personal* are generally such as are moveable, and may be carried about the person of the owner wherever he pleases to go; such as money, jewels, garments, animals, household furniture, and almost every description of property of a moveable nature. Things personal, however, are not confined to moveables; for as things real comprise not only the land itself, but such incorporeal rights as issue out of it, so things personal include not only those tangible subjects of property which are capable of locomotion, but also the incorporeal rights or interests which may grow out of or be incident to them. This class (to which may be assigned the term of incorporeal chattels), comprehends among other species, patent right, or the exclusive privilege of selling and making particular contrivances of art; and copyright, or the exclusive privilege of selling and publishing particular works of literature.

CHATELS, MORTGAGE OF: See title **MORTGAGE OF PERSONAL PROPERTY**.

CHATELS PERSONAL } See title
CHATELS REAL } CHATELS.

CHATELS, PLEDGE OF: See title PLEDGE.

CHAUD-MEDLEY. The killing of a man in an affray in the heat of blood, and while under the influence of passion; it is thus distinguished from chance medley, which is the killing a man in a casual fray in self-defence.

CHAUNTRY. A church or chapel endowed with lands or other yearly revenues for the maintenance of one or more priests to sing masses daily for the souls of the donors, and such others as they appointed. (*Les Termes de la Ley.*) Such uses would at the present day be void as *superstitious*. (See title *SUPERSTITIOUS USES*.) The chauntries were abolished by a statute passed in the last year of the reign of Henry VIII. and the first year of that of Edward VI.

CHEATING. Various forms of cheating are made criminal offences, chiefly the following:

- (1.) Obtaining goods, &c., by false pretences;
- (2.) Selling goods by false scales;
- (3.) Various offences enumerated in the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11.

CHEQUES. Are orders in writing made by a customer upon his banker to pay money in favour of a person named in the order, or "to bearer" or "to order." The bank is liable for payment of a forged cheque, whether the cheque is forged in whole or in part; but the bank is protected where merely the indorsement upon the cheque is forged (16 & 17 Vict. c. 59, s. 19). Under the Crossed Cheques Act, 1876 (39 & 40 Vict. c. 81), passed in consequence of the decision in *Smith v. Union Bank of London*, 1 Q. B. Div. 31, a general crossing consists of the words "and Co." on the face of the cheque within transverse lines, and with or without the words "not negotiable," and a special crossing consists of the name of a banker written in like manner as the words "and Co.;" and any person receiving an uncrossed cheque may cross it either generally or specially. A cheque crossed generally shall only be paid by the bank on which it is drawn to a bank; and when crossed specially, to the specified bank. And payment according to these provisions in the Act is a protection both to the customer and to the bank upon which he has drawn the cheque; but non-compliance with these provisions renders the bank liable to its own customer for any damage he may sustain therefrom, unless the banker's non-compliance is inadvertent,

CHEQUES—continued.

through the cheque not appearing at the time of presentation for payment to have been crossed.

CHIEF CLERK. Is the clerk in Chancery appointed to assist the Master of the Rolls or the Vice-Chancellors—each of them having three such clerks—in their chamber business. The chief clerks exercise large administrative and some judicial functions in aid of the judge, and as representing him.

See title *MASTERS AT COMMON LAW*.

CHIEF, EXAMINATION OF WITNESS IN. Every witness who gives his testimony in a trial at *Nisi Prius*, is first examined by the counsel of the party on whose behalf he is called; and the first examination is termed his examination in chief. He is then subject to cross examination by the counsel on the other side; which cross-examination may be in its turn succeeded by a re-examination by the counsel who originally called him (3 C. & P. 113). In the Court of Chancery the examination in chief has hitherto been taken by affidavit, but under the Judicature Act, 1873, the practice in Chancery is assimilated to that of the Common Law.

CHIEF RENT. Those rents which are payable by the freeholders of manors, are frequently so called, and they are also denominated quit-rents, *i.e.*, *quieti redditus*, because thereby the tenant goes quit and free of all other services.

CHIEF, TENANT IN. All the land in the kingdom was supposed to be holden mediately or immediately of the king, who was styled the lord paramount or lord above all; and those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite* or *in chief*, which was the most honourable species of tenure, but at the same time subjected the tenant to greater and more burdensome services than inferior tenures did.

See title *FEUDAL TENURES*.

CHILD. In law means a legitimate child in the absence of evidence of an intention to signify an illegitimate child.

CHILD, ABANDONMENT OF. Consists in the desertion and exposure of children under two years of age, whereby their life is endangered or their permanent health injured.

See title *ABANDONMENT*.

CHILD STEALING, OFFENCE OF. Under the stat. 24 & 25 Vict. c. 100, s. 56, any one who, whether by force or fraud, unlawfully leads, decoys, or entices away, or who detains any child under the age of

CHILD STEALING, OFFENCE OF—continued.

fourteen years, with intent to deprive the lawful guardian of the possession of the child, or with intent to steal the articles upon it; and any one knowingly receiving or harbouring such a child, is guilty of felony, and is punishable with penal servitude from seven to five years, or to imprisonment for two years, with or without hard labour, and if a male under sixteen, with or without whipping.

CHILTERN HUNDREDS. The stewardship of the Chiltern Hundreds is a nominal office in the gift of the Crown, usually accepted by members of the House of Commons desirous of vacating their seats. "Her Majesty's Chiltern Hundreds" are three in number, namely, Stoke, Desborough, and Bonenham, and are distinguished by the use made of them for parliamentary purposes. By law a member once duly elected is compellable to discharge the duties of the trust conferred upon him, and is not able at will to resign it. But by stat. 6 Anne, c. 7, and several subsequent statutes, if any member accepts of any office of profit from the Crown (excepting officers in the army or navy accepting a new commission), his seat is vacated. If, therefore, any member wishes to retire from the representation of the county or borough by which he was sent to Parliament, he applies to the Lords of the Treasury for the stewardship of one of the Chiltern Hundreds, which having received, and thereby accomplished his purpose, he again resigns the office. (May's Parl. Pr. 576-7; Bushby's Election Law, 4th ed.)

CHIMIN. A way, which is of two kinds—(1.) The king's highway; and, (2.) A private way. (1.) *The king's highway* is that by which the king's subjects and all under his protection have free liberty to pass, although the property in the soil on each side, or even in *medium filum viæ*, may belong to some private person. (2.) *A private way* is that by which one or more persons have a right or liberty to pass through another person's ground. Cowell.

See title WAY.

CHIROGRAPH. An instrument of gift or conveyance attested by the subscription and crosses of the witnesses, and which was in the Saxon times called *Chirographum* and which being somewhat changed in form and manner by the Normans, was by them styled *charta*. Anciently, when people made a chirograph or deed which required a counterpart, they engrossed it twice upon one piece of parchment contrarywise, leav-

CHIROGRAPH—continued.

ing a space between, in which they wrote in great letters the word "chirograph," and then cut the parchment in two through the middle of the word, concluding the deed with "*In cujus rei testimonium utraque pars mutuo scriptis præsentiibus fide media sigillum suum fecit apponi.*" This was afterwards called *dividenda*, because the parchment was so divided or cut. And the first use of these chirographs was in Henry III.'s time. Chirograph was also of old used for a fine. And this manner of engrossing the fine and cutting the parchment in two pieces continued to be observed until the abolition of fines by the stat. 3 & 4 Will. 4, c. 74. Cowell.

See next title.

CHIROGRAPHER OF FINES. *Chirographus finium et concordiarum* (from the Greek *χειρόγραφον*, which is a compound of *χειρ*, a hand, and *γράφω*, I write). It signified the officer of the Common Pleas who engrossed fines in that Court so as to be acknowledged into a perpetual record, after they had been acknowledged and fully passed by those officers by whom they were previously examined. Cowell.

CHIVALRY. This word comes from the French *chevalier*; and signifies that peculiar species of tenure by which lands were formerly held, called tenure by knights' service. It is of a martial and military nature, and obliges the tenant to perform some noble or military office unto his lord.

See title FEUDAL TENURES.

CHIVALRY, COURT OF. An ancient but long disused court which used to be held before the Lord High Constable and Earl Marshal, in matters criminal and civil. Its criminal jurisdiction was confined to deeds of arms and war; its civil jurisdiction extended to redressing injuries of honour, encroachments in matters of coat-armour or of precedences, or of other like family distinction,—but, *nota bene*, only where there was no remedy at the Common Law, and the petitioner or complainant in this Court never obtained pecuniary satisfaction. The Heralds' College was and is a sort of successor to this Court as regards matters of pedigree and of armour.

See title HERALDS' COLLEGE.

CHLOROFORM. Administering this drug with intent to commit an indictable offence is, by the stat. 24 & 25 Vict. c. 100, s. 22, made a felony, punishable with penal servitude for life or five years, or with imprisonment for two years with or without hard labour.

CHOSE. This word is generally used in combination with others. The most common combinations in which it is found are

CHOSE—continued.

the following :—(1.) Chose local ; (2.) Chose transitory ; and (3.) Chose in action. (1.) *Chose local* is such a thing as is annexed to a place ; thus, a mill is a chose local. (2.) *Chose transitory* means anything of a moveable or transitory nature, which may be taken or carried away from one place to another. (3.) *Chose in action* (the most ordinary combination) is a phrase which is sometimes used to signify a right of bringing an action, and at other times the thing itself which forms the subject matter of that right, or with regard to which that right is exercised ; but it more properly includes the idea both of the thing itself and of the right of action as annexed to it. Thus, when it is said that a debt is a chose in action, the phrase conveys the idea not only of the thing itself, i.e., the debt, but also of the right of action or of recovery possessed by the person to whom the debt is due. When it is said that a chose in action cannot be assigned, it means that a thing to which a right of action is annexed cannot be transferred to another together with such right. Thus if A. owes B. £10, it is obvious that B. has a debt, and also a right of recovering such debt against A. ; now if B. were to assign or transfer his debt, together with his right of recovery, to C., this would be assigning a chose in action, which the law would not allow for the reasons stated in Co. Litt. 214 a, 266 a ; 2 Roll. 45 ; *Mouldale v. Birchall*, Sid. 212. But more recently such assignments came to be allowed in Equity, and latterly in some instances at Law, until eventually, by the Judicature Act, 1873, a chose in action has been made assignable in every case.

CHOSSES IN ACTION : See titles CHOSE ; NOTICE.

CHRISTIANITY. To bring this religion into ridicule or contempt is an offence against the Common Law of England, and as such is indictable. (Holt, Libel, 69, n.) The Christianity here intended was originally that established by law (See title ARTICLES OF RELIGION, THIRTY-NINE) ; but all Protestant Dissenters are not only tolerated (See title TOLERATION ACT), but enjoy as of right and not by toleration all civil advantages, with immaterial exceptions (See titles NON-CONFORMISTS ; JEWS ; ROMAN CATHOLICS). And it seems doubtful, if an atheist would be liable to this indictment, and apparently it is only professing Churchmen that are liable to it, in case they should ridicule the religion which they profess.

See title ATHEISM.

CHURCH. A place of worship, to be adjudged a church in law must have ad-

CHURCH—continued.

ministration of the sacraments and sepulture annexed to it (Cowel). The fabric of the church consists of the nave or body of the church, with the aisles, the chancel, and the steeple.

See title CHAPELS.

CHURCH AND STATE. The Anglo-Saxon Church, first nationalised by Archbishop Theodore of Tarsus (668), was in closest relation with the state, and the highest spiritual dignities were held by Englishmen of noble family. The church after the Conquest (1066) was brought into closer connection with the Court of Rome, and many foreign ecclesiastics received appointments in it ; but in 1076, William I. successfully withstood the claim of Pope Hildebrand to hold England as a fief of the Papacy, and by a series of ordinances established the royal supremacy over the church, separating between and defining the respective functions of the civil and ecclesiastical jurisdictions. This separation was afterwards more fully defined by Henry II. (1164) in the Constitutions of Clarendon (see title CLARENDON, CONSTITUTIONS OF). In the reigns of John and Henry III., the papal supremacy was restored, but in the reign of Edward I. that of the king was restored, and during that reign and the subsequent reigns was consolidated by a series of statutes calculated to check the aggressions of the Papacy, the principal of these statutes being,—

- (1.) *De Asportatis Religiosorum* (35 Edw. I.), to forbid "alien priors" assessing taxes or withdrawing money on that head out of England ;
- (2.) *Statute of Provisors* (25 Edw. III.), to forbid nominations by the Pope to English livings ;
- (3.) *Statute of Præmunire* (16 Ric. II. c. 5), to forbid appeals to the Court of Rome, or executing in England the process of that Court.

In the reign of Henry IV. the rise of the Lollards tended to weaken the connection of the English church with the state ; but that body and the Wycliffites, their successors, failed to establish a national character, and partly by the force of persecution (Stat. *de Hæretico Comburendo*, 2 Hen. 4, c. 15), and partly by the loyalty of the people to the Crown, was effectively subordinated as a religious system.

In the reign of Henry VIII. the "Reformation Parliament" (1529–1536), whereby the English church was finally and for ever freed from any control on the part of the papacy, the royal supremacy was re-formulated and re-established, and (among other things tending to establish and main-

CHURCH AND STATE—*continued.*

tain that supremacy) bishops and archbishops were to be nominated by *congé d'élire* in the manner still in use (*see* title CONGE D'ELIRE). Subsequently, the lesser monasteries (1536–37) and also the larger monasteries (1540) were dissolved, and thereby the legal and political revolution in the constitution of the church was accentuated and rendered permanent.

The subsequent changes have been merely religious, *i.e.*, in matters of doctrine; but at the present day, although the church is still united with the state, yet Dissent has a substantive existence, and is not a system existing by toleration merely.

See title NONCONFORMISTS.

CHURCH DISCIPLINE ACT. This is the stat. 3 & 4 Vict. c. 86 (*Jenkins v. Cook*, 1 P. Div. 80); it seems to be doubtful how far it is affected by the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 55), *see Reg. v. Bishop of Oxford*, 4 Q. B. Div. 245; and on app. 4 Q. B. Div. 525.

See title PUBLIC WORSHIP REGULATION ACT.

CHURCH-RATES. These were abolished as a compulsory assessment by the stat. 31 & 32 Vict. c. 109, and the payment of these or of any analogous assessment to be collected instead of them was made voluntary. The assessment while it existed was made in a vestry meeting; it fell generally upon all such property as was rateable to the poor-rate; it went to support the temporal necessities of the church. The Act expressly preserves the compulsory payment of church rates when and so long as the rates are a security for money borrowed; also, where they are in extinguishment or in abolition of tithes or like charges on property within the parish.

CHURCHWARDENS. These, although laymen, are a species of ecclesiastical officers, being sworn in by the archdeacon or bishop of the diocese. They are entrusted generally with seeing to the repairs, management, and good order of the church, and to decency of conduct therein. They are a body corporate, and may as such be sued for the goods of the church, and are answerable to their successors in office. Usually, the parishioners elect one, and the parson the other churchwarden, the customary number being two. In virtue of their appointment, churchwardens are overseers of the poor.

See title POOR.

CHURCHYARD. Is the freehold of the parson or rector; but by the statute *Ne Prosternat Arborea*, he may not commit waste therein. Gifts to maintain a tombstone in a churchyard are void, and, *semble*,

CHURCHYARD—*continued.*

because they benefit no one (*Rickard v. Robson*, 31 Beav. 244); *secus*, for maintaining tablets in a church, because, *semble*, they benefit all right-minded churchgoing people (*Hoare v. Osborne*, L. R. 1 Eq. 585).

See CHARITABLE USES.

CHURLE. Among the Anglo-Saxons a tenant at will of free condition, who held land from the thanes on condition of rent or services. They were of two sorts; (1.), one who hired the lord's outland or tene-mentary land, as our farmers do now; (2.), the other, who tilled and manured the inland or demesnes (yielding work and not rent), and were thence called his sockmen or ploughmen. Spelman on Feuds; Cowel.

See title CEORL.

CINQUE PORTS. Five important havens, formerly esteemed the most important in the kingdom. They were Dover, Sandwich, Romney, Hastings, and Hythe; Winchelsea and Rye have since been added to the number. They have similar franchises in many respects with the counties Palatine, and particularly had an exclusive jurisdiction (before the mayor jurats of the ports), in which the king's ordinary writ did not run. These ports have a governor called the Lord Warden of the Cinque Ports, who has the authority of an admiral amongst them, and used to send out writs in his own name. But the king's writ now runs to, and is executed in, these ports in like manner as in other parts of the kingdom (*see* C. L. P. Act, 1852, s. 122).

CIRCUITS. These are the routes taken by the several judges in holding the assizes. The judges appear to have gone circuit for the first time towards the end of Henry I.'s reign. In more recent times the stat. 3 & 4 Will. 4, c. 71, regulated the appointment of convenient places for holding the assizes; and the stat. 26 & 27 Vict. c. 122, enabled the Queen in Council to alter the circuits. Until the year 1876 there were eight circuits in England and Wales, *viz.*, Home, Norfolk, Midland, Northern, Oxford, Western, South Wales, and North Wales; however, in the last-mentioned year, some important changes were effected, and the circuits as now arranged are seven in number, namely, Northern, North-Eastern, Midland, South-Eastern, Oxford, Western, and North and South Wales, the Home Circuit being (as such) abolished; and the assizes are held four times a year, special provisions being made by the Winter Assizes Acts (1876, 1877) for the grouping of counties for criminal business.

CIRCUITY OF ACTION. Is where a party to an action, by an indirect and cir-

CIRCUTY OF ACTION—*continued.*

cuituous course of legal proceeding, makes two or more actions necessary, in order to obtain that justice between all the parties concerned in the transaction, which by a more direct course might have been gained in a single action. As in an action on a contract, in which the defendant, instead of giving in evidence a breach of the warranty in mitigation of damages, allows the plaintiff to recover the full amount of the contract in the first action, and then subsequently commences against him a cross action to regain the amount to which the consideration had failed. Formerly indeed, he was compelled to bring a cross action, and had no other remedy, but more recently "the cases have established that the breach of the warranty may be given in evidence in mitigation of damages, on the principle it should seem, of avoiding circuity of action." (*Per Tenterden, C.J.*, 2 B. & Ad. 462). The desire to avoid circuity of action was one of the principal reasons that led the Court of Chancery to assume concurrent jurisdiction (*e.g.*, in fraud, &c.) with the Courts of Common Law; and this reason is acted upon in numerous instances under the Judicature Acts.

CIRCULAR NOTES. These are similar instruments to Letters of Credit. They are drawn by bankers in this country upon their foreign correspondents in favour of persons travelling abroad. The correspondents must be satisfied of the identity of the applicant before payment; and the requisite proof of such identity is usually furnished, upon the applicant's producing a letter with his signature, by a comparison of the signatures.

CIRCUMSPECTE AGATIS. The title of the stat. 13 Edw. 1, regulating the jurisdiction of the temporal and ecclesiastical Courts. The date usually assigned to this statute is 1285; but there seems to be reason to believe that it was not in existence at that period. It was, however, cited as early as 19 Edw. 3. It originally was not a statute, but a writ supposed to have been issued in pursuance of the statute called *Articuli Cleri* (*see* that title), of which, in the form in which it is printed both in the authentic and ordinary edition of the statutes, it is a repetition and abridgement. It was probably a writ of mandate, framed for the purpose of being issued by the king to his judges on behalf of the Spiritual Courts, in or after 1315, and embodying what were then supposed to be the legitimate objects of the jurisdiction of those latter Courts. Its authority as a statute, is, however, no longer questioned. 12 Ad. & El. 315.

CIRCUMSTANTIAL EVIDENCE. That evidence which may be afforded by particular circumstances. It is called circumstantial evidence in contradistinction to that species of evidence which is of a more positive and unequivocal nature. Whence the latter is sometimes called *direct* evidence, and in that case circumstantial is designated *indirect*. Sometimes also, it is called the doctrine of presumptions; because when the fact itself cannot be proved it may be presumed, by the proof of such circumstances as either necessarily or usually attend such facts, being in the former case conclusive, and in the latter more or less cogent only.

See titles **DIRECT EVIDENCE; PRESUMPTIONS IN CRIMINAL LAW.**

CIRCUMSTANTIBUS, TALES DE. Literally, like persons out of those present or standing by. This phrase is applied to the making up the number of persons on a jury, by taking some of the casual bystanders, who happen to be qualified for serving on a jury. This takes place when the jurors who are empanelled, from some cause or other, do not appear or, if appearing, are challenged by either party, and so disqualified.

See title **CHALLENGE OF JURORS.**

CITATION. The process used in the Ecclesiastical Courts and Court of Probate and Divorce; to call the party—defendant or respondent, before them. It is analogous to the writ of summons at Common Law.

CITATIONS, LAW OF: *See* title **LAW OF CITATIONS.**

CITY. In this country is a town which is or which hath been the see of a bishop; and yet there seems to be no necessary connection between a city and a see (1 Steph. Black. 130). Other towns are called boroughs, and may or may not send members to Parliament.

CITY OF LONDON. This city is the capital of the Empire. It constitutes no part of the county of Middlesex, although locally situate therein; whence the Middlesex Registry Act does not apply to lands within the city. Also, the *nisi prius* sittings of the High Court for London are held at the Guildhall, *i.e.*, City Hall, and not (as for Middlesex) at Westminster. The city has in addition its own peculiar court, *viz.*, the Lord Mayor's Court, which, however, now occupies the position of an inferior Court, in this respect differing from the Chancery Court of Lancaster. And it has also a Sheriff's Court, now called the City of London Court, which is comprised within the County Courts Act, 1867 (30 & 31 Vict. c. 142). The city enjoys certain

CITY OF LONDON—*continued.*

exceptional privileges and customs, and more particularly the freemen of the city and their wives and families; also, the very speedy and efficacious remedy called Foreign Attachment, whereby moneys belonging to the alleged debtor may be seized or attached and (in effect) impounded before judgment in the action.

CITY OF LONDON COURT: See title CITY OF LONDON.

CIVIL DEATH. If a man entered into a monastery, or abjured the realm, he was formerly, and if he is outlawed for treason or felony or other cause, he still is, dead in law, and therefore if an estate be granted to any one for his life generally, it would determine by such civil death. For which reason in conveyances the grant is usually made "for the term of a man's *natural* life," which can only determine by his natural death. (3 Inst. 213; 3 P. Wms. 37, n. (B); 2 Rep. 48 b.).

CIVIL LAW. In its general signification it is the established law of every particular nation, commonwealth, or city, and is the same with that which is called Municipal Law. In its particular signification, however, it usually means the Roman Law, as comprised in the Institutes, Code, and Digest of the Emperor Justinian.

CIVIL LIST, SETTLEMENT OF. Prior to the Revolution of 1688, it was customary to grant to the king at the commencement of each reign the ordinary revenues of the Crown (see title TAXATION, HISTORY OF), without imposing any limitation upon his personal expenditure. These revenues were estimated in times of peace to be sufficient for the support of his majesty's person and household, and for the maintenance of his civil and military government; for all extraordinary occasions, such as times of war, grants of extraordinary supplies were made to him. In the reign of Charles II. the principle of appropriating the supplies to the specific services had been formally established, and such appropriation was in fact made the condition, or one of the conditions, upon which the same was granted; but notwithstanding that such was the recognised principle or condition of the grant, it is certain that Charles II. misapplied towards his own private pleasures a large amount of these supplies.

Accordingly, upon the accession of William and Mary, Parliament provided separately for the king's *civil list* a sum of £700,000, derived in part from the hereditary revenues of the Crown, and partly from the excise duties, and voted in addition the sum of £500,000 for the other expenses of government not included in the

CIVIL LIST, SETTLEMENT OF—*contd.*

civil list. At this period the civil list embraced not only the support of the king's person and dignity, but also the salaries of civil officers and pensions.

In this condition the civil list remained during the reigns of Anne, George I., and George II.; but on the accession of George III. that king gave up the hereditary revenues of the Crown in England altogether, in consideration of a civil list of £800,000 a year. He still retained, however, the hereditary revenues of the Crown in Scotland, the Duchies of Cornwall and Lancaster, the Irish civil list, and various other sources of revenue, amounting not unfrequently to the annual sum of £4,700,000 odd. But notwithstanding this vast income, George III. was always in debt, through the great multiplication of pensions and sinecure places, these being the means which that prince adopted with a view to increasing the influence of the Crown.

In view of these abuses, Mr. Burke in 1780 proposed his scheme of "economic reform;" and in 1782, the Rockingham Civil List Act was passed, in virtue of which many useless offices were abolished, the pension list was diminished, and the civil list expenditure was divided under eight heads. But the civil list was still suffered to comprise (in addition to the support of the king's person and dignity) the expenses of the civil government; viz. the salaries of judges, &c., annuities to members of the royal family, salaries in the diplomatic service, and numerous public pensions.

During the reigns of George III. and George IV. various of these latter items of expenditure ceased to be chargeable on the civil list; and upon the accession of William IV., the civil list was still further relieved, and in particular, from judicial salaries, pensions, and diplomatic service salaries, and at the same time that king surrendered all the hereditary revenues of the Crown. Upon the accession of Queen Victoria, the Crown was finally restricted to a definite annuity of £385,000 for the support of the person and dignity of the sovereign, and Her Majesty was empowered to grant pensions annually to the extent of £1200.

The Crown still retains the revenues of the Duchies of Cornwall and Lancaster, those of the latter being the property of the reigning sovereign, and those of the former the property of the Prince of Wales as Duke of Cornwall; and the Crown possesses the capacity to acquire and also to dispose of other private property, under the Act of 39 & 40 Geo. 3, c. 88, and has acquired further facilities for these purposes

CIVIL LIST, SETTLEMENT OF—*contd.*

by the Crown Private Estates Act, 1873 (36 & 37 Vict. c. 61).

CIVIL SIDE. The legal business of the assizes is arranged according to the natural division of such cases as are merely civil, in which the disputes of subjects (citizens) as to property are decided, and those of a criminal nature, when men are charged with offences against the welfare of society at large. In the county-hall or court in which the trials take place, it is very usual for one side or portion of the building to be appropriated to the hearing of cases of the former character, and the other side or portion to the hearing of those of the latter character. And hence the phrase has become common that the judge is either sitting "on the civil side" or "on the criminal side," meaning thereby that he is either presiding at *Nisi Prius* or trying a prisoner, as the case may be. It is now customary for two judges to attend circuit together, and then one of them sits on the "civil," the other on the "criminal side."

CIVILIS OBLIGATIO. See title NATURALIS OBLIGATIO.

CIVILIS POSSESSIO. See title POSSESSIO CIVILIS.

CIVILITER. In a man's civil character or position, or by civil, in opposition to criminal, process; as "sheriffs who execute process at their peril are answerable *civiliter* for what they do upon it," or "a man may, without his own fault, be possessed of a horse which has been stolen, but nevertheless he is answerable *civiliter* to the true owner of it." (1 B. & P. 409, per Rooke, J.).

CLAIM. Was a mode of instituting certain (chiefly administrative) proceedings in the Court of Chancery, without filing a bill. It was abolished after the 14th of February, 1860. A summons now effects the same object substantially.

CLAIM, CONTINUAL. When a man was entitled to enter into any lands or tenements of which another was seised in fee or in tail, and he who was so entitled made continual claim to the lands or tenements before he who was so seised, died seised thereof; then even in the event of such person dying seised of the same, and the lands or tenements descending to his heir, might he who made such continual claim, or his heir, have entered into the lands or tenements so descended by virtue of his having made such continual claim. So if a man were disseised, and the disseisee made continual claim to the tenements in the life of the disseisor, and the disseisor died seised in fee, and the land descended

CLAIM, CONTINUAL—*continued.*

to his heir, yet notwithstanding its having so descended, the disseisee might have entered upon the possession of the heir, by virtue of such continual claim. Such a claim must always have been made within a year and a day before the death of the person holding the land, and as the claimant could not know when such death would take place, he was therefore obliged continually to be making such claim: *i.e.*, at the expiration of every year and a day, in order that he might be sure of his claim being made within a year and a day of the tenant's death, and hence it was termed *continual claim* (Litt. 414). But no such continual claim is of any utility at the present day to preserve a right of entry, or distress, or action, 3 & 4 Will. 4, c. 27, s. 11.

CLAIM, STATEMENT OF: See title STATEMENT OF CLAIM.

CLARENDON, CONSTITUTIONS OF. In the reign of Henry II., A.D. 1164, Blackstone states that there are four things which peculiarly merit the attention of the legal antiquarian, one of which is the *constitutions of the parliament at Clarendon*, whereby the king checked the power of the pope and his clergy, and narrowed the exemptions they claimed from the secular jurisdiction. These Constitutions enacted in substance that the king's Courts should try all contested rights of advowson and presentation; ecclesiastics should obey the king's summons; appeals from the archbishop should be to the king alone; all disputes regarding lands between ecclesiastics and laymen should be tried by the king's justices; all pleas of debt, notwithstanding the same may be affected with a trust, should be determined in the king's Courts, with other provisions of a similar character.

CLASS, GIFT TO. Gifts to a class do not lapse like gifts to an individual, if any member or members of the class survive the death of the testator; also usually the class is ascertained at the testator's death, but it may (upon the actual words used) be liable to increase or diminution after the death; and it may even be ascertained during his lifetime.

See title LAPSE.

CLAUSUM FREGIT (*he broke the close*). Every unwarrantable entry on another's soil the law entitles a trespass *by breaking his close*. The words of the writ of trespass command the defendant to shew cause, *quare clausum querentis fregit*.

See title TRESPASS.

CLEARANCE. The master of a vessel, ready to commence its voyage, obtains the necessary clearance (or *transire*) from the

CLEARANCE—*continued.*

customs officer or other the proper authority of the port of departure. A clearance is usually granted upon the master's declaring the nationality of the vessel, and producing certificates of competency, and paying the port dues. Putting off without a clearance subjects the cargo to forfeiture, and the guilty persons to other penalties (16 & 17 Vict. c. 107).

CLERGY: See title CONVOCATION.

CLERGY, BENEFIT OF, or privilege of clergy, formerly signified certain privileges or exemptions which the clergy alone enjoyed. It had its origin from the pious regard paid by Christian princes to the church in its infant state. The exemptions which were granted to the church were principally of two kinds:—(1.) Exemption of places consecrated to religious duties from criminal arrests, which was the foundation of sanctuaries; (2.) Exemption of the persons of clergymen from criminal process before the secular judge in a few particular cases, which was the true original meaning of the phrase "benefit of clergy." In England, however, a total exemption of the clergy from secular jurisdiction could never be thoroughly effected, though often endeavoured by the clergy; and therefore, though the ancient benefit of clergy was in some capital cases, yet it was not universally allowed. And in some particular cases, the use was for the bishop or ordinary to demand the clerks to be remitted out of the king's Courts as soon as they were indicted; concerning the allowance of which demand there was for many years great uncertainty, till at length it was finally settled in the reign of Henry VI., that the prisoner should first be arraigned, and might then claim his benefit of clergy by way of declinatory plea; or after conviction by way of arresting judgment. But afterwards other persons were placed upon the same footing with the clergy with respect to this privilege. It was formerly required that those who claimed benefit of clergy should be able to read; but by 5 Ann. c. 5, it was enacted that the benefit of clergy should be granted to all those who were entitled to ask it, without requiring them to read by way of conditional merit, hence persons convicted of manslaughter, bigamies, and simple or grand larcenies, &c., were asked what they had to say why judgment of death should not be pronounced upon them; and they were then told to kneel down and pray the benefit of the statute. The abuses attending the privilege grew very many, and a better code of criminal law and procedure in later days tacitly supplanted the plea, which was ultimately abolished altogether by the stat. 7 & 8 Geo. 4, c. 28, s. 6.

CLERGYMEN. These, who are otherwise called clerks in holy orders, enjoy certain privileges, and are subject to certain disabilities in law. Thus, on the one hand, they are exempt from serving on juries (6 Geo. 4, c. 50), and they are protected from all obstructions in the discharge of their duty (24 & 25 Vict. c. 100, s. 36); while, on the other hand, they cannot be members of the House of Commons, and labour under a general disability as to trade; but they may be owners of shares in a company (*Lewis v. Bright*, 4 El. & Bl. 917). Their professional and private conduct is more severely judged of than is that of private individuals in general, the entire body of the Canon Law being binding upon them.

See titles CANON LAW; CONVOCATION.

CLERK OF THE ARRAIGNS. The official who addresses the prisoner upon his arraignment is so called. He requires him to hold up his hand in answer to his name, then reads the indictment to him, and asks him to say whether he is guilty or not guilty of the crime whereof he stands indicted.

CLERK OF THE ASSIZE. A clerk whose duty it was to record all things judicially done by the justices of assize in their circuits (Cromp. Juris. 227; Cunningham); abolished by 7 Will. 4 & 1 Vict. c. 30.

CLERK OF CENTRAL OFFICE. The clerks of the central office of the Supreme Court of Judicature Act are classified as principal clerks, first class clerks, second class clerks, and copying clerks.

See title CENTRAL OFFICE (SUPREME COURT).

CLERK OF THE CHANCERY. See title CHIEF CLERK.

CLERK OF THE COMMONS. An officer whose duty it is to attend to matters connected with the business of the House of Commons. He is assisted by two "clerks assistant," who sit at the table with him; he signs orders of the House, indorses bills, reads anything required to be read, and makes short minutes of the business transacted known as the "Votes and Proceedings." He holds his office for life under the Crown, and is appointed by letters patent.

CLERK OF THE CROWN. This is an officer of the Court of Chancery, appointed under the Royal Sign Manual. He performs the duties of the Clerk of the Hanaper; his office is continued by the Great Seal (Offices) Act, 1874 (37 & 38 Vict. c. 81), which also regulates the fees to be taken in the office. His duties are not confined to the Court of Chancery, but

CLERK OF THE CROWN—continued.

follow the Lord Chancellor even to Parliament. Thus, upon the meeting of a new Parliament, the Clerk of the Crown in Chancery delivers to the Clerk of the House of Commons a list of the names of members returned to serve in the Parliament, after which the Commons go up to the House of Lords, and the Lord Chancellor addresses them generally upon the object and purposes of their being summoned to Parliament. The Clerk of the Crown also certifies in like manner the election of representative peers for Scotland and Ireland. Moreover, all warrants to issue new writs are directed to him; and he reads all the titles of bills at the time the royal assent is signified to them by commission (See May's Parl. Prac. 7th ed., pp. 185, 187-8, 630, and 529).

CLERK OF THE HANAPER, or HAMPER.

An officer of the Court of Chancery, whose duty it was to receive all the money due to the king for the seals of charters, patents, commissions, and writs; and also fees due to the officers for enrolling and examining the same. Cowel.

CLERK OF THE HOUSE OF COMMONS.

An officer appointed by the Crown, whose duty it is to make a record of the proceedings of the House, which he or his deputies enter upon the journals, to receive and preserve the petitions presented to the House, and generally to assist the Speaker in the details of his duties. He is usually a barrister-at-law. Similar officers are employed in the House of Lords. By the 33 Geo. 3, c. 13, the clerk of Parliament is directed to indorse on every Act, immediately after the title thereof, the day, month, and year when the same shall have passed, and shall have received the royal assent; and such indorsement shall be taken to be part of the Act, and shall be the date of its commencement, where no other commencement shall have been provided by the Act.

CLERK OF THE PARLIAMENT ROLLS.

An officer in the High Court of Parliament, who records all things done therein, and engrosses them fairly on parchment rolls, for their better preservation to posterity. There is one of these officers to each House of Parliament. Cowel.

See also title **CLERK OF THE HOUSE OF COMMONS.**

-CLERK OF THE PARLIAMENTS. An officer of the House of Lords, whose duties are similar to those of the chief clerk of the House of Commons.

See title **CLERK OF THE HOUSE OF COMMONS.**

CLERK OF THE PEACE. An officer belonging to the sessions of the peace, whose duty it is to read indictments, to enrol the Acts, draw the process, and perform various other duties connected with the administration of justice at the sessions.

CLERK OF THE PETTY BAG. An officer of the Court of Chancery, whose duty it used to be to record the return of all inquisitions out of every shire; to make out patents of customers, gaugers, controllers, and aulnagers; all *congés d'élire* for bishops; the summonses of the nobility, clergy, and burgesses to Parliament, &c.—33 Hen. 8, c. 22; Cowel. The office is abolished on next vacancy (42 & 43 Vict. c. 78).

CLERK OF THE PRIVY SEAL. There are four of these officers, who attend the lord privy seal, or in the absence of the lord privy seal, the principal secretary of state. Their duty is to write and make out all things that are sent by warrant from the signet to the privy seal, and which are to be passed to the great seal; and also to make out privy seals (as they are termed) upon any special occasion of his majesty's affairs, as for the loan of money and such like purposes. 27 Hen. 8, c. 11. Cowel.

CLERK OF THE SIGNET. An officer whose duty it is to attend on his majesty's principal secretary, who always has the custody of the privy signet, as well for the purpose of sealing his majesty's private letters, as also grants which pass his majesty's hand by bill signed: there are four of these officers. 27 Hen. 8, c. 11. Cowel.

CLOSE ROLLS and CLOSE WRITS. Certain letters of the king sealed with his great seal and directed to particular persons and for particular purposes, and not being proper for public inspection, are closed up and sealed on the outside, and are thence called *writs close (literæ clausæ)*, and are recorded in the *close rolls* in the same manner as others are in the *patent rolls (literæ patentes)*, or open letters.

CLUBS. These are companies, but not being for profit are not within the meaning of the Winding-up Acts (*In re St. James's Club*, 2 De G. M. & G. 383). They are essentially social, and the exclusion of a member, if not wanton, is without remedy (*Hopkinson v. Exeter (Marquess)*, L. R. 5 Eq. 63).

COAL MINES REGULATION ACT. The Act at present in force is the stat. 35 & 36 Vict. c. 76, which applies not only to coal mines, but also to mines of stratified ironstone and such like. The Act contains very many minute and exacting regulations, relating to (among other things) the employ-

COAL MINES REGULATION ACT—*continued.*

ment of women, young persons, and children above and below ground, the maintenance of two open shafts to every mine, inspectors and inspections, arbitrations in disputes, and proper ventilation and management generally. Penalties are imposed upon persons offending against the provisions of the Act, not exceeding £20 on the owner, agent, or manager, and not exceeding £2 on other persons for each offence, and (after notice) £1 for every day that the offence continues; also, imprisonment for a period not exceeding three months for wilful offences causing danger to life or limb.

See title **METALLIFEROUS MINES REGULATION ACTS.**

COASTGUARDSMEN. Are entitled to salvage, where they render services that are beyond the scope of the duties imposed upon them by law. The rate of remuneration in such cases is regulated by 18 & 19 Vict. c. 91, s. 20.

See title **SALVAGE.**

COASTING SHIPS: See title **COASTING TRADE.**

COASTING TRADE. All trade by sea from any one part of the United Kingdom to any other part thereof. The ships employed in this trade are called Coasting Ships; and such ships are strictly confined to the coasting trade. Kay's Ship. 119.

CODICIL. A supplement to a will, or an addition made by the testator and annexed to the will, being written for the explanation or alteration of, or for the purpose of making some addition to, or some subtraction from, the dispositions of the testator as contained in his will. In the Roman Law, a codicil was an informal will; but in English Law, the formalities of execution and of attestation are as strict in the case of codicils as in that of wills.

See title **WILLS.**

COEMPTIO. Was a process of conveyance *per aes et libram*, whereby a woman was placed *in manu* of the purchaser or grantee; and such purchaser or grantee might either be a stranger or the husband of the woman; and if he was her husband, then besides being *in manu* she was also put *in loco filiae* to him. Coemptio to the husband was said to be *matrimonii causâ*; to a stranger it was said to be *fiduciae causâ*, e.g., to get rid of an old tutor, and obtain a new one.

See titles **CONFARREATIO**; **USUS MULIERIS.**

COGNATI. See titles **AGNATI**; **NEXT OF KIN.**

COGNISANCE or CONUSANCE. This word has several significations. 1st. It

COGNISANCE or CONUSANCE—*contd.*

signifies an acknowledgment. It is used in this sense when applied to fines, or those fictitious suits, by means of which estates in lands were transferred from one party to another. Thus a fine "*sur cognisance de droit*" signified a fine "upon acknowledgement of the right." (See title **CONCORD.**) 2nd. The word is applied to that plea or answer put in by the defendant in an action of replevin, when he acknowledges the taking of the distress in respect of which the action is brought, but insists that such taking was legal, as he acted with the command of another who had a right to distrain. Here, it will be observed, the defendant makes an acknowledgment of the fact charged against him, but offers a legal excuse for his conduct. (See *Trevilian v. Pyne*, 1 Salk. 107; *Chambers v. Donaldson*, 11 East, 65.) 3rd. It is used in the sense of judicial notice or superintendence. Thus cognisance of pleas signifies the right or privilege granted by the Crown to any person or body corporate, not only to hold pleas within a particular jurisdiction, but also to take cognisance of them, i.e., to take judicial notice or superintendence of them, in other words to have jurisdiction to hear them.

See titles **AVOWRY**; **REPLEVIN.**

COGNITOR. In Roman Law, was a procurator, only more formally appointed, that is to say, he was appointed in the presence of the other side, and by a set form of words.

See title **PROCURATOR.**

COGNIZEE: See title **CONCORD.**

COGNIZOR: See title **CONCORD.**

COGNOVIT ACTIONEM. An instrument signed by a defendant in an action, confessing the plaintiff's demand to be just. The defendant who signs this cognovit thereby empowers the plaintiff to sign judgment against him, in default of his paying the plaintiff the sum due to him within the time mentioned in the cognovit. Under the stat. 1 & 2 Vict. c. 110, s. 9, every such cognovit must be attested by an attorney, who must also under stat. 32 & 33 Vict. c. 62, s. 24, have explained to the debtor the nature of the instrument. And under the last-mentioned statute, s. 26, every cognovit must be filed with the clerk of dockets and judgments in the Court of Queen's Bench within twenty-one days next after the execution thereof, otherwise the same is void as being fraudulent against creditors.

See also title **ATTORNEY, WARRANT OF.**

COHABITATION. Bonds to induce future illicit cohabitation are void; but when in consideration of past cohabitation (i.e.,

COHABITATION—*continued*.

in consideration of nothing) they are good (3 Mac. & G. p. 100, note c). Either a husband or a wife may compel cohabitation by action for the restitution of conjugal rights and otherwise; but when the husband has committed an aggravated assault upon his wife, she may be protected, by order of the convicting magistrate, from any resumption of the cohabitation.

See title MATRIMONIAL CAUSES ACT.

COIF. Serjeants-at-law were called serjeants of the coif, from the circumstance of the lawn coif which they wore on their head, under their caps, when they were elevated to that rank. It was originally used to cover the crown of the head, which was closely shaved, and a border of hair left round the lower part, which made it look like a crown, and was thence called *corona clericalis*, or *tonsura clericalis*. Cowel.

COINAGE OFFENCES: See titles COUNTERFEIT COIN; MINT.

COLLATERAL, from the Lat. *lateralis*, that which hangs by the side. Its legal signification does not differ from its common acceptance. Thus, a collateral assurance signifies an assurance beside the principal one. So when a man mortgages his estates as security to a party lending him a sum of money, he also may enter into a bond, as an additional or collateral security. A collateral security is, therefore, something in addition to the direct security, and in its nature usually subordinate to it; and it is in the nature of a double security, so that when one fails the other may be resorted to.

COLLATERAL CONSANGUINITY. That which exists between persons who are derived from the same stock or ancestors, however remote. Every person who is descended or propagated from the same stem (i.e., from the same male or female lineal ancestor) from which any other particular person is descended or propagated, and who is neither the immediate parent or progenitor, nor the progeny of such particular person, is properly and aptly denominated or defined to be a *collateral* relative. And when any person is the collateral relative of any other person, all the descendants from such persons, reciprocally and respectively, are collateral relations.

See title LINEAL CONSANGUINITY.

COLLATERAL DESCENT: See titles DESCENTS; LINEAL DESCENTS.

COLLATERAL ISSUE. When a prisoner has been tried and convicted, and he then pleads in bar of execution diversity

COLLATERAL ISSUE—*continued*.

of person, i.e., that he is not the same person who was attainted, and the like; this question of fact, whether or not he is the same person, is called a collateral issue, and a jury is then empaneled to try this issue, viz., the identity of his person. It is a general rule of evidence, that whatever would raise a collateral issue is to be excluded, unless, *semble*, the case is one in which the collateral issue should be settled by way of preliminary to the chief issue.

COLLATERAL SECURITY: See title COLLATERAL.

COLLATERAL WARRANTY. In alienating property by deed, there was usually a clause in it called the clause of warranty, whereby the grantor, for himself and his heirs, warranted and secured to the grantee the estate so granted. This warranty was either *lineal* or *collateral*. *Lineal warranty* was where the heir derived, or might by possibility have derived his title to the land warranted, either from or through the ancestor who made the warranty; as where a father, or an elder son in the life of the father, released to the disseisor of either themselves or the grandfather, with warranty, this was lineal to the younger son. *Collateral warranty* was where the heir's title to the land neither was nor could have been derived from the warranting ancestor; as where a younger brother released to his father's disseisor, with warranty, this was collateral to the elder brother.

See title WARRANTY.

COLLATIO: See titles HOTCHPOT; REDUCTION.

COLLATION TO A BENEFICE. Advowsons are either *presentative*, *collative*, or *donative*. (1.) An advowson presentative is where the patron has a right of presentation to the bishop or ordinary, and moreover to demand of him to institute his clerk, if he finds him canonically qualified, and this is the most usual kind of advowson. (2.) An advowson *collative* is where the bishop and patron are one and the same person, in which case the bishop cannot present to himself, but in the one act of collation, or conferring of the benefice, he does all that is usually done in presentative advowsons by both presentation and institution. 3. Regarding the advowson donative, see title ADVOWSON.

COLLIGENDUM BONA DEFUNCTI (Letters ad). When a person dies intestate and leaves no representatives or creditors to administer, or leaving such representatives and creditors, they refuse to take out administration, &c., the judge

COLLIGENDUM BONA DEFUNCTI—
continued.

of the Court of Probate may commit administration to such discreet person as he approves of, or grant him these letters *ad colligendum bona defuncti* (to collect the goods of the deceased). Such a grant is purely official, and does not constitute the grantee executor or administrator, his only business being to take care of the goods, and to do other acts for the benefit of those who are entitled to the property of the deceased.

See title ADMINISTRATION, GRANT OF.

COLLISION. The old common law rule, regarding damages to ships in collision, was that in case of contributory negligence neither vessel recovered; but since Nov. 2, 1875, the rule of the Court of Admiralty has been adopted, viz., the following,—That the damages are equally divided, each party recovering one moiety of his own loss, and each party paying his own costs (*The Milan*, Lush. 395). Of course, where the collision is the result of inevitable accident (and not of negligence), there is no liability, and no damage recoverable (Judgment of Lord Stowell in *The Woodrop Sims*, 2 Dods. 85). There are numerous statutory provisions intended to obviate the frequency of collisions at sea,—e.g., regulations as to lights, signals, crossing vessels, vessels overtaking each other, &c. (See *Kay's Shipmasters*, 933–952).

COLLUSION. A deceitful agreement or compact between two or more persons for the one party to bring an action against the other for some evil purpose, as to defraud a third party of his right (*Les Termes de la Ley*). As a general rule, collusion between the parties to an action is fatal to the success of it, e.g., in proceedings for a divorce; and a judgment obtained by collusion in one action is not pleadable as a *res judicata* in a second action (*Girdlestone v. Brighton Aquarium Co.*, 3 Exch. Div. 137); but in particular instances it is not so, as in the old proceedings for suffering a common recovery.

COLONIAL COURTS: *See* titles COLONIES; COLONIAL GOVERNORS; COLONIAL LAW.

COLONIAL GOVERNORS. By stat. 11 & 12 Wm. 3, c. 12, governors guilty of oppression, or other crimes or offences in their colonies, may be tried in the Queen's Bench or by special commission (*Fabrigas v. Mostyn*, Cowp. 161); and they may be sued in the courts of their own colony or dependency in respect of civil matters (*Hill v. Bigge*, 3 Moo. P. C. Cas. 465). But they or any other governors are not liable in the courts of their own government for matters of an executive (although abstractly criminal) character committed

COLONIAL GOVERNORS—continued.

by them in their capacity of governors (*Luby v. Lord Wodehouse*, 17 O. L. Rep. (Ireland) 618); and *à fortiori*, they are not liable in such cases, where the legislature of the colony has passed an Act of indemnity (*Phillips v. Eyre*, L. R. 6 Q. B. 1).

COLONIAL LAW. The stat. 6 & 7 Vict. c. 34, provides for the apprehension of offenders within the United Kingdom escaping to the colonies, and *vice versa*, and for their being sent for trial to the jurisdiction within which the offence was committed; and the stat. 12 & 13 Vict. c. 96, provides for the trial in the colonial courts of offenders upon the seas afterwards coming within the colonial jurisdiction; and the stat. 37 & 38 Vict. c. 27, provides for the punishment that may be inflicted on conviction.

See titles COLONIES; FOREIGN JURISDICTION.

COLONIES. As a general rule, a colony acquired by discovery and occupation is to be governed by the laws of England; and if acquired by conquest, or by cession, then by its own laws, so far as they are not contrary to morality, and until the conqueror sees fit to change them. But when the laws of England depend upon circumstances that are peculiar to England, and which do not apply to the colonies also, then these particular laws of England do not hold good even in colonies acquired by discovery or occupation, e.g., the Law of Mortmain in the Island of Grenada (*Attorney-General v. Stewart*, 2 Mer. 143); and the law (now abolished) against aliens holding real property in India (*Mayor of Lyons v. East India Co.*, 1 Moo. P. C. C. 175). The Crown may in the case of colonies acquired by conquest or cession grant them a legislative assembly; and in the case of colonies acquired by discovery or occupancy, it may sanction the constitution of a representative legislature for them. And thereafter the Crown's power of legislation is at an end, as regards colonies of all kinds, which are thereafter governed by the acts of their own legislatures in conjunction with and subject to the acts of the Imperial legislature; but only such acts of the Imperial legislature extend to the colonies as expressly, or by reasonable implication, are intended so to do (1 Steph. Black. 109–110).

By the statute 28 & 29 Vict. c. 63, any colonial law that is repugnant or contrary to any Act of Parliament extending to the particular colony, or that is repugnant or contrary to any order made under the authority of the Act, is to be read subject to such act or order, and is to be void to the extent of the repugnancy.

COLOUR. A technical term used in pleading to signify that apparent right of the opposite party, the admission of which is required in all pleadings, by way of confession and avoidance. Of such pleadings it is, as the name imports, of their very essence to *confess* the truth of the allegation which they propose to answer or avoid, which formerly was done by an introductory sentence, "*True it is that, &c.*," preceding the defence relied upon in answer. But though this formal admission is now generally abandoned, it is still essential that the confession clearly appear on the face of the pleading. In many places it is absolute and unqualified; as, in an action on a covenant, a plea of release admits absolutely the execution of the covenant and the breach complained of; but in some the confession is of a qualified kind, or *sub modo* only. Thus, to an action of trespass for taking the plaintiff's corn, a plea that the defendant was rector, and that the corn was set out for tithe, and that he took it as such rector, would be a good plea by way of confession and avoidance. For though there is no direct confession that the defendant took the plaintiff's corn as alleged in the declaration, but, on the contrary, an assertion of a title to the corn in himself, yet the plea implies that the plaintiff was the original owner, and entitled against all the world, except the defendant. There is, therefore, a confession, so far as to admit some sort of apparent right or *colour* of claim in the plaintiff, and is therefore within the old rule laid down by pleaders on this subject; *that pleadings in confession and avoidance should give colour*. The colour thus explained, inherent in the structure of all pleadings in confession and avoidance, is termed *implied colour*, to distinguish it from *express colour*, which, instead of an implied admission, is a direct and positive assertion of an apparent title in the opposite party, introduced into pleadings of this nature to satisfy the rule as to confession or admission. This latter kind of *colour* is employed or used to be employed, in cases where the pleader was desirous of pleading by way of confession and avoidance to a traverse, and the facts of his case admitted no sort of title in the opposite party, or, in other words, gave no implied colour. He then, for the *express* purpose of giving colour, inserted in his plea a fictitious allegation of some *colourable but insufficient* title in the plaintiff, which he at the same time avoided by the preferable title of the defendant. And in his replication the plaintiff was not allowed to traverse the fictitious matter thus suggested. The practice of giving *express colour* came to be almost entirely confined

COLOUR—continued.

to trespass and trover, and in those actions extended to no other pleading than the plea. The form adopted in trespass to land was to allege a defective charter of demise, and in trespass for taking goods, that the defendant delivered the goods to a stranger, who delivered them to the plaintiff, from whom the defendant took them. By these allegations a colourable or apparent right was given to the plaintiff in both cases, and the pleas were rendered good, which otherwise would have been defective for want of colour (Stephen on Pl. 229 *et seq.*; 1 Ch. Pl. 504; 3 Reeves, E. L. 438.) But under the C. L. P. Act, 1852, s. 64, express colour was no longer necessary, and the better opinion was that under s. 49 of that Act, it was abolished; and certain it is, that under the present practice, no colour (either express or implied) would be tolerated in any pleading, unless so far as it arose naturally or necessarily from the nature of the defence.

COMBINATION OF INVENTIONS: See titles PATENTS; TRADE-MARKS.

COMBINATION OF WORKMEN. The stat. 22 Vict. c. 34, enacts, in explanation of the stat. 6 Geo. 4, c. 129, that no workman, by reason merely of his combining with other workmen for the purpose of fixing the rate of wages, or for the purpose of peaceably and without threat or intimidation dissuading others from working with a view to fixing the rate of wages, shall be deemed or taken to be guilty of the offence of molestation or obstruction; but the Act is not to authorize a workman to break his contract. See also Trades Unions Act, 1871 (34 & 35 Vict. c. 31), and Criminal Law Amendment Act, 1871 (34 & 35 Vict. c. 32).

See title TRADE UNIONS.

COMITIA. Was an assembly, either (1) of the Roman Curiae, in which case it was called the *comitia curiata vel calata*; or (2) of the Roman centuries, in which case it was called the *comitia centuriata*; or (3) of the Roman tribes, in which case it was called the *comitia tributa*. Only patricians were members of the first comitia, and only plebeians of the last; but the comitia centuriata comprised the entire populace, patricians and plebeians both, and was the great legislative assembly passing the *leges* properly so called, as the senate passed the *senatus consulta*, and the comitia tributa passed the *plebiscita*. Under the Lex Hortensia, 287 B.C., the *plebiscitum* acquired the force of a *lex*.

COMITY. As between nations, is the recognition by each of the laws of the others, wherever those laws are applicable; and

COMITY—*continued.*

this recognition is limited by the paramount regard which each country has for its own laws and its own citizens.

COMMANDITE: See title SOCIÉTÉ.

COMMENDAM. The holding a living or benefice in *commendam* is (where a vacancy occurs) holding such living commended by the Crown until a proper pastor is provided for it. This may be temporary, for one, two, or three years; or perpetual, being a kind of dispensation to avoid the vacancy of the living, and is called a *commenda retinere*. These *commendams* are now seldom granted except to bishops.

See title PLURALITIES.

COMMENDATIO. A practice whereby landless men placed themselves under the protection of a hlaford or lord, and who thereby became answerable to justice for them.

See title FRANK PLEDGE.

COMMENDATORS. Secular persons on whom benefices or church livings are bestowed. They are so called because the benefices were commended and intrusted to their oversight; they are not proprietors, but only a kind of trustees. Where the bishop is commendatory, the grant is usually made to him while he continues bishop of the particular diocese, and not longer, the intention of the grant being to augment the revenues of the bishopric where it is poor.

See title PLURALITIES.

COMMISSARY. In the Ecclesiastical Law is a title applied to those officers who are ordained to supply the bishop's office in the distant places of his diocese, or in such parishes as were peculiar to the bishop, and were exempted from the jurisdiction of the archdeacon (Lyndewood's *Provin.*; Cowel).

COMMISSION. In English Law is much the same as *delegatio* with the civilians, and is commonly understood to signify the warrant, authority, or letters patent, which empower men to perform certain acts, or to exercise jurisdiction either ordinary or extraordinary. In its popular sense it frequently signifies the persons who act by virtue of such an authority. There are various sorts of commissions, which will be found under the following titles. The word commission also denotes the reward or remuneration paid to an agent (*e.g.*, auctioneer) for work done by him; but the agency is in such cases usually of a special character, *e.g.*, a *del credere* agent.

See title DEL CREDERE.

COMMISSIONS OF ASSIZE. Commissions empowering the judges to sit on the circuit for the purpose of holding the assizes. The commissioners of assize constitute a branch of the High Court of Justice as fully as when they are sitting at Westminster or in Lincoln's Inn.

COMMISSION OF BANKRUPT. A commission or authority formerly granted by the Lord Chancellor to such discreet persons as he should think proper, to examine the bankrupt in all matters relating to his trade and effects, and to perform various other important duties connected with bankruptcy matters; these persons were thence called *commissioners of bankruptcy*, and had in most respects the powers and privileges of judges in their own Courts. But regularly constituted Courts and judges in bankruptcy have now superseded such commissions and commissioners.

See title BANKRUPTCY.

COMMISSION OF CHARITABLE USES.

A commission issuing out of the Court of Chancery to the bishop and others, when lands which were given to charitable uses had been misemployed, or there was any fraud or dispute concerning them to inquire of and redress the same. The Charity Commissioners are a more or less permanent commission to whom this duty is for the present exclusively assigned; and they specially watch over the management of charity properties, and may negative litigation in the Courts regarding alleged mismanagement.

See title CHARITABLE TRUSTS ACTS.

COMMISSION OF DELEGATES. When any sentence was given in any ecclesiastical cause by the archbishop, this commission under the great seal was directed to certain persons, usually lords, bishops, and judges of the law, to sit and hear an appeal of the same to the king in the Court of Chancery. But latterly the Judicial Committee of the Privy Council has supplied the place of this commission.

COMMISSION TO EXAMINE WITNESSES. When a cause of action arises in a foreign country, and the witnesses reside there, or in a cause of action arising in England, where the witnesses are abroad or are shortly to leave the kingdom; or if witnesses residing at home are aged and infirm, and therefore cannot come to Court; in any of these cases, a Court of Equity will grant a *commission* to certain persons to attend these witnesses wherever they may reside, and to examine them and take down their depositions in writing upon the spot, and these depositions are then received in Court as valid evidence in the cause.

See also titles EVIDENCE; WITNESSES.

COMMISSION OF LUNACY. A commission issuing out of Lunacy authorizing certain persons to inquire whether a person represented to be a lunatic is so or not, in order that, if he is a lunatic, the king may have the care of his estate. The masters in lunacy at the present day are permanent officers appointed to discharge the duties of these commissions, under the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86); and the masters in discharging these duties are answerable to the commissioners in lunacy, being in a manner their deputies or agents.

COMMISSION OF OYER AND TERMINER: See title OYER AND TERMINER.

COMMISSION OF THE PEACE. A commission from the king under the great seal, appointing persons therein named jointly and separately justices of the peace.
See title JUSTICES, &c.

COMMISSION TO TAKE ANSWERS IN EQUITY. When a defendant in a suit lived more than twenty miles from London, there might have been a *commission* granted to take his answer in the country, where the commissioners administered to him the usual oath, and then the answer being sealed up, either one of the commissioners carried it up to Court, or it was sent by a messenger, who swore that he received it from one of the commissioners, and that the same had not been opened or altered since he received it. But latterly such an answer might be sworn in the country before any solicitor of the Court who had been appointed a commissioner to administer oaths in Chancery. The present answer in Chancery (and at Common Law) is a mere affidavit, and is not a pleading: it is sworn anywhere before a solicitor who is a commissioner to administer oaths.

COMMITTEE. An assembly of persons to whom matters are referred. *A committee of the House of Commons* is a committee to whom a bill after the second reading is committed, that is, referred; and is either selected by the House in matters of small importance, or else upon a bill of consequence the House resolves itself into a committee of the whole House. *A committee of the whole House* is formed of every member; and to form it, the Speaker quits the chair (another member being appointed chairman), and the Speaker may in that case sit and debate as a private member. In these *committees* the bill is debated clause by clause, amendments are made, the blanks are filled up, and sometimes the bill is almost entirely remodelled. After it has gone through this committee, it is again brought before the House for re-consideration, after which it is read a third time,

COMMITTEE—continued.

and then passed or not passed, as the case may be.

COMMITTEE OF LUNATIC. Is the person appointed by the lunacy jurisdiction to take care of the person of a lunatic so found by inquisition; and such person is called the committee of the person of the lunatic. The same person or any one else may be appointed the committee of the lunatic's estate.

COMMITTEE ON PRIVATE BILLS. The difference between a committee on a private bill and a committee on a public bill is, that while the latter consists of the House itself, with a chairman of committees presiding instead of the Speaker, the former consists of a selected number of members who sit in a committee room and take evidence for and against the bill; the witnesses being examined by counsel as in a Court of Justice. In the Commons' committees on private bills, the public are admitted; but from the Lords' committees they are excluded.

COMMITTEE, SELECT. A select committee consists of a certain number of members of either House of Parliament, appointed to inquire into and report upon matters specially referred to them. It is called a select committee, as distinguished from a committee of the whole house, a committee of supply, a committee of ways and means, &c.; and it usually conducts its proceedings in a separate apartment provided for the purpose, and not in the body of the House itself. Among the most important of this class of committees, railway committees may be instanced as examples.

COMMITTEE OF SUPPLY. A committee of supply is a committee of the House of Commons, in which the grants of money necessary for the public service are voted, after the estimates of the sums required by the various public departments have been laid before the House.

COMMITTEE OF WAYS AND MEANS. This committee is one which follows next in order to a committee of supply in the financial business of the House of Commons; and its object is to consider the ways and means of raising the supply which has previously been granted in the other committee. The difference between them is that one controls, the other provides.

COMMITTEE OF WHOLE HOUSE: See title COMMITTEE.

COMMIXTIO. A term in Roman Law denoting the mixing together of solids. The ownership is not changed when the

COMMIXTIO—continued.

mixing has been effected without the consent of either owner; *secus*, when they both consent.

See title **CONFUSIO**.

COMMODATUM. A term in Roman Law denoting the contract of a loan for use (*prêt à usage*). It is always gratuitous. The property in the thing lent remains in the lender, whereas in *matuum* (*prêt à consommation*) that property passes into the borrower. The borrower (*commodatarius*) is required to use the utmost diligence in safeguarding the thing lent.

COMMON, RIGHT OF. Is a right which one person who is not the owner has of taking some part of the produce of land belonging to another. There are four kinds of rights of common, viz.:

- (1.) Common of Pasture, which may be, either
 - (a.) Appendant; or
 - (b.) Appurtenant; or
 - (c.) *Pur Cause de Vicinage*; or
 - (d.) In Gross;
- (2.) Common of Piscary;
- (3.) Common of Estovers;
- (4.) Common of Turbary;

As a general rule, rights of common are acquired in the same manner as easements, viz., either

- (1.) By grant; or
- (2.) By prescription, which implies a grant.

And the Prescription Act, 2 & 3 Will. 4, c. 71, applies to all varieties of rights of common, for the acquisition of which it appoints thirty years and sixty years, the former period conferring a title defeasible otherwise than with reference to time, and the latter a title defeasible by production of written evidence only.

Similarly, the remedies for disturbance of a right of common are the same as for the denial or obstruction of an easement, viz. :—

- (1.) An action on the case, which is substituted for the old writ of admeasurement; and

- (2.) *Abatement*.

Rights of common may be extinguished in one or other of the following ways :—

- (1.) By unity of possession;
- (2.) By release;
- (3.) By severance;
- (4.) By enfranchisement; or
- (5.) By inclosure.

See titles **APPROVEMENT**; **INCLOSURE**; **INCORPOREAL HEREDITAMENTS**.

COMMON, TENANCY IN: See titles **PARTITION**; **TENANT IN COMMON**.

COMMON ASSAULT: See title **ASSAULT AND BATTERY**.

COMMON BAIL: See title **BAIL**.

COMMON BAR. In an action of trespass *quare clausum fregit*, if the plaintiff declared against the defendant for breaking his close in a certain parish, without otherwise particularizing or describing the close, and the defendant himself happened to have any freehold land in the same parish, he frequently affected to mistake the close in question for his own, and pleaded what was called the *common bar*, viz., that the close in which the trespass was committed was his own freehold, which compelled the plaintiff to new assign, i.e., to assign his cause of complaint over again, alleging that he brought his action in respect of a trespass committed upon a different close from that claimed by the defendant as his own freehold. Now, however, a defendant cannot well affect ignorance with regard to the real close, as by a rule of Court (Hil. Term, 4 Will. 4), the plaintiff is now bound to *particularize* the close or place in the declaration by assigning to it its familiar name, or by describing it by its abutments or other sufficient description. The above-mentioned plea was also called a *bar at large* and a *blank bar* (Steph. Plead. 250, 4th ed.). Under the present practice, instead of new assigning in such a case, the plaintiff would be leave amend his statement of claim so as to introduce the requisite particularity.

COMMON BENCH. The Court of Common Pleas was formerly so called, because the causes of *common persons*, i.e., causes between subjects only, and in which the Crown had no interest, were tried and determined in that Court.

See title **COURTS OF JUSTICE**.

COMMON CALAMITY. Where two or more persons perish in one shipwreck or other common calamity, there is no presumption in English Law, derivable from age or sex, as to which survived the other or others (*Underwood v. Wing*, 4 De G. Mac. & G. 633; *Wing v. Angrave*, 8 H. L. Cas. 183). A different rule prevails in the French, and prevailed in the Civil Law.

See title **PRESUMPTION**.

COMMON CARRIER: See title **CARRIER**.

COMMON COUNTS: See title **COUNTS**, **COMMON**.

COMMON EMPLOYMENT. Servants engaged in one common employment, and injured through the negligence of one of themselves, have no remedy for such injury against the common master (*Bartons-hill Coal Co. v. Reid*, 3 Mac. 295), provided the master's own personal negligence has not intervened, through insecurity of tackle or apparatus, or through careless selection of incapable workmen (*Roberts v. Smith*,

COMMON EMPLOYMENT—*continued*.

2 H. & N. 213). There is frequently a dispute as to whether the servants are in fact engaged in one common employment; that phrase is, however, an elastic one, and is liberally construed in exoneration of the master (*Wilson v. Merry*, L. R. 1 Sc. Ap. 326).

COMMON INFORMER: See title QUI TAM ACTIONS.

COMMON INTENDMENT. The plain common meaning of any writing, as apparent on the face of it, without straining or distorting the meaning of the writer. *Bar to common intendment* was an ordinary or general bar to the declaration of a plaintiff (Co. Litt. 78; Cowel).

COMMON INTENT. Certainty in pleading has been stated by Lord Coke (Co. Litt. 303) to be of three sorts, viz., certainty to a *common intent*, to a certain intent in general, and to a certain intent in every particular. By a *common intent*, when words are used which will bear a *natural* sense, and also an *artificial* one, or one to be made by argument or inference, the *natural* sense prevails (*Dovaston v. Payne*, 2 H. Bl. 527; 2 Smith's L. C. 132).

COMMON LANDS: See titles APPROVE-
MENT; INCLOSURE.

COMMON LAW. (1.) As opposed to Equity, denoted that portion of the law which was administered in the Common Law Courts at Westminster, as opposed to the Chancery Courts in Lincoln's Inn. That distinction has been abolished, and the two fused together, by the Judicature Acts, 1873-5.

(2.) As opposed to statute law, it included not only the law administered at Westminster, but the law administered or otherwise applied or exercised everywhere and anywhere, as the law of the land established by customs and precedents, and not arising from the direct act of the legislature. In this sense, Common Law would include real property law, so far as same is independent of statute; and in fact, real property law constituted at one time the great bulk of the Common Law.

(3.) It is also opposed sometimes to the Canon Law, sometimes to the Civil Law, and sometimes to the Law Military and Naval, or Martial.

COMMON LAW PROCEDURE ACTS. The three Acts so called are the 15 & 16 Vict. c. 76, 17 & 18 Vict. c. 125, and 23 & 24 Vict. c. 126. They have been very extensively superseded by the Judicature Acts, 1873-5, which (with the Orders and Rules thereunder) constitute a common procedure for both Law and Equity.

COMMON PLEAS. One of the superior Courts of Common Law. The proceedings in this Court are the same as those in the other Courts of Common Law. The Court was fixed at Westminster by or in virtue of that provision in Magna Charta requiring *communia placita* to be held in some one definite place (*aliquo certo loco teneantur*).

See title COURTS OF JUSTICE.

COMMON RECOVERY: See title RECOVERY, COMMON.

COMMON SERJEANT. Is a judicial officer attached to the corporation of the City of London, who assists the recorder in disposing of the criminal and other business of the city.

COMMON TRAVERSE: See title TRAVERSE.

COMMON VOUCHER: See title RECOVERY.

COMMUNE CONCILIUM REGNI ANGLIÆ. The general council of the realm assembled in Parliament. Cowel.

See title COURTS OF JUSTICE.

COMMUNI DIVIDUNDO: See title FRI-
NIUM REGUNDORUM.

COMMUNIA PLACITA NON TENENDA IN SCACCARIO. A writ directed to the treasurer and barons of the Exchequer, forbidding them to hold pleas between *common* persons in that Court (Reg. of Writs, 187; Cowel); however, by means of the fiction *quo minus*, the Court of Exchequer re-acquired the fullest jurisdiction between subject and subject.

See title QUO MINUS.

COMMUNIS ERROR FACIT JUS. A mistake of law that has been undeviatingly pursued by the Courts or by conveyancers and others, becomes in fact good law, and the mistake is purged by the uniformly consistent practice.

COMMUTATION OF TITHES: See titles TITHES; TITHE RENT CHARGE.

COMPANIES. Are associations of persons, who have agreed to become shareholders or members. A partnership is such an association. But the term company is chiefly applied to associations that partake of the character of corporations, and some of which are in fact corporations. They may have been established by Act of Parliament for the execution of purposes of a public character (such as railways, waterworks, and such like), and to all such companies (in addition to their own special Act) the provisions of the three following general Acts are applicable, namely, the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), the Companies Clauses

COMPANIES—continued.

Act, 1863 (26 & 27 Vict. c. 118), and the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); or they may have been established for purposes of private gain or other purposes of a merely private character, and are then usually called joint stock companies. To these last-mentioned companies are principally applicable the following general statutes, namely, the Companies Act, 1862 (25 & 26 Vict. c. 89), the Companies Act, 1867 (30 & 31 Vict. c. 131), and the Companies Act, 1877 (40 & 41 Vict. c. 26); and where the company is a life assurance company, the further stat. 33 & 34 Vict. c. 61, requiring the deposit of £20,000 as a prior condition to the establishment of any new life assurance association. There are also companies established on the Cost Book system, and principally engaged in working minerals within the stannaries of Cornwall and Devon.

See titles CORPORATION; COST BOOK MINING COMPANIES; JOINT STOCK COMPANIES; PARTNERSHIP; PUBLIC COMPANIES.

COMPANIES ARRANGEMENT ACT:

See title ARRANGEMENT, SCHEME OF.

COMPARISON OF HANDWRITING: See title HANDWRITING.

COMPENSATIO. In Roman Law (as in French Law) is the set-off of English Law.

See title SET-OFF.

COMPENSATION. In English Law, denotes the pecuniary sum awarded under railway and other statutes, in payment and compensation of and for lands and buildings taken compulsorily or by agreement for public purposes. The chief statute upon the matter is the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). Compensation may also become payable under the terms of an agreement or covenant, apart from statute; and as such is distinguishable from damages strictly so called. *Seem*, a covenant to pay compensation for subsidence-damage from mining runs with the land, i.e., with the excepted mines (*Aspden v. Seddon*, 1 Exch. Div. 496).

COMPENSATION WORKS: See title WORKS, COMPENSATION.

COMPETENCY OF WITNESSES. Is the phrase which denotes that any particular individual proposed to be called as a witness, is receivable as one; and, in that meaning, it is commonly contrasted with the *credibility* of the witness. The grounds of incompetency were at one time very numerous, but have been gradually lessened by statute, and principally by the following statutes:—3 & 4 Wm. 4, c. 42, ss. 26, 27,

COMPETENCY OF WITNESSES—contd.

rendering competent as witnesses persons interested in or affected by the verdict or judgment (in extension of Lord Kenyon's decision in *Bent v. Baker*, 3 T. R. 27); 6 & 7 Vict. c. 85, rendering competent as witnesses generally all persons, although objectionable on the ground of their having committed some crime or having some interest; 14 & 15 Vict. c. 99, rendering the parties to the action (not being an action of adultery or of breach of promise of marriage) competent as witnesses, this last competency being extended by 16 & 17 Vict. c. 83, to the husbands and wives of parties, and by 40 Vict. c. 14, to the defendants and their wives or husbands, in indictments involving merely a civil right; and by 32 & 33 Vict. c. 68, to actions of adultery and breach of promise. In criminal actions (not including revenue matters), the parties or their husbands or wives are in general still incompetent, excepting on indictments for fraud and such like. And want of intellect, or immaturity of intellect, is, of course, an enduring ground of incompetency.

See titles CREDIBILITY OF WITNESSES; EVIDENCE; WITNESSES; WILLS, &c.

COMPOSITION. As well by the Common Law as under the Bankruptcy Act, 1869, it is lawful for a debtor in embarrassed circumstances to come to an arrangement with his creditors to pay them so much in the pound, and to be released or forgiven by them the rest. The agreement is usually carried out by means of a composition deed, but such a deed is not requisite by the Common Law, there being a sufficient consideration to support the arrangement as a simple contract merely, in the mutual agreement of all the creditors in consideration of the agreements of the others to assent to the composition (*Sibree v. Tripp*, 15 M. & W. 23). It is necessary by the Common Law that all the creditors should have assented to the composition; but under the Bankruptcy Act, 1869, a composition is resolved upon by an extraordinary resolution of the creditors, i.e., a resolution passed by a majority in number and three-fourths in value of the creditors in general meeting, confirmed by a majority in number and value of the creditors assembled at a subsequent general meeting held at an interval of not less than seven nor more than fourteen days.

See also titles BANKRUPTCY; LIQUIDATION.

COMPOSITION DEED: See title COMPOSITION.

COMPOUND HOUSEHOLDER. Is of one several persons between whom the occu-

COMPOUND HOUSEHOLDER—contd.

pation of a house is divided, such persons being tenants and not lodgers. In such cases, the owner (immediate lessor) is usually rated to the relief of the poor (59 Geo. 3, c. 12, s. 19; 32 & 33 Vict. c. 41). The occupier, although not so rated, has the same municipal privileges as if he were rated (21 & 22 Vict. c. 43); also the same parliamentary privileges (14 & 15 Vict. c. 14; 32 & 33 Vict. c. 41) in boroughs, provided the poor rate is in fact paid. In counties, if the proportion of rateable value falling on each joint occupier or owner is sufficient as a separate qualification, he may vote (30 & 31 Vict. c. 102, s. 27).

COMPOUND LARCENY: See title LARCENY.

COMPOUNDING FELONY. Where a person has been robbed, and he knows the felon, and receives back from him his goods that were stolen, or some other amends, upon agreement not to prosecute, this is a misdemeanour.

See titles ADVERTISEMENTS; THEFT; VOTE.

COMPROMISE. Is an arrangement arrived at, either in court or out of court, for settling a dispute upon what appears to the parties to be equitable terms, having regard to the uncertainty they are in regarding the facts or the law and the facts together.

See titles COMPROMISE OF SUIT; FAMILY ARRANGEMENT.

COMPROMISE OF SUIT. When a suit is not carried through to verdict, or decree, or judgment, but the parties agree upon certain terms, which include a stay of proceedings, they are said to compromise the suit. A mere doubtfulness of right is a sufficient consideration to support a compromise (*Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449). Counsel for the parties may also compromise a suit without the authority and even against the wishes of their clients. The parties themselves may compromise it, but without prejudice to their solicitor's lien (*Wright v. Burrows*, 3 C. B. 344). A compromise when made with the sanction of the Court may afterwards (if necessary) be enforced in the action by summary process (*Scully v. Lord Macdonald*, 8 Ch. Div. 658).

COMPULSORY PILOTAGE: See title PILOTAGE.

COMPULSORY POWERS. Under the Lands Clauses Consolidation Act, 1845, compulsory powers are given to railway companies and to public companies generally of acquiring lands for the purposes of their respective undertakings, upon the

COMPULSORY POWERS—continued.

terms and subject to the conditions specified in the Act. Usually that Act is incorporated in the special Act establishing the company; and under the Education Act, 1870 (which is a general Act), the school boards may exercise the compulsory powers contained in the Lands Clauses Act. The various Public Health Acts also confer upon local boards of health and sanitary authorities large compulsory powers for the abatement of nuisances and the better providing for the public health.

See titles LANDS CLAUSES CONSOLIDATION ACT; PUBLIC HEALTH.

COMPURGATION. A mode of trial in Anglo-Saxon times, in which facts were decided upon the oath of the defendant or accused person, supported by eleven compurgators swearing to his credibility. It was superseded in the king's Courts by trial by jury (see title JURY, TRIAL BY, HISTORY OF), but it afterwards lingered in the Borough Courts.

See title COMPURGATORS.

COMPURGATORS. Persons who swear they believe the oath of another person made in defence of his own innocence. Such was the case, e.g., with the clergy, who, when accused of any capital crime, were not only required to make oath of their own innocence, but also to produce a certain number of persons, called *compurgators*, to swear that they believed the oath of the accused. It is a rude form of evidence, the modern phase of which is *character-evidence*.

See title CHARACTER, EVIDENCE AS TO.

COMPUTE, RULE TO. In cases where the plaintiff had an interlocutory judgment, and the amount of damages was a simple matter of calculation, and no evidence was required to ascertain the amount, beyond what was apparent on the face of the pleadings, the Court instead of putting the plaintiff to execute a writ of inquiry, would refer it to the master to compute principal and interest. This course was usually pursued when interlocutory judgment had been signed in an action on a bill of exchange, or promissory note, or banker's cheque. The Courts in the first instance granted a rule to shew cause why it should not be referred to the master to compute principal and interest, &c., which rule had to be served upon the defendant, and if cause was not shewn the rule was made absolute (*Bayley's Pr.* 221; *Lush's Pr.* 706). But under the C. L. P. Act, 1852, in the case of judgment by default no rule to compute was necessary (s. 92); and in actions where the plaintiff sought to recover a debt or liquidated demand in money, judgment by default was final (s. 93);

COMPUTE, RULE TO—continued.

while in actions in which the amount of damage was substantially a matter of calculation, it was not necessary to issue a writ of enquiry, but the Court or a judge might direct that the amount for which final judgment was to be signed should be ascertained by one of the masters, who was to indorse his finding on the rule or order referring the matter to him, and this indorsement had the effect of a verdict upon a writ of enquiry (s. 94). Under the present practice as regulated by the Judicature Acts and the orders and rules thereunder, no writ of inquiry is necessary in any of these cases, but it is referred to the Chief Clerk in the Chancery and to the Master in the Common Law Divisions to compute the amount of damage when that is substantially matter of calculation; and for this purpose no rule to compute is necessary, as the proper direction in that behalf is contained in the judgment (at least in the Chancery Divisions); but a rule to compute may in this case still be necessary in the Common Law Divisions. See titles **ASSESSMENT OF DAMAGES**; **WRIT OF ENQUIRY**.

CONCEALMENT OF BIRTH: See title **BIRTH, CONCEALMENT OF**.

CONCEALMENT IN EQUITY. Is a branch of actual fraud consisting of a *suppressio veri*, the other branch being misrepresentation, which consists in a *suggestio falsi*, and both branches constituting a fraud, without reference to any peculiarity in the relative positions of the defrauding and defrauded persons. But a man is not guilty of concealment, if he merely does not tell, or holds his tongue (*Qui tacet, non videtur affirmare*), unless he was under an obligation to speak out, e.g., in effecting an insurance upon life or goods, in negotiating family compromises, in making purchases from a man's *cestuis qui trustent* of the trust property, and such like. The remedies for the fraud of concealment are the usual remedies in other cases and kinds of fraud.

See titles **FRAUD**; **MISREPRESENTATION**.

CONCILIUM ORDINARIUM. In Anglo-Norman times was an executive and residuary judicial committee of the Aula Regis.

See titles **CABINET COUNCIL**; **COURTS OF JUSTICE**; **PRIVY COUNCIL**.

CONCLUSION TO THE COUNTRY. When a party in pleading traversed or denied a material fact or allegation advanced by his opponent, he usually concluded his pleading with an offer that the issue so raised might be tried by a jury; this he did by stating that he put himself upon the country; and a pleading which so con-

CONCLUSION TO THE COUNTRY—continued.

cluded was then said to conclude to the country: and the technical phrase itself was termed a "*conclusion to the country*."

CONCORD. An agreement entered into between two or more persons, upon a trespass having been committed, by way of amends or satisfaction for the trespass. In that species of conveyance which was formerly in use, called a *fine*, the word "*concord*" also occurs; and here it signifies an agreement, called the *finis concordie*, between the parties, who are levying the fine of lands one to another, how and in what manner the lands shall pass; this concord is usually an acknowledgment from the deforciant (i.e., defendants), that the lands in question are the right of the complainant; and from this *acknowledgment*, or *recognition* of right, the party levying the fine is called the *cognizor*, and he to whom it is levied the *cognizee*.

CONCURRENT JURISDICTION. Used to be that portion of the law which was enforced (prior to the 1st of November, 1875) in the Courts of Equity equally with the Courts of Law, and in which Equity assumed a concurrent jurisdiction chiefly upon the ground of the remedy at Law being inadequate or only circuitously rendered adequate. Under the Judicature Acts, 1873-5, the entire jurisdictions of Law and Equity are made concurrent in name, but the old distinctions of substance are not affected by that merely nominal fusion.

See title **EXCLUSIVE JURISDICTION**.

CONCURRENT WRIT. Is a copy of the original writ of summons issued in an action, the very date being the same; the seal bears the word "concurrent" on it, and shews the date when the concurrent seal was impressed (i.e., issued). A concurrent writ is frequently issued, for service out of the jurisdiction (Order vi. 2).

CONDEMNATION MONEY. The party who fails in a suit or action is sometimes said to be *condemned* in the action, whence the damages to which such failure has made him liable used to be frequently called *condemnation money*. Thus in proceedings to enforce a recognizance by writ of *scire facias* it is laid down that "these persons (the bail) stipulated that if the defendant should be condemned in the action, he should pay the *condemnation money*, or render himself into custody."

CONDICTIO. In Roman Law, was the general name for a personal action, just as *vindicatio* was the general name for a real action. It lay to recover a sum certain or a thing certain; when authorized by any statute (e.g., to recover any statutory

CONDICTIO—continued.

penalty), it was called a *condictio ex lege*. The *condictio* was originally merely a step in the *actio sacramenti*.

See titles SACRAMENTI ACTIO; VINDICATIO.

CONDICTIO FURTIVA. Was the action of *condictio* applied for the recovery of stolen property.

See title FURTUM.

CONDITION. In French Law, the following peculiar distinctions are made:—

(1.) A condition is *casuelle*, when it depends on a chance or hazard;

(2.) A condition is *potestative*, when it depends on the accomplishment of something which is in the power of the party to accomplish;

(3.) A condition is *mixte*, when it depends partly on the will of the party and partly on the will of others;

(4.) A condition is *suspensive*, when it is the future and uncertain event, or present but unknown event, upon which an obligation takes or fails to take effect;

(5.) A condition is *resolutoire*, when it is the event which undoes an obligation which has already had effect as such.

CONDITIONS. At the Common Law, a condition, or the benefit of a condition, could only be reserved to the grantor, lessor, or assignor, and his real or personal representatives, and not to a stranger; but by the stat. 8 & 9 Vict. c. 106, s. 5, under an indenture executed after the 1st of October, 1845, the benefit of a condition respecting any lands or tenements may be taken, although the taker thereof be not named a party to the same indenture.

A condition affecting freehold lands must be created, if not by the same deed, at all events by a deed executed and delivered at the same time as the deed which creates the estate; but a condition affecting chattels, rents, annuities, and such like, may be created subsequently to the principal deed.

CONDITIONS, BREACH OF. By the Common Law, no one could take advantage by entry or action of the breach of a condition, except persons who were parties or privies in right and representation. Therefore, by the Common Law, neither privies in law* (*e.g.*, lords claiming by escheat) nor grantees and assignees of the reversion, could have such advantage of it. But by stat. 32 Hen. 8, c. 34, grantees and assignees now possess this right, whether the grant is of the whole or only of a part of the estate of the reversion, but not so as to apportion the condition; how-

* Nevertheless if the condition were implied in law, privies in law might take advantage of the breach.

CONDITIONS, BREACH OF—continued.

ever, now, by stat. 22 & 23 Vict. c. 35, s. 3, such apportionment may be made where the reversion is severed, *i.e.*, split up into parts.

Even when lands are descendible by some rule or custom to a person other than the heir by the Common Law, *e.g.*, in gavelkind lands, none but the heir by the Common Law might enter for the breach; although after such entry, the customary heir or heirs might enter on him, and enjoy along with him, if the custom so directed. But the right of taking advantage of a breach of condition being merely personal (1 Pres. Shep. T. 150), not even the heir at Common Law might enter for a condition broken in the lifetime of his ancestor.

CONDITIONS, IMPOSSIBLE. In Roman Law, a legacy subject to an impossible condition was valid, and was at once an absolute bequest; and this is also the rule as to bequests of personal property in English Law. Again, in Roman Law, a stipulation (*i.e.*, contract) subject to an impossible condition was void altogether; and this is also the rule of the English Law as to such a contract in the general case. But a distinction has been taken in English Law chiefly upon the words of the contract, between on the one hand a condition which is already impossible, and known to be so to the contracting parties at the time of their contracting (in which case the contract is invariably void, as being simply foolish), and, on the other hand, a condition which subsequently to the contract becomes impossible, or the impossibility of which was unknown to the parties at the time of the contract (in which latter case the contract may or may not, according to the language, be and remain binding). See Leake on Contracts, 356.

CONDITIONS OF SALE. Are the conditions upon which land is sold; and when the sale is by private contract they are embodied (together with the particulars of sale) in the agreement for sale; but when the sale is by public auction, then the conditions of sale are a separate document, as are also the particulars of sale and the agreement. Usually, however, even in a sale by public auction, the conditions and particulars are printed on the same paper; and at the foot of the conditions, there is also printed the memorandum of agreement with blank spaces for the purchasers to fill up and sign.

The various matters provided for in the conditions of sale are principally the following:—

- (1.) The conduct of sale,—the biddings, &c.; and this condition is to state that the property is subject to a

CONDITIONS OF SALE—continued.

- reserved price (if the fact is so), or that the vendor reserves the right to bid (if that is so);
- (2.) The deposit money,—and its forfeiture in case of purchaser's default;
 - (3.) The valuation or other appraisement of fixtures, &c.;
 - (4.) The abstract of title to be furnished,—the commencement (or "root") of title being specified, and exclusion of investigation of prior title;
 - (5.) The exclusion of enquiries after possible dowresses;
 - (6.) The evidence of recitals, &c.,—usually all recitals in deeds, &c., twenty years old being made evidence, unless their inaccuracy or falsehood is otherwise demonstrated;
 - (7.) The expenses of investigating title and making searches;
 - (8.) The ascertainment of the identity of the property sold with that referred to in the abstract of title;
 - (9.) The provisions entitling or disentitling to compensation for errors in description or acreage of property;
 - (10.) The date for completion by payment of residue of purchase-money, and execution of a proper deed of assurance;
 - (11.) The receipt of rents and payment of outgoings,—by whom to be borne, and as from what date the purchaser to be entitled and liable thereto respectively, with a provision for payment of interest by purchaser on his unpaid purchase-money where possession not taken at the date appointed;
 - (12.) The delivery up of title deeds, or arrangements for their custody and production by vendor;
 - (13.) The time for making objections to and requisitions upon the title, with a provision rescinding contract at vendor's option if he is unable to reasonably satisfy the purchaser, and the latter insists on being satisfied; and
 - (14.) The forfeiture of deposit, and right of re-sale at purchaser's expense, when the purchaser is in default in not completing the contract.

CONDITIONS PRECEDENT AND SUBSEQUENT. Conditions are precedent or subsequent with reference either to *estates* or to *rights of action*.

(I.) Conditions precedent and subsequent with reference to *estates*.

In the construction of *personal bequests*,—

CONDITIONS PRECEDENT AND SUBSEQUENT—continued.

(a.) where the condition is precedent, and there is no limitation over on its non-fulfilment, it is sufficient if it is performed in substance, when from unavoidable circumstances it cannot be fulfilled to the letter; but when there is a limitation over of the legacy on non-fulfilment of the condition, a strict and literal performance of it is required (1 Wh. Rep. Leg. 769). On the other hand,—(b.) when the condition is subsequent, then, as being odious, it is construed with strictness, and to be of any avail to defeat an estate (whether vested or contingent), it must have been fulfilled to the letter (1 Wh. Rep. Leg. 783); consequently, the condition subsequent when from unavoidable circumstances it cannot be fulfilled to the letter, a mere substantial performance of it will not suffice; in other words, the condition subsequent becoming impossible in part is discharged in whole, and the prior vested estate becomes absolute; for it is only reasonable that before a person is deprived of the benefit conferred upon him the literal event on which the forfeiture is to arise should happen. Thus, if a condition which is precedent to some bequest requires the consent of three trustees to the marriage of the legatee, and one of those trustees dies, and there is no limitation over, the approbation of the surviving two trustees previously to the marriage will be a sufficient compliance with the condition; and in such a case, if the condition were subsequent, the happening of the like event would discharge the condition *in toto*, inasmuch as the literal performance was become impossible. See 1 Wh. Rep. Leg. 803.

(II.) Conditions precedent to the vesting of a *right of action*, also, conditions subsequent divesting the same.

The right of action is not complete without the previous performance, or else the remission, of all (if any) conditions precedent to the obligation attaching to the defendant; and therefore it is necessary to aver in the declaration a performance of all such conditions, or else a sufficient excuse for the non-performance thereof (*Grafton v. Eastern Counties Ry. Co.*, 8 Exch. 699). By the C. L. P. Act, 1852, s. 57, it is made lawful for the plaintiff or defendant in any action to aver performance of conditions precedent generally; but this enactment does not relieve him from the necessity of averring specifically any excuse for a non-performance thereof, and in this specific averment both the conditions excused and the excuses of performance must be averred with particularity (*London Dock Co. v. Sinnott*, 8 E. & B. 347); but although the discharge

CONDITIONS PRECEDENT AND SUBSEQUENT—continued.

of an obligation under seal can only be effected by a deed under seal, the discharge need not be so averred in the declaration (*Thames Haven Dock Co. v. Brymer*, 5 Exch. 696), or now in the statement of claim. A general averment of readiness and willingness to perform all conditions precedent is not sufficient in the case of a condition precedent which requires either performance or an excuse from performance (*Roberts v. Brett*, 6 C. B. (N.S.) 611); but where the acts to be done on the parts of the plaintiff and defendant are *concurrent*, the party who sues the other for non-performance of his part, need only aver a willingness and readiness to perform (*Morton v. Lamb*, 7 T. R. 125); and the rule is the same with respect to agreements under seal (*Glazebrook v. Woodrow*, 8 T. R. 366). And when the declaration or statement of claim sufficiently shews that the defendant has absolutely incapacitated himself from performing his part of the contract, it is not necessary to aver either the performance of conditions precedent, or a readiness and willingness to perform the concurrent acts (*Hochster v. De la Tour*, 2 E. & B. 678); e.g., bankruptcy has been decided to be such an incapacitation in the case of a contract for the sale of goods to be paid for by instalments (*In re Edwards, Ex parte Chalmers*, L. R. 8 Ch. App. 289).

Again, conditions precedent or subsequent may be *void conditions*.

There is, however, a very great distinction between real property on the one hand and personal property on the other, with reference to the effect of such conditions being void; for real property is governed entirely by the Common Law, whereas personal property is largely subject to rules derived from the Roman Civil Law. Thus, **FIRSTLY**, with reference to *real property*, if a condition in restraint of marriage is general and therefore void, then,—

- (a.) If the condition is *precedent*, no estate or interest will arise, because the estate was only to arise upon the fulfilment of the condition, which is impossible, and the Common Law will not, *to the prejudice of the heir*, dispense with the fulfilment of the condition; but
- (b.) If the condition is *subsequent*, the estate to which it is annexed will become freed from the condition and be absolute.

SECONDLY, with reference to *personal estate*, if a condition in restraint of marriage is general and therefore void, then,—

CONDITIONS PRECEDENT AND SUBSEQUENT—continued.

- (a.) If the condition is precedent, the bequest will take effect as if no condition had been imposed; and
- (b.) If the condition is subsequent the prior bequest becomes absolute.

And by the rules of the Roman Civil Law, and the analogous rules of the English Law derived therefrom, restraints on the freedom of marriage are so odious, that, even where they are partial only,—

- (a.) If the condition is *subsequent*, expressly or impliedly providing for the cesser of the interest in the event of marriage, then,—
 - (aa.) If there is no bequest over in the event of marriage, the prior bequest is absolute; but
 - (bb.) If there is a bequest over in the event of marriage, the prior bequest becomes divested in the event of marriage, and the property passes to the second legatee. But,—
- (b.) If the condition is *precedent*, then,—
 - (aa.) If there is no bequest over in the event of marriage, the legacy is forfeited (*Young v. Furze*, 8 De G. M. & G. 756; *sed dubitatur*, see 2 Jarm. Wills, 2nd ed. 37); and
 - (bb.) If there is a bequest over in the event of marriage, the prior legacy is forfeited, and passes over to the second.

CONDITIONS REPUGNANT. It is a well established rule of law, that conditions or restraints inconsistent with, or repugnant to, the estate or interest to which they are annexed, are absolutely void. Numerous illustrations of the rule are furnished in the reported decisions. Thus (1.) The power of alienation being an incident inseparable from an estate in fee simple, it follows that any condition against alienation annexed to a conveyance or devise to any one in fee simple is absolutely void, whether the condition be general, i.e., forbidding alienation altogether (Co. Litt. 206 b, 223 a), or be particular, i.e., forbidding alienation in certain specified modes, e.g., by mortgage; and it makes no difference if there be a forfeiture or executory devise over in case of an attempt at alienation (*Ware v. Cann*, 10 B. & C. 433). The rule is the same, in the case of a gift in fee tail with a condition annexed to it not to suffer a common recovery or fine, or execute any other disentailing assurance (*Piers v. Winn*, 1 Vent. 321). Also, in *Bradley v. Peizoto* (3 Ves. 324), in the case of a bequest to A. for life, and at his decease to his executors and

CONDITIONS REPUGNANT—continued.

administrators, it was held that A. took an absolute interest in the legacy, and that a condition restraining him from disposing of the principal of the legacy, followed by a gift over in case he should attempt to do so, was inconsistent with the previous absolute bequest, and was therefore altogether void.

Again (2.) In the case of a devise in fee, with a condition (being a mere condition) that no wife should have dower or husband curtesy out of the estate devised, the condition would be void for repugnancy.

Again (3.) In the case of a feoffment in fee, with a condition excluding females from ever taking the inheritance, the condition would be void for repugnancy.

Again (4.) In the case of a gift in fee to A., with a condition that failing disposition thereof by A. in his lifetime (*Ross v. Ross*, 1 J. & W. 154), or so far as such disposition should not extend (*Watkins v. Williams*, 3 Mac. & G. 622), the undisposed of principal should devolve in a certain specified way, the condition is void for repugnancy, it being an inconsistent thing to separate the devolution of property from the property itself, or to attempt to give one's property away twice absolutely.

Again (5.) In the case of an absolute bequest or devise, or other gift to A., with a condition that the property given should not be liable to the debts of A., the condition would be void for repugnancy (*Rochford v. Hackman*, 9 Hare, 475).

Again (6.) In the case even of a life or other limited interest being given to A., with a condition that he is not to anticipate the same, the condition would be void for repugnancy (*Brandon v. Robinson*, 18 Ves. 429); for property cannot be given for life any more than in fee simple, without the power of alienation being incident to the gift. And even in the case of a married woman, such a restraint on anticipation is totally void for repugnancy, unless the married woman's interest is her own separate estate (see title SEPARATE ESTATE). Nevertheless, a proviso determining a life-interest in property upon the bankruptcy of the life-tenant, and carrying the property over has been held valid (*Lockyer v. Savage*, 2 Stra. 947); *à fortiori* such a proviso would be valid in case the bankruptcy occurred in the lifetime of the testator (*Yarnold v. Moorhouse*, 1 Russ. & My. 364), or settlor (*Manning v. Chambers*, 1 De G. & Sm. 282).

But while avoiding in that manner all general restraints and all conditions which are contradictory to the inherent essence of the gift, the law nevertheless, not only permits, but favours, partial or limited re-

CONDITIONS REPUGNANT—continued.

straints. For example, the following limited restraints on alienation, and others like them, are valid in law:—

- (1.) A condition not to alien in mortmain, or to A. or B. in particular: and
- (2.) A condition not to alien within a limited time.

On the other hand, a condition not to alien excepting to one specified individual would be void, as being virtually an unlimited or general restraint (*Attwater v. Attwater*, 18 Beav. 330).

CONDITIONS, VOID. Besides the conditions above exemplified that are void for repugnancy, there are other void conditions. For example, conditions in restraint of the cohabitation of man and wife (*Wren v. Bradley*, 2 De G. & Sm. 49), and provisions having reference to the future separation of man and wife (*Cartwright v. Cartwright*, 3 De G. M. & G. 982; *Cocksedge v. Cocksedge*, 14 Sim. 244), are void as being contrary to public policy; and so also, and for the like reason, are conditions in general restraint of trade, and in general restraint of marriage (*Newton v. Marsden*, 2 J. & H. 356; *Allen v. Jackson*, 1 Ch. Div. 399). And with reference to the validity of conditions not to dispute a will, these conditions appear to be valid as to real estate, but (unless there is a gift over) void as regards personal estate.

See title CONDITIONS PRECEDENT AND SUBSEQUENT.

CONDITIONAL LIMITATIONS. These consist in the original limitations or definitions of an estate, and not in the determination or destruction by means of a condition of an estate previously limited. They apply both to real and to personal estate.

(1.) With reference to real estate. If real estate is given to a woman for widowhood (*durante viduitate*), such a limitation is good, even if it be not followed by any limitation over on her re-marriage, and *à fortiori* if it be followed by such latter limitation; and if real estate is given to a woman as long as she shall remain unmarried (*dum sola fuerit*), such a limitation is good (Co. Litt. 42a); although, as being (in appearance at least), in general restraint of marriage, it would be void as a condition subsequent whether followed or not by a limitation over.

(2.) With reference to personal estate. The authorities are in favour of the validity of such limitations until marriage (see *Webb v. Grace*, 2 Phil. 702; *Heath v. Lewis*, 2 De G. M. & G. 954; *Morley v. Rennoldson*, 2 Hare, 579); from which cases it is necessary to distinguish *Wren v. Bradley* (2 De G. & Sm. 49), as not being

CONDITIONAL LIMITATIONS—contd.

a case of conditional limitation, but of void condition subsequent.

The true construction of conditional limitations, where the condition has reference to death, or to death under specified circumstances, is governed by the following rules:—

(1.) With reference to personal estate.

(a.) When personal estate is given to A. absolutely or indefinitely, "and in case of his death," or "in the event of his death," to B., the testator, in the absence of evidence of a contrary intent, is taken to have intended death *at some particular period* (and not death generally), and therefore,

(aa.) When the interest given to A. is immediate, and there is no other period to which the death can be referred, the death is to be referred to some period in the lifetime of the testator (*Schenk v. Agnew*, 4 K. & J. 405).

(bb.) Where the interest given to A. is preceded by some particular interest given to another, the death is to be referred to some period in the lifetime of the latter (*i.e.* of the prior beneficiary*), and it is immaterial in this case whether or not the death of A. occur antecedently or subsequently to the death of the testator; and generally where any period other than the lifetime of the testator can be suggested, that period is to be preferred.

(b.) When personal estate is given to A. for life only and not absolutely, and "if he should die," or "in case he should die," or "in the event of his death," &c., to B., the death is not to be referred to any period in particular either in the lifetime of the testator or not but is to be taken as referred to generally; and so also if only the interest or income of a fund is given to A. (2 Jarm. Wills, 2nd ed., 633).

(2.) With reference to real estate.

(a.) Where by a will executed before the Wills Act, 1 Vict. c. 26, real estate is given to A., and in case of his death to B.,

(aa.) If the words of reference to death are to death simply, then the reference is to death generally and not to any particular period either within the lifetime of the testator or not.

(bb.) If the words of reference to death are not to death simply, but to death under certain specified circumstances, then the attempt must be made to shew that the reference is to some particular period suggested by the specified circumstances (2 Jarm. Wills, 2nd ed., ch. 49).

(b.) Where by a will executed since the Wills Act, 1 Vict. c. 26, real estate is given to A., and in case of his death to B.,

* "Duration of the prior estate" might probably be the more correct expression.

CONDITIONAL LIMITATIONS—contd.

(aa.) If the words of reference to death are to death simply, then the reference is to death within the lifetime of the testator, or, (if there should be any estate given to another which is prior to A.'s estate), then to death within the period of the lifetime of the prior beneficiary,* and it is immaterial in this case whether the death of A. occur antecedently or subsequently to the death of the testator.

(bb.) If the words of reference to death are not to death simply, but to death under certain specified circumstances, then the attempt must be made to shew that the reference is to some particular period suggested by the specified circumstances (2 Jarm. Wills, 2nd ed., ch. 49).

CONDOMINIA. Were co-ownerships or limited ownerships, such as *emphyteusis*, *superficies*, *pignus*, *hypotheca*, *usufructus*, *usus*, and *habitatio*. These were more than mere *jura in re aliend*, being portion of the *dominium* itself, although they are commonly distinguished from the *dominium* strictly so called.

CONDONATION. A technical term, formerly used in the Ecclesiastical Courts, and from them transferred to the Court for Divorce and Matrimonial Causes, to signify *forgiving* by a husband or wife of a breach, on the part of the other, of his or her marital duties. The legal effect of which forgiving, or *condonation*, is, that usually the party cannot subsequently seek redress for an offence already forgiven. For instance, if after his knowledge of the wife's adultery a husband cohabits with her, such an act of *condonation* bars him from his remedy of divorce; and a wife is equally barred who has condoned an act of cruelty on the part of the husband. It is an important exception, however, to the general doctrine of condonation, which is founded on a willingness to heal the disputes of married life, that a subsequent repetition of the crime revives the former offence, and nullifies the intermediate act of condonation by the injured party.

CONDUCT MONEY. Money paid to a witness who has been subpoenaed on a trial, sufficient to pay the reasonable expenses of going to, staying at, and returning from, the place of trial. These expenses are estimated according to the rank of life of the party, the state of his health at the time, and other similar circumstances (*Lush's Pr.* 460); they are paid by the subpoenaing party in the first instance.

CONFARREATIO. In Roman Law, was a sacrificial rite resorted to by marrying

* "Duration of the prior estate" might probably be the more correct expression.

CONFARRATIO—*continued*.

persons of high patrician or priestly degree, for the purpose of clothing the husband with the manus over his wife; the civil modes of effecting the same thing being *coemptio* (formal) and *usus mulieris* (informal).

See titles *COEMPTIO*; *USUS MULIERIS*.

CONFERENCE. Is a word of various meanings in law.

(1.) It denotes the bringing together of client and counsel, and entitles a junior counsel to the fee of £1 6s., whereas a consultation (*i.e.*, a bringing together of senior and junior counsel) carries only a fee of £1 3s. 6d.

(2.) It denotes the bringing together of the two Houses of Parliament, when there is a dispute between them, so that by means of some members of the respective houses chosen to represent them at the conference, they may consider (*i.e.*, confer upon) the matter in dispute, so as to come to an understanding about it.

(3.) It also denotes any informal meeting of plenipotentiaries or delegates of different states to consider of and confer upon matters affecting them internationally.

CONFESSION. This word, in the law, retains its usual and popular signification. Thus, when a prisoner is indicted of treason, and brought to the bar to be arraigned, and the indictment being read to him, and the Court demanding what he can say thereto, he *confesses* the offence and indictment to be true, or pleads *not guilty*. The word *confession* is also used in civil matters, as where a defendant confesses the plaintiff's right of action by giving him a *cognovit*, &c.

CONFESSION AND AVOIDANCE. Pleadings in *confession and avoidance* are those in which the party pleading admits or confesses, to some extent at least, the truth of the allegation he proposes to answer, and then states matter to *avoid* the legal consequence which the other party has drawn from it. Of pleas of this nature, some are distinguished as pleas in *justification* or *excuse*, others as pleas in *discharge*. The former shew some justification or excuse of the matter charged in the declaration or statement of claim, the latter some discharge or release of that matter. The effect of the former, therefore, is to shew that the plaintiff never had any right of action, because the act charged was lawful; whilst the effect of the latter is to shew that, though he once had a right of action, it is discharged or released by some matter subsequent. Of those in justification or excuse, the *son assault demesne*, in an action of trespass for assault and battery (wherein the de-

CONFESSION AND AVOIDANCE—*continued*.

fendant alleges that the assault complained of was committed in self-defence against the attack of the plaintiff), is an instance: and a common example of those in discharge is, in an action of covenant, a plea of release, wherein the defendant alleges that the plaintiff had, after the breach, released him from all breaches, &c.

See titles *COLOUR*; *PLEADINGS*.

CONFESSION OF DEFENCE. When any matter of defence to an action arises subsequently to the commencement of the action, and such matter of defence is pleaded either in the statement of defence or (by leave) in a further statement of defence, if the plaintiff is of opinion that the new matter of defence is such as to defeat his claim, he may instead of replying thereto deliver a confession of such defence or further defence, and sign judgment for his costs up to the date of the delivery of such defence or further defence (Order xx., 3).

CONFESSION, JUDGMENT BY: See title *ATTORNEY, WARRANT OF*.

CONFIDENTIAL COMMUNICATIONS.

Are privileged from production and inspection, *e.g.*, communications between husband and wife (16 & 17 Vict. c. 83), unless in the matter of indictable fraud under the Debtors Act, 1869, or unless they are the mere secrets of business; also, the communications made by a party to his counsel or solicitor; also, *semble*, communications made to the priest of a church in which confession is a legally authorized practice; also, matters of state either external or internal.

See title *PRIVILEGED COMMUNICATION*.

CONFIRMATION. See titles *CONVEYANCES*, sub-title *CONFIRMATION*; *INFANTS, INCAPACITIES OF*.

CONFIRMATION OF SALES. The Act of 25 & 26 Vict. c. 108 (Confirmation of Sales Act, 1862), enables trustees that are authorized to dispose of the trust estate by way of sale, exchange, partition, or enfranchisement to dispose of the surface of the lands separately from the minerals, and the minerals separately from the surface; but the sanction of the Court (to be obtained on petition) is required before any such disposition can be made. The Court may upon the petition grant to the trustees general powers of making such sales and other dispositions (*In re Wynn's Devised Estates*, L. R. 16 Eq. 237).

CONFISCATION. Is a not unusual penalty for offences against laws, whether municipal or international; *e.g.*, for carry-

CONFISCATION—continued.

ing contraband, for the offence of smuggling, &c.

See title FORFEITURE.

CONFLICT OF EVIDENCE. In an action, particularly one involving scientific measurements and calculations or chemical analyses, the plaintiff's and the defendant's witnesses are generally found to conflict very much in their evidence; and when that is so, it is for counsel to comment thereon, and to support the consistency and inherent probability of the evidence in favour of his own client; and the judge (or the jury) have to decide as to which evidence is the more credible.

CONFLICT OF LAWS. In international law, as regards persons and personal property there are a great many and very diverse laws applicable for some purposes and not for others; and the difficulty of defining the exact limits of the respective applicability of these laws occasions what is called a "conflict of laws." There is no such conflict as regards real property.

See title LEX FORI.

CONFLICT OF PRESUMPTIONS. In this conflict certain rules are applicable, viz. (1.) Special take precedence of general presumptions; (2.) Constant of casual ones; (3.) Presume in favour of innocence; (4.) of legality; (5) of validity: and when these rules fail, the matter is said to be at large.

CONFUSIO. In French Law (as in Roman Law), is the extinction of a debt by the merger of the persons of debtor and creditor in one and the same person. *Confusio* denotes also (in Roman Law) the mingling of *liquids*.

See titles COMMIXTIO; MERGER.

CONGÉ D'ÉLIRE. The "permission to elect" granted by the sovereign to the dean and chapter of the cathedral church, upon the Crown's nomination (by letters missive), of a bishop or archbishop. This mode of election was first enacted by the Reformation Parliament in 1531, and was aimed at establishing the royal supremacy and excluding the supremacy of the Pope over the English church (see title CHURCH AND STATE). In case the dean and chapter neglect or omit for more than twelve days to make the election pointed out and permitted to them, the king may thereafter elect by his own letters patent. The prelate must do homage to the sovereign, from whom also he must sue out his temporalities.

CONJUGAL RIGHTS, RESTITUTION OF. Under the stat. 20 & 21 Vict. c. 85, application for this purpose may be made to the Court by either husband or wife upon petition. The adultery of the wife is a bar to her obtaining restitution (*Hope*

CONJUGAL RIGHTS, RESTITUTION OF—continued.

v. Hope, 1 S. & T. 94: but see *Leaver v. Leaver*, 2 S. & T. 665, Appx. 11). A deed of separation is no bar to a suit for restitution of conjugal rights (*Anquez v. Anquez*, L. R. 1 P. & M. 176). In case the decree is made, a time is fixed within which it must be complied with, in order that an attachment may issue after that time in case it is not complied with (*Cherry v. Cherry*, 29 L. J. (Mat. Cas.) 441).

CONNIVANCE: See title DIVORCE.

CONNUBIUM: See title CONUBIUM.

CONQUEST: See titles CESSION; COLONIES.

CONSANGUINITY, or KINDRED. Relationship by *blood*, in contradistinction to *affinity*, which is relationship by *marriage*.

CONSCIENCE, COURTS OF. Courts of conscience, or, as they were otherwise called, *Courts of Request*, were Courts constituted by Act of Parliament in the City of London and other commercial districts for the recovery of small debts. They were constituted of two aldermen and four common councilmen, who sat twice a week to hear all causes of debt not exceeding the value of forty shillings, which they examined in a summary way, by the oath of the parties or other witnesses, and made such order therein as was consonant to equity and good conscience.

See title SMALL DEBTS COURTS.

CONSCRIPTION. For service in the army or navy, means compulsory service falling upon all male subjects evenly, within or under certain specified ages.

See title IMPRESSMENT.

CONSEIL DE FAMILLE. In French Law, certain acts require the sanction of this body. For example, a guardian can neither accept nor reject an inheritance to which the minor has succeeded without its authority (Code Nap. 461); nor can he accept for the child a gift *inter vivos* without the like authority (Code Nap. 463). So also, in bringing or compromising a suit on behalf of the child, or generally in compounding claims, and in numerous personal relations, e.g., consent to marriages of orphans, the authority of this body is necessary.

CONSEIL JUDICIAIRE. In French Law, when a person has been subjected to an interdiction on the ground of his insane extravagance, but the interdiction is not absolute, but limited only, the Court of first instance which grants the interdiction, appoints a council, with whose assistance the party may bring or defend actions, or compromise the same, alienate his estate make or incur loans, and the like.

CONSENSUS NON CONCUBITUS. The maxim *consensus non concubitus facit matrimonium* literally translated means that it is consent and not cohabitation that produces marriage. But of course cohabitation long continued is a ground for presuming consent, unless that presumption can be otherwise displaced.

See titles COHABITATION; MARRIAGE.

CONSENSUS TOLLIT ERROREM: See title COMMUNIS ERROR FACIT JUS.

CONSENT OF THE CROWN. In cases where the proceedings of Parliament may interfere with the rights or prerogatives of the Crown, by the provision of any particular bill introduced into any branch of the legislature, it is necessary to obtain the consent of the Crown before such bill can pass through any of its stages.

CONSENT, JUDGMENT OR ORDER BY. Usually a judgment or order obtained by consent is not appealable; and after it has been passed and entered it cannot even be varied on the ground of mistake, unless for reasons sufficient to set aside the agreement (*Attorney-General v. Tomline*, 7 Ch. Div. 388); but a consent given by counsel, although in the presence and with the sanction of his client, may be withdrawn before the order is drawn up, if the consent has been given through inadvertence, but not if the client has changed his mind merely (*Holt v. Jesse*, 3 Ch. Div. 177).

See titles CONSENT SUIT; SHORT CAUSE.

CONSENT OF PROTECTOR: See title PROTECTOR.

CONSENT SUIT: See title SHORT CAUSE.

CONSEQUENTIAL DAMAGES: See title DAMAGES.

CONSERVATORS. This phrase is almost exclusively applied at the present day to the boards of persons having the care and management of the Thames and its contributories, or of other rivers. Their constitution, interests, and powers are to be collected mainly, if not entirely, from the particular statutes passed regarding them.

See title THAMES CONSERVANCY.

CONSERVATORS OF THE PEACE: See title JUSTICES OF THE PEACE, ORIGIN OF.

CONSIDERATION. This is one of the three particular requisites, or essentials, to a simple contract. It is not necessary in the case of a contract of record, or by specialty. Considerations are usually valuable (*i.e.*, for money or money's worth), and forbearances as well as acts are included among valuable considerations. Some considerations are merely voluntary, and others are meritorious (*i.e.*, for natural love and affection). Valuable and meri-

CONSIDERATION—continued.

torious considerations are sometimes both denoted by the phrase good consideration. A bargain and sale requires a valuable consideration in money; a covenant to stand seised requires a meritorious consideration.

CONSISTORY COURT. The *Consistory Court* of every diocesan bishop is held in their several cathedrals for the trial of all ecclesiastical causes arising within their respective dioceses. The bishop's chancellor or his commissary is the judge, and from his sentence an appeal lies to the archbishop of each province respectively, or to the Dean of Arches, as his officer.

See titles COURTS, ECCLESIASTICAL; OFFICIAL PRINCIPAL.

CONSOLIDATED ORDERS. These are certain general orders and rules prescribing the method of procedure in the Court of Chancery, and a great portion of these have been in no way affected, and a still greater portion of them only partially and immaterially affected, by the orders and rules made under the Judicature Acts. These consolidated orders, which were promulgated under the chancellorship of Lord Campbell, and which came into force from and after the 14th of February, 1806, are so called because, after abrogating (with a few specified exceptions) all the then existing or prior orders, they consolidated the rules of practice and procedure generally (see *Morgan's Chancery Acts and Orders*, 4th ed., 360–614); and subsequently there have been certain supplementary orders and rules which are called by their proper dates; and the prior orders remaining unabrogated by the consolidated orders are also now distinguished by their proper dates.

See title ORDERS AND RULES.

CONSOLIDATIO. In Roman Law, is the merger which arises by release in English Law.

CONSOLIDATION OF ACTIONS. Where in the same Division of the High Court of Justice there are several pending actions instituted by the same plaintiff or plaintiffs against divers defendants,—then, if the question or questions in dispute are substantially the same in all the actions (and, consequently, the evidence in proof or disproof of the question or questions, when of fact, is substantially the same), the Court will, upon the application of the divers defendants, or of such of them as have appeared, and so soon as they have appeared, order the several actions to be consolidated (Order LI., 4). In the consolidation-order, or rule, the applicant-defendants jointly and severally undertake to abide by the verdict or judgment in the

CONSOLIDATION OF ACTIONS—*contd.*

consolidated action; but this undertaking does not, of course, interfere with these defendants' right of moving to set aside the verdict, or of moving by way of appeal from the judgment. The order of consolidation is not binding on the plaintiff strictly speaking, but it is binding upon him practically.

CONSOLIDATION OF MORTGAGES. As a general rule, both in suits for foreclosure and in suits for redemption, the mortgagor cannot redeem one mortgage without redeeming all other mortgages which the mortgagee holds upon any part of his property; for these the mortgagee has a right to consolidate together (*Selby v. Pomfret*, 1 J. & H. 336). And this rule is applicable as well to mortgages of realty (*Neve v. Pennell*, 11 W. R. 986) as to mortgages of personalty (*Watts v. Symes*, 1 De G. M. & G. 240), and holds good against a purchaser for value of the equity of redemption, and also against a subsequent mortgagee thereof, although each is without notice of the other mortgages (*Beavor v. Luck*, L. R. 4 Eq. 537).

This doctrine of consolidation depends upon a principle altogether different from that upon which tacking depends. Because in tacking, the right is to throw together several debts lent on the *same* estate, and to do so under the priority and protection afforded by the legal estate; but in consolidation, the right is to throw together on one estate several debts lent on *different* estates, and to do so *without reference to any priority or protection afforded by the legal estate*, but solely upon the equitable maxim that he who seeks equity must do equity. Further, not only is getting in the legal estate not necessary as a preliminary to consolidation as it is to tacking, but even notice at the time of lending the mortgage money on the second estate, which would be fatal to any subsequent right of tacking, is wholly immaterial as regards the right of consolidation (*Fisher on Mortgages*, 2nd ed., pp. 678, 679). But see *Baker v. Gray*, L. R. 1 Ch. Div. 491; *Brown's Snell's Principles of Equity*, 5th ed. pp. 317, 318.

See titles MORTGAGE; NOTICE; TACKING.

CONSOLIDATION ORDER OR RULE:

See title CONSOLIDATION OF ACTIONS.

CONSOLS. Are the Consolidated Bank Annuities of the United Kingdom of Great Britain and Ireland. They are called *consolidated*, because in the year 1787, the three separate capital funds representing the National Debt, theretofore variously designated the *aggregate* fund, the *general*

CONSOLS—*continued.*

fund, and the *South Sea* fund, were combined together into one consolidated fund.

See title NATIONAL DEBT.

CONSPIRACY. This is a criminal offence of the degree of a misdemeanour, and is punishable with fine or imprisonment, or both. It is defined as an agreement between two or more persons,—(1.) Falsely to charge another with a crime punishable by law, either from a malicious or vindictive motive or feeling towards the party, or for the purpose of extorting money from him; or, (2.) Wrongfully to injure or prejudice a third person, or any body of men, in any other manner; or, (3.) To commit any offence punishable by law; or, (4.) To do any act with intent to prevent the course of justice; or, (5.) To effect a legal purpose with a corrupt intent, or by improper means.

CONSTABLE. The word constable has been said to be derived from the Saxon language, and to signify the support of the king; but others have, with greater reason, supposed it to be derived from the Latin *comes stabuli*, an officer who among the Romans used to regulate all matters of chivalry, tilts, tournaments, and feats of arms, &c. (1.) The *Constable of England*, or *Lord High Constable*, as he was called, was an officer of high dignity and importance in this realm about the time of Henry VIII.; but since that period the office has been disused in England, except on great and solemn occasions. He was then the leader of the king's armies, and had the cognizance of all matters connected with arms and war. He also sometimes exercised judicial functions in the Court of Chivalry, where he took precedence of the earl marshal. His jurisdiction is partly now vested in the Court of Admiralty. The constables, however, to which we more immediately refer now are of two sorts, *high constables* and *petty constables*. (2.) *High Constables* are appointed at the Court leets of the franchises or hundreds over which they preside, or in default of that, by the justices at the quarter sessions, and are removable by the same authority that appoints them. They have the superintendence and direction of all petty constables within their district, and are in some measure responsible for the conduct of these latter. They have also the surveying of bridges, the issuing of precepts concerning the appointment of overseers of the poor, of surveyors of the highways, of assessors and collectors of taxes, &c. (3.) The duties of *Petty Constables* are subordinate to those of the high constable, and of a less important character. (4.) There are also *Constables of Castles*, who are governors or keepers of the same, and

CONSTABLE—continued.

whose office is usually honorary. These constables of castles possessed jurisdiction within the precincts of the manors on which their castles were built; but by Magna Charta (1215), chap. 24, no sheriff, constable, coroner, or bailiff of the king was thereafter to hold pleas of the Crown.

See titles **ARREST**; **POLICE**; **WARRANT**.

CONSTABLE OF ENGLAND: See title **CONSTABLE**.

CONSTABLES OF CASTLES: See title **CONSTABLE**.

CONSTITUTION, CHARACTER OF ENGLISH. According to Sir John Fortescue (who was tutor to Henry VI.), the English Government is political and not regal, that is, limited and not absolute. Even the king's prerogatives are given to him only for the subject's good. According to Mr. Hume, on the other hand, the Government of England, in its earlier periods, was most arbitrary and absolute.

Certain it is that the prerogative of purveyance, as regards both articles of consumption and labour, had been commuted into a right of pre-emption at a reasonable price; that in judicial matters, torture was unrecognised by the law, although occasionally resorted to in fact; that the rights of juries were respected by the Courts of Law, although sometimes evaded; and that illegal condemnations upon political charges were infrequent. Therefore England, compared with other countries, was more nearly what Fortescue says than Hume; and Hallam supports Fortescue's opinion. Hallam, moreover, attributes this general character of the English constitution to the four following causes, namely:—

- (1.) The civil equality of all freemen below the rank of the peerage;
- (2.) The subjection of the peers themselves to the impartial arm of justice and taxation;
- (3.) The passion of the early kings for continental conquest, whereby they were constantly in want of money; and
- (4.) The vigour of the first three Norman sovereigns, who effectually repressed the principles of insubordination and resistance, which were natural to feudalism.

At the same time there is some justification for Hume's opinion, in the frequent interferences of the King's Privy Council in matters affecting the liberties and properties of the subject; also, in the fact that the constable and the marshal exercised a large jurisdiction, which was most arbitrary; also, in the circumstance that the feudal rights of the Crown, namely,

CONSTITUTION, CHARACTER OF ENGLISH—continued.

wardships, escheats, and forfeitures were exercised unsparingly; also, lastly in the circumstance that the forest jurisdictions, although nominally abridged by the *Charta di Foresta*, were still extensive and encroaching. It may, therefore, be concluded that Fortescue's opinion is more flattering than true, and that Hume's opinion is slightly overdrawn the other way.

CONSTITUTION, GROWTH OF. The English constitution, unlike the American one, was not made, but grew; and the following stages in its growth are roughly distinguishable:—

(1.) The reign of Henry III., in which three points were established, namely—

- (a.) The Commons' right to participate in *taxation*;
- (b.) The Commons' right to participate in *legislation*; and
- (c.) The Commons' right to control the *application of supplies*;

(2.) The reign of Edward III., in which three points were established, namely—

- (a.) The Commons' right to participate in *taxation*;
- (b.) The Commons' right to participate in *legislation*; and
- (c.) The Commons' right to inquire into *public abuses*, and to *impeach public ministers*;

(3.) The reigns of Henry IV., V., and VI. (Lancastrian line), in which seven points were established, namely—

- (a.) The Commons' *exclusive* right in matters of *taxation*;
- (b.) The Commons' right to *appropriate the supplies*;
- (c.) The Commons' right to make grants of supplies conditional upon *redress of grievances*;
- (d.) The Commons' right to participate in *legislation*;
- (e.) The Commons' right to control the *administration*;
- (f.) The Commons' right to *impeach public ministers*; and
- (g.) The Commons' rights of *privilege*, namely—
 - (aa.) Freedom of speech in Parliament;
 - (bb.) Freedom from arrest during Parliament;
 - (cc.) Right of decision upon election returns.

CONSTITUTIONES. Were laws promulgated, i.e., enacted by the Roman Emperor. They were of various kinds, namely, the following:—

- (1.) *Edicta*: See title **EDICT**.
- (2.) *Decreta*: See title **DECRETUM**.

CONSTITUTIONES—continued.

(3.) *Rescripta*, called also *Epistolae*: See title **RESCRIPTUM**.

Sometimes they were general, and intended to form a precedent for other like cases; at other times they were special, particular, or individual (*personales*), and not intended to form a precedent. The emperor had this power of irresponsible enactment by virtue of a certain *lex regia*, whereby he was made the fountain of justice and of mercy.

See title **LEX REGIA**.

CONSTITUTIONS OF CLARENDON: See title **CLARENDON, CONSTITUTIONS OF**.

CONSTRUCTION, RULES OF. The various rules for the construction of documents, whether wills or writings *inter vivos*, are stated under the title **INTERPRETATION**, along with which the title **EXTRINSIC EVIDENCE** should be consulted. The great rule is of course to arrive at the intention from the words used, not to conjecture an intention, and then make the words conform to it. Precedents or decided cases are of absolutely no good as a means of construing any new document; but they may (and often do) furnish or exemplify a principle of construction that may be serviceable.

CONSTRUCTIVE FRAUD. Is a fraud in the view of a Court of Equity, although it falls short of actual fraud. Thus, it is neither a *suppressio veri* nor a *suggestio falsi*, i.e., it is neither a fraudulent concealment nor a fraudulent misrepresentation; nevertheless, it is construed to be a fraud,—either (1.) Because it is contrary to the policy of the law or to general public policy; or (2.) Because it arises from an abuse of the fiduciary relations; or (3.) Because it has effects that are unconscionable as regards either the party immediately affected by the fraud on some third party. Marriage brokerage contracts are an example of the first species of constructive frauds; gifts from a client to his solicitor of the second; and post-obit bonds of the third. The alleged fraud may, however, be disproved, like every other presumption of the Court, by extrinsic or other evidence to the contrary.

See title **FRAUD**.

CONSTRUCTIVE NOTICE: See title **NOTICE**.

CONSTRUCTIVE TRUST. Is a trust which is raised or created, i.e., constructed, by a Court of Equity without regard to the intention of the parties,—in this respect differing from an express trust which is founded on the expressed intention, and from an implied or resulting trust which is based on the implied intention. Examples of constructive trusts are a vendor's

CONSTRUCTIVE TRUST—continued.

lien and heir-of-mortgagee's trust for next of kin.

See title **TRUSTS**.

CONSUL. This is an officer of a commercial character, appointed by the different states to watch over the mercantile interests of the appointing state, and of its subjects in foreign countries. There are usually a number of consuls in every maritime country, and they are usually subject to a chief consul, who is called the consul-general. A consul is not a public minister, nor entitled to the immunities of such; but in the absence of an ambassador or *chargé d'affaires*, a consul-general may act as temporary minister, and as such, *semble*, he is entitled for the time to these immunities, and to that position (Tuson on Consuls).

CONSULTATION: See title **CONFERENCE**.

CONSULTATION, WRIT OF. When a party to a suit in one of the inferior Courts had obtained a writ of prohibition from one of the superior Courts from proceeding further in the matter, and such superior Court finally, after demurrer and argument, was of opinion that there was no competent ground for having so restrained such inferior jurisdiction, then judgment was given against him who applied for the prohibition in the superior Court, and a writ of consultation was awarded; so called because, upon consultation and deliberation had, the judges found the prohibition to be ill founded, and therefore by this writ they returned the cause to its original jurisdiction to be there determined in the inferior Court. But the writ of consultation appears to be wholly obsolete.

See titles **CERTIORARI**; **PROCEDENDO**.

CONSUMMATION OF MARRIAGE. Is the effective sexual intercourse of newly married people. Where this is impossible, it is a ground for nullity of marriage, as distinguished from a divorce, which implies a consummation. The decree of nullity is *nisi* in the first instance (36 Vict. c. 31).

CONTAGIOUS DISEASES. Various statutes have been passed to check the spread of contagious diseases, as well in the case of human beings as in the case of the brute animals. The two principal statutes for the examination and (if necessary) the treatment of prostitutes at certain military and naval stations are 29 & 30 Vict. c. 35, and 32 & 33 Vict. c. 69; but the policy of this legislation being questioned by some persons, the repression of contagious sexual disease makes little progress. The Public Health Acts contain provisions for the repression of small-pox and other like disorders, by isolation of the sufferers and

CONTAGIOUS DISEASES—*continued.* otherwise. The principal statutes seeking to exclude the importation of infected animals or their exposure in proximity to others not infected, and providing for their slaughter or detention at the port of importation are 32 & 33 Vict. c. 70, and 39 & 40 Vict. c. 36.

CONTEMPORANEA EXPOSITIO. The maxim *contemporanea expositio est optima et justissima in lege* means that the construction which a statute receives at the time it is first enacted is the most likely to be the true construction (*Morgan v. Crawshay*, L. R. 5 H. L. 304).

See title **OPTIMUS LEGUM INTERPRET CONSUETUDO.**

CONTEMPT OF COURT. This consists in any refusal to obey an order or process of the Court, or in offending against particular statutes, the contravention of which is thereby declared to be a contempt of Court; or in interfering with and violating the known and well-ascertained rules of the Court, *e.g.*, of the Court of Chancery, regarding the custody or marriage of its wards; and also in certain offences of a vague kind, but which are generally calculated to prejudice the Court in its trial of the action, or in the regard of the people for it. See the true nature of the offence stated in the *Queen v. Castro* (L. R. 9 Q. B. 219). Every Court has, subject to the control of the Court of Queen's Bench, inherent power to punish for a contempt of Court, by whomsoever committed, and the offender may be committed without warrant (*In re Wilson*, 7 Q. B. 984). The contempt for which a County Court may commit must be a contempt *in facie curiæ* (9 & 10 Vict. c. 95, s. 113). The jurisdiction to commit for contempt is not to be used slightly, or for collateral purposes (*In re Clements*, 46 L. J. (Ch.) 375).

See title **CONTUMACY.**

CONTENEMENT. A landowner's tenement is so called, when regarded as his means of support. *i.e.*, the lands are the same to the landholder as his merchandize is to the merchant, or his wainage to the waggoner.

CONTENTIOUS JURISDICTION. The litigious proceedings in the Probate Division of the High Court are sometimes said to belong to its *contentious* jurisdiction, in contradistinction to what is called its voluntary or non-contentious jurisdiction. Dr. Tristram's book on the Court of Probate is subdivided into the Non-contentious and the Contentious Jurisdictions of the Court.

See title **VOLUNTARY JURISDICTION.**

CONTESTATIO LITIS. Was that stage in an action in Roman Law at which issue was joined, and the parties were thereafter bound to stand or to fall by the issue so joined. It operated a *novatio* of the original obligation, and as having that effect it is mentioned by Gaius as one of the modes of determining or of discharging an obligation.

See titles **LEGIS ACTIONES**; **MERGER.**

CONTINGENCY, DOUBLE. The law will not tolerate or recognise any estate or interest or right dependent upon a double possibility or double contingency. This is a mere rule of prudence and common life, acted upon every day. One of its applications in law is the rule for the creation of contingent remainders in real estate which cannot be given to a person who is doubly unborn, *i.e.*, to the child of an unborn father.

CONTINGENT DEBT. May or may not be provable in bankruptcy, according as in the judgment of the registrar it is or is not capable of being estimated; and his decision upon the point seems necessary to be obtained.

See title **PROOF OF DEBTS IN BANKRUPTCY.**

CONTINGENT LEGACY. Is a legacy which is to vest in the legatee upon the happening of some specified event, *e.g.*, upon the legatee's marrying or attaining a certain age.

CONTINGENT REMAINDER. This is a limitation of an estate, which is confined to real property. For the rules and limits of its creation, and for its more accurate definition, see title **INCORPOREAL HEREDITAMENTS.** Words appearing to create a contingent remainder in personal property do not in fact create one, but create an executory interest, which in its definition and in the rules and limits of its creation differs very materially from a contingent remainder.

See title **INCORPOREAL HEREDITAMENTS.**

CONTINUANCE. Anciently the parties to an action, or their attorneys for them, used to appear in open Court; the plaintiff's advocate stated his cause of complaint *viva voce*; the defendant's advocate his ground of defence; plaintiff's advocate replied; and the altercation continued till the two parties came to contradict one another, or, as it was termed, to an *issue*. If this issue was upon a point of law, the judges decided it: if upon a point of fact, it was tried by a jury, or by one of the other modes which prevailed at that period. While this was going on, the officers of the Court, who sat at

CONTINUANCE—*continued.*

the feet of the judges, took a written minute of the proceedings on a parchment roll, which was called *the record*, and was preserved as the official history of the suit, and that alone, the correctness of which could be afterwards recognised and depended on, was the only evidence of the matters stated there, and the Court would not allow it to be contradicted. As the proceedings generally occupied more days than one, the Court used to adjourn them from time to time; if these adjournments, which were called *continuances*, were not made, the suit was at an end, since there was no period at which either party had a right again to call the Court's attention to it; and if the *continuance*, though made, were not entered on the record, the suit was equally at an end, since the record was the only evidence the Court would admit of the fact of the continuance. In such a case the action was said to be *dis-continued*. And latterly when a cause was put down in the list of causes to be tried at a certain time, and from some cause or other it was not then tried, but was adjourned, a minute of such adjournment was entered on the record, which was technically termed entering a continuance, because such entry signified that the cause was not yet finished, but continued pending. This practice of entering continuances was, however, abolished by r. 31, T. T., 1853.

CONTINUANDO. In trespasses of a permanent nature, where the injury is continually renewed (as by spoiling or consuming the herbage with the defendant's cattle) the declaration may allege the injury to have been committed by *continuation* from one given day to another, which is called laying the action with a *continuando*, and the plaintiff shall not then be compelled to bring separate actions for every day's separate injury. 2 Roll. Abr. 545.

CONTRABAND. Some articles are notoriously and essentially contraband, *i.e.*, capable of being used in war only; other articles are in the opposite extreme, and (excepting by some imaginative application) can never be useful in war at all. Between these two extremes, there are many articles said to be "*ancipitis usus*," *i.e.*, of variable application, usually in peace but not unfrequently in war. Articles *ancipitis usus* are such articles as provisions, coals, naval stores, timber, tar, and the like. Such articles, if the natural productions of the country conveying them, should be privileged from the confiscation which carrying contraband entails; but this question is at present the subject of no settled law, and the very list of articles *ancipitis usus* has never been completely

CONTRABAND—*continued.*

defined. Nevertheless all articles *ancipitis usus*, and even articles of use in peace only become contraband by destination, if attempted to be carried into a blockaded port. Even persons and papers of a diplomatic character may be contraband. The penalty for wilfully carrying contraband either *in se* or by destination is forfeiture of the vessel as well as of the cargo.

CONTRACTOR: See title SUB-CONTRACTOR.

CONTRACTS. There are three classes of contracts:—

- (1.) Record.
- (2.) Specialty.
- (3.) Simple.

I. Contracts of records, which are really only judgments, possess the following characteristics:—

- (1.) They merge all other contracts or grounds of action;
- (2.) They have the effect of an estoppel;
- (3.) They require no *consideration*; and,
- (4.) They used to bind the land of the judgment debtor, but since 1864 they do not.

II. Specialty contracts, which are really only agreements by deed, possess the following characteristics:—

- (1.) They merge all simple contracts or other grounds of action;
- (2.) They have the effect of an *estoppel*;
- (3.) They require no *consideration*; and
- (4.) They may be made to bind the land by binding the heir.

Specialty contracts, although they estop the parties, may be avoided on the ground of fraud or illegality: thus in *Collins v. Blantern* (2 Wils. 341) the defendant had covenanted by deed to pay the plaintiff £700, and having refused to do so the plaintiff sued him upon the covenant; the defendant pleaded that the bond was given as part of a scheme for stifling a criminal prosecution; this plea was held to be a good defence.

Specialty contracts may be discharged in two ways:—

- (1.) By performance;
- (2.) By another specialty substituted for them, but not by any mere simple contract.

Thus: if a man has covenanted to repair or to build a house he can only be discharged by doing the thing, or else by another deed releasing him. This rule is without exception where the covenant has not yet been broken (*i.e.*, before breach of covenant), but after breach there is one exception, and that is where an uncertain sum of money is to be got as damages for the breach (*Blake's Case*, 6 Rep. 43 b).

III. Simple contracts. To every simple

CONTRACTS—continued.

contract there are the three following *general* or *abstract* requisites:—

- (1.) Certainty in the terms of the contract;
- (2.) Assent of both parties to it (*assensus ad idem*); and
- (3.) Mutuality of obligation.

To every simple contract there are also the three following *particular* requisites:—

- (1.) Request;
- (2.) Consideration; and
- (3.) Promise.

Whence the following distinction, viz.:—

I. Where the consideration is *executory*, i.e., in the case of *executory* contracts, the request and also the promise are *implied* by law, although, of course, both or either of them may be *express*.

II. Where the consideration is *executed*, i.e., in the case of *executed* contracts,—subdivided into the following two classes of cases, viz.:—

- (1.) The acceptance of an executed consideration which was not moved by a previous request; and
- (2.) A consideration executed on request.

The former of these two subdivisions is invariably obligatory as a ratification (*see* title **RATIFICATION**); but as to the second subdivision, the following varieties present themselves, viz.:—

- (a.) Where the plaintiff has been *legally compelled* to pay what the defendant was *legally compellable* to pay, e.g., A. was surety for B. for £500 owing by B. to C.; C. compelled A. to pay; then A. brought his action against B. to be repaid. Here the request and the promise are both *implied* in law;
- (b.) When the plaintiff has *voluntarily* paid what the defendant was *legally compellable* to pay, and the defendant afterwards *promises* to repay the plaintiff, e.g., A. owes B. £50, and C., to oblige A., pays the £50 to B. for him, then A. promises to repay C. Here the request to pay is implied in law, but the promise is not; and
- (c.) When the plaintiff has *voluntarily* paid what the defendant was *morally*, but not *legally* compellable to pay, e.g., A. owes B. £50 on an immoral debt, and C., to oblige A., pays it; then A. afterwards promises to repay C. Here the request to pay is not implied, and the promise to repay is without a legal consideration.

In every contract *privity* is an essential requisite to any one suing on it; in other words, no person can take advantage of the consideration in a contract excepting the party from whom the consideration has

CONTRACTS—continued.

moved, which means that no person can sue on a contract excepting the parties to it; and this is what is understood by *privity*. An example of the absence of *privity* is the following:—A. gives £50 to his servant to pay a tradesman's debt; the tradesman knowing of it sues the servant for money had and received to the tradesman's use (*Baron v. Husband*, 4 B. & Ad. 611); in this case the tradesman lost his action for want of *privity* between him and the servant.

CONTRACTS IN RESTRAINT OF MARRIAGE. The law as to these is,—that the contract if in general restraint is void, if for a partial restraint only is good.

See titles **CONDITIONAL LIMITATIONS**; **CONDITIONS VOID**; **RESTRAINTS UPON MARRIAGE**.

CONTRACTS IN RESTRAINT OF TRADE. All such contracts as a general rule are void, because they are against public policy (*Mitchel v. Reynolds*, 1 Sm. L. C. 356). But such contracts are allowed to be good where the restraint is limited to a particular time, or to a particular locality, and when a valuable consideration has been given for them.

The requisites to a valid contract in restraint of trade are two, viz.:—

- (1.) That the restraint be limited either in time or in locality, or in both; and
- (2.) That a valuable consideration should have been paid for the restraint.

What shall be reasonable in point of time or locality varies with the nature of the business.

And generally, the restraint is only allowed so far as is necessary to protect the trader.

CONTRACTUS. In Roman Law has been defined as a *pact* plus an *obligatio*. It is included under the more general word *conventio*, which however extends to including also a simple pact; it is commonly opposed to *delictum*, which is the English *tort* in substance. The Roman Law recognises four determinate classes of contracts proper, namely, Real (*re*), Verbal (*verbis*), Literal (*litteris*), and Consensual (*consensu*),—the varieties of the real being the *mutuum*, the *commodatum*, the *depositum*, and the *pignus*, and the varieties of the consensual being the contract of sale (*emptio venditio*), the contract of hiring (*locatio conductio*), the contract of partnership (*societas*), and the contract of mandate (*mandatum*). The verbal contract is simply the *stipulatio*; and the literal contract was the *nomen*, in its two varieties, viz., a *re in personam* (being a transfer from the day-book into the ledger) and a *personá in per-*

CONTRACTUS—continued.

sonam (being a transfer from one column of the ledger into another column of the same book). There were also several in-nominate (i.e., unclassified and unclassifiable) contracts, such as *Precarium*, *Permutatio*, *De Aestimato*, and *Transactio*. And in Roman law, wherever a consideration underlay any agreement or pact (*subest tamen causa*), the agreement or pact became actionable as a contract, just as in English Law. There were also many implied contracts in Roman Law; and in addition there were six *quasi-contracts* so-called, namely, the *negotiorum gestorum*, the *tutor et pupillus*, the *rei eriscundae*, the *communi dividundo*, the *haeres legatorum nomine*, and the *indebiti solutio*,—all which corresponded more or less with, but differed in material respects from, the contracts properly so called.

CONTRACTUS, BONAE FIDEI. In Roman Law, were those contracts (e.g., *emptio venditio*) which admitted of equitable defences and other equitable considerations; they were opposed to contracts *stricti juris* (e.g., *stipulatio*), which admitted no such equitable defences or considerations,—at least, until their original character was compelled by statute to admit them. All the praetorian contracts were *contractus bonae fidei*; but some of the *civiles contractus* were also *bonae fidei*.

CONTRACTUS, CIVILES. In Roman Law, were those contracts (e.g., *emptio venditio*) which were actionable either in virtue of the old common law or by virtue of any particular statute; they were opposed to the *contractus praetorii* which were actionable only through the aid of the praetor, who (for that purpose) had to adopt the existing legal forms of actions.

See title FORMULAE.

CONTRACTUS PRAETORII: See title CONTRACTUS, CIVILES.

CONTRACTUS STRICTI JURIS: See title CONTRACTUS BONAE FIDEI.

CONTRAINTÉ PAR CORPS. In French law, is the civil process of arrest of the person, which is imposed upon vendors falsely representing their property to be unincumbered, or upon persons mortgaging property which they are aware does not belong to them, and in other cases of moral heinousness.

CONTRAT. In French Law, contracts are of the following varieties:—

- (1.) *Bilateral*, or, *synallagmatique*, where each party is bound to the other to do what is just and proper; or
- (2.) *Unilateral*, where the one side only is bound; or

CONTRAT—continued.

- (3.) *Commutatif*, where one does to the other something which is supposed to be an equivalent for what the other does to him; or
- (4.) *Aléatoire*, where the consideration for the act of the one is a mere chance; or
- (5.) *Contrat de bienfaisance*, where the one party procures to the other a purely gratuitous benefit; or
- (6.) *Contrat à titre onéreux*, where each party is bound under some duty to the other.

CONTRIBUTION. It is a rule of law, that all persons in the nature of co-sureties for the debt of another shall directly (as in Roman Law) or indirectly (as in English Law) bear their proper share of the liability, so far as regards the mutual relief of each other, and depend for their individual reimbursement upon their action against the principal debtor. The remedy of a co-surety against his co-surety is said to be for *Contribution*; that against the principal debtor is said to be for *Re-coupment*. It is likewise a rule of law, that there is no contribution between *wrongdoers* (*Merryweather v. Nizan*, 8 T. R. 186); *secus*, if the wrong is a breach of trust.

See titles RECOUPMENT; SURETYSHIP.

CONTRIBUTORIES. In the winding-up of an insolvent company the persons liable to contribute towards payment of the creditors of the company are so called. Where the company is limited, this liability extends of course only to the amount limited and remaining unpaid, whether such liability is limited by shares or by guarantee (see title LIMITED LIABILITY); *secus*, where the company is an unlimited company. There are usually two classes of contributories arranged on two lists,—the A. list and the B. list. The A. contributories are first liable to the full extent of the liability whether that is limited or is unlimited; and next to them, the B. list is liable, so far as the liability of the A. list has not been fully met, but not of course further; and this liability of the B. list is further confined to debts and liabilities already incurred at the date of the B. list ceasing to be existing members of the company. For the B. list comprises all past members of the company who have not for one whole year next before the commencement of the winding-up of the company ceased to be members; and the A. list comprises all present members of the company, i.e., members being such at the date of the commencement of the winding up.

See title WINDING-UP, COMMENCEMENT OF; also title COST BOOK MINING COMPANIES.

CONTRIBUTORY NEGLIGENCE. Is the negligence of an injured person, who but for such negligence might or would have escaped all injury. By the common law, the effect of it was and is to deprive the injured party of all right to damages for the injury,—but the rule is now different as regards the collision of vessels, where both are to blame (*see* title **COLLISION**). The negligence of a servant is the negligence of the child she is carrying in her arms.

CONTUMACY. Is the term used for contempt of Court, as regards matters ecclesiastical, and the Ecclesiastical Courts.
See title **CONTEMPT OF COURT**.

CONUBIUM. In Roman Law was the right of intermarriage between two persons; the marriage itself was contracted by the consent of the parties followed by the *deductio in domum* of the wife, the other formalities of the law being also observed, when there were any. People might intermarry without having the *conubium*; but the effects of such a marriage were limited, the children not being in the potestas of the parent, nor taking the quality of the father but following the mother's condition. The right of intermarriage was frequently conceded to foreign states; and some general statutes were passed (*e.g.*, *Lex Aelia Sentia*) to enable Latin freedmen to intermarry with Roman citizens, and to cure certain mistakes apt to be committed in such latter kinds of marriages.

CONVENT. A religious house, now regarded as a merely voluntary association, not importing civil death (*In re Metcalfe*, 83 L. J. (Ch.) 308).

See titles **CHURCH AND STATE**; **MONK**.

CONVENTICLE ACT. An Act of 1664, for the suppression of religious assemblies of Non-conformists, forbidding the assembling of five persons (besides the household) at any religious meeting.

See title **FIVE-MILE ACT**.

CONVENTIO: *See* title **CONVENTION**.

CONVENTION. The most general name for agreement; it is the *conventio* of Roman Law.

See titles **CONTRACTUS**; **PACTA**.

CONVENTION PARLIAMENT. A title commonly given to the Parliament of 1660, but which is also applicable to that of 1688, and in fact to any Parliament which assembles *proprio motu*, without being summoned by the Crown.

See titles **SEPTENNIAL ACT**; **TRIENNIAL ACT**.

CONVENTION PARLIAMENT, ACTS OF. The matters to be provided for by

CONVENTION PARLIAMENT, ACTS OF —continued.

this parliament (which assembled in 1660) were the following:—

- (1.) An indemnity for the past;
- (2.) The restoration of the church;
- (3.) The settlement of the revenue; and
- (4.) The repeal of the late obnoxious statutes.

With reference to the first of these four matters, Charles II., by his declaration from Breda, had offered an indemnity to all persons who had been concerned in the late irregular proceedings, with the exception only of his father's regicides; and this promised indemnity was endeavoured to be secured by "The Act of Indemnity and Oblivion," which Act excepted, however, not only those who had signed the death-warrant against Charles I., but also all those who had sat when sentence was pronounced against that king, together with several others.

With reference to the second of these four matters, Episcopalianism was restored as the national religion, and with it the bishops were reinstated in the House of Lords. The lands, also, of the church, which had been confiscated, and some of them even sold to purchasers from the state, were also restored to the church, and no compensation given to the purchasers who were deprived of them. The dispossessed clergy who survived at the Restoration were restored to their former livings or to fresh benefices, so far as such restoration could be carried out without dispossession of the then existing incumbents, who were allowed to remain in possession if willing to conform.

With reference to the third of these four matters, military tenures were abolished, and with them the revenue derived by the Crown from aids, wardships, &c.: and, in lieu thereof the excise was given to the Crown.

With reference to the fourth of these four matters, the militia was replaced under the sole command of the king; the Triennial Act of 1641 was repealed; and the following Acts of an ecclesiastical character were passed:—The Corporation Act, the Act of Uniformity, the Act against Conventicles, and the Five Mile Act.

CONVENTIONARY TENEMENTS. Are tenements within the assessionable manors of the Duchy of Cornwall, held from seven years to seven years under the duke. Many of them have been enfranchised under the statutes 7 & 8 Vict. c. 105 and 11 & 12 Vict. c. 83.

See titles **ASSESSIONABLE MANORS**; **CORNWALL, DUCHY OF**.

CONVENTUAL CHURCH. A church

CONVENTUAL CHURCH—continued.

consisting of regular clerks professing some order of religion, or of a dean and chapter, or other such society of ecclesiastics. Cowel.

CONVERSION. This word has two significations in law. (1.) In the action of trover it denotes the appropriating by the defendant to his own use of the goods of the plaintiff, in a manner short of criminal; the appropriation consisting substantially in the negative act of withholding them from the plaintiff, upon his demand; (2.) In Equity it denotes the notional alteration of land into money, or of money into land, in accordance with a direction to that effect of a testator or settlor, and in pursuance of the equitable doctrine that what is agreed or imperatively directed to be done is already as good as done. As a consequence of this doctrine, it has been held:—

(a.) That lands directed to be converted into money for certain purposes, some only of which fail, descend, in the case of the direction being contained in a will, to the heir-at-law of the testator (*Ackroyd v. Smithson*, 1 Bro. C. C. 503); and, in case of his death, to his next of kin (*Smith v. Claxton*, 4 Maddox, 492); but that, in the case of the direction being contained in a deed, the devolution is just the reverse; and

(b.) That money directed to be converted into land for certain purposes, some only of which fail, goes, in the case of the direction being contained in a will, to the executor of the testator (*Cogan v. Stevens*, 1 Beav. 492, n.); and, in the case of his death, to his executor (*Reynolds v. Godlee*, 1 Johns. 536); but that, in the case of the direction being contained in a deed, the devolution is just the reverse.

(c.) Where the purposes for which the conversion was to take place *totally* fail, the property is regarded as being what it actually is, and the doctrine of conversion is in that case excluded.

See titles RECONVERSION; TROVER.

CONVERSION IN EQUITY: See title CONVERSION.

CONVEYANCER.—Is a person who prepares and settles conveyances and wills, whether of landed estates or of goods. Most Equity barristers are also conveyancers, as an incidental or supplementary branch of the business they go through at their own chambers; but some few people are conveyancers and not barristers, just as some few people are pleaders only and not barristers. And such conveyancers, not being at the bar, but under the bar, never address the Court; and not being barristers

CONVEYANCER—continued.

they have a legal right to recover their conveyancing fees or charges.

See title CONVEYANCING COUNSEL.

CONVEYANCES. These, which anciently were called *Assurances*, are instruments under seal, whereby lands are conveyed or assured from the vendor to the vendee, so as to vest in the latter such an estate as the vendor has in himself to convey or assure, and as the words of limitation in the deed limit or mark out.

Conveyances arrange themselves under two great classes, viz.:—

(I.) Conveyances at the Common Law, and hereunder:—

- (1.) Feoffments;
- (2.) Gifts;
- (3.) Grants;
- (4.) Bargains and sales;
- (5.) Leases;
- (6.) Exchanges.
- (7.) Partitions;
- (8.) Releases;
- (9.) Confirmations;
- (10.) Surrenders;
- (11.) Assignments;
- (12.) Defeasances; and
- (13.) Disclaimers.

(II.) Statutory Conveyances, sub-divided as follows:—

(A.) Conveyances operating under the Statute of Uses and hereunder:—

- (1.) Covenants to stand seised;
- (2.) Deeds of lease and release;
- (3.) Deeds leading or declaring the uses;
- (4.) Deeds of revocation of uses;
- (5.) Deeds of appointment under powers; and generally
- (6.) Any Common Law conveyances made to uses.

(B.) Conveyances under statutes other than the Statute of Uses, and hereunder,—

- (1.) Release under 4 Vict. c. 21;
- (2.) Grant under 8 & 9 Vict. c. 106;
- (3.) Disentailing assurances under 3 & 4 Will. 4, c. 74;
- (4.) Assurances of married women under 3 & 4 Will. 4, c. 74; and
- (5.) Conveyances and leases (concise forms) under 8 & 9 Vict. c. 119, and other subsequent statutes.

Again, of deeds which operate under the Statute of Uses, there is this other division, namely,—

(I.) Deeds operating with transmutation of possession, and hereunder,—

- (1.) Bargain and sale;
- (2.) Covenant to stand seised, &c., there being no transmutation until the statute itself effects the alteration in the legal seisin; and

CONVEYANCES—continued.

(II.) Deeds operating with transmutation of possession, and hereunder,—

(1.) Deeds leading or declaring the uses ;

(2.) Feoffment to uses, &c.,

the legal seisin being first transferred by the Common Law assurance before the statute operates to effect a second transfer.

(I.) Conveyances at Common Law, and hereunder the following,—

(1.) *Feoffment*. This was the most ancient form of conveyance applicable to corporeal hereditaments. It consisted of two parts, viz.,—

(a.) The limitation of the estate intended for the feoffee ; and

(b.) The livery of seisin.

First. *The Limitation of the Estate*.—This consisted in defining by the words of limitation the estate which was intended to be given to the feoffee. Originally, it sufficed to pronounce these solemn words *orally* in the presence and hearing of witnesses and of the feoffee ; and although a deed or writing may have been (as in fact it was) occasionally used for that purpose, the same was unnecessary. However, by the stat. 29 Car. 2, c. 3 (Statute of Frauds), s. 1, it was enacted that all leases, estates, interests of freehold or term of years, or any uncertain interest in messuages, manors, lands, tenements, or hereditaments, made or created by livery of seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized in writing, should have the force and effect of leases or estates at will only, and no greater force and effect ; the only exception being that leases for a term not exceeding three years from the making thereof were to be good, although made by parol without writing, provided they reserved a rent of two-thirds at least of the full improved value. And now, by the stat. 8 & 9 Vict. c. 106, s. 3, it is enacted that no feoffment other than a feoffment made under a custom by an infant, shall be valid unless made by deed.

Secondly. *The Livery of Seisin*. The seisin was the feudal possession ; and a transfer of the land accompanied with seisin was the transfer of an estate carrying the seisin with it. Livery of seisin was of two kinds,—either

(1.) Livery in deed ; or

(2.) Livery in law.

No deed of feoffment was complete, or to the present day is complete, unless the same has been followed with livery of seisin ; and as a convenient mode of evidencing the fact of such livery having been made, it is usual to indorse upon the deed which contains the limitations a notice to the effect that the seisin was delivered

CONVEYANCES—continued.

at a certain place, day, and hour ; and such indorsement is also signed and witnessed.

The feoffment, strictly speaking, was the proper form of conveyance of an estate in fee simple absolute or determinable ; if it was used to pass a fee tail, it was more properly termed a gift, and if it was used to pass a life estate, it was more properly termed a lease.

When a particular estate, whether for years or of freehold, and a freehold remainder are created together *de novo* out of a corporeal hereditament in possession, the livery which is given to the tenant of the particular estate in possession enures to the remainderman ; on the other hand, when an estate is created afterwards, expectant on a lease for years then in being, the livery must not be made to the lessee for years, but to the remainderman himself with the consent of the lessee for years. Of course, no such remainder can by feoffment at Common Law be created afterwards expectant on a lease for life, or estate of freehold.

[The feoffment was a conveyance of very powerful efficacy. Thus, by reason of the entry and livery of seisin, it cleared all disseisins, abatements, intrusions, and other wrongful or defeasible estates, when the entry of the feoffor was lawful ; and it not only passed the present estate of the feoffor, but barred him of all present and future right and possibility of right to the thing which was so conveyed ; insomuch that if he had divers estates all of them passed by the feoffment ; and if he had any interest, rent, common, condition, power, or contingent use or benefit in, to, or out of the land, it was extinguished by the feoffment ; and the feoffment destroyed also all contingent remainders in strangers, if supported only by an estate of freehold in the feoffor ; and so powerful was its efficacy, that it frequently operated by wrong, whence also it was called a *tortious* conveyance, passing to the feoffee the full estate marked out by the words of limitation, although that should be in excess of the estate which the feoffor had in himself to grant. But by the stat. 8 & 9 Vict. c. 106, s. 3, the feoffment was deprived of this tortious operation and was reduced to the level of an *innocent* conveyance.]

(2.) *Gift*.—This was the form of conveyance properly applicable to the creation of an estate tail ; whence the person creating the estate tail is termed the donor, and the person taking it the donee. It required livery of seisin to make it effectual.

(3.) *Grant*.—This was the distinctive mode of conveyance of an incorporeal hereditament, which however must have been

CONVEYANCES—continued.

in existence at the date of the grant, and not created by the grant.

(4.) *Bargain and Sale*.—This form of conveyance was applicable not only to corporeal but also to incorporeal hereditaments in actual existence. It required to be for money, or money's worth, and not for natural love and affection merely. All persons having an estate of freehold might convey by means of it, but not persons having a mere term of years. The enrolment of a bargain and sale, if made within the proper time relates back to the execution of the deed, and any intervening alienation or charge by the bargainor would therefore be void; but an alienation or charge by the bargainee would be good when the bargain and sale was afterwards perfected by enrolment. Enrolment was first rendered necessary by the Statute of Enrolments (27 Hen. 8, c. 16), but only when the bargain and sale was for an estate of freehold.

(5.) *Lease, including Underlease*.—A lease is properly a conveyance (subject to rent) of lands or tenements made for life, for years, or at will, but always for a less estate than the lessor has in the premises; and similarly an underlease is a lease made by the lessee for a less period than the period of his own lease.

Sometimes, what purports in its language to be only an agreement for a lease is, in reality, an actual lease; for if there are words of present demise and an apparent intent to the effect of these words, then the deed is an actual lease, notwithstanding the words are "agrees to let," and allusion is made to a lease to be executed at some future date (*Pool v. Bentley*, 12 East, 168; *Doe d. Phillip v. Benjamin*, 9 Ad. & El. 614).

Where, however, by reason of the stat. 8 & 9 Vict. c. 106 such an "agreement to let" cannot possibly (because not by deed) operate as an actual lease, it is now treated as an agreement only, and will be specifically enforced.

By the Common Law, a tenant for life (except under a power) cannot make a lease for a longer period than that of his own life; and a lease granted by him for a longer period is as to the excess absolutely void as against the remainderman or reversioner.

By the Common Law, a tenant in tail could not, without a fine or recovery, make any lease binding on the issue in tail, or remainderman, or reversioner; and if a husband seised *jure uxoris* made a lease of the wife's land, whether she joined in it or not, the lease was only good during the joint lives of the husband and wife and the life of the husband surviving her, and was

CONVEYANCES—continued.

voidable (although not void) if the wife survived.

(6.) *Exchange*.—This is a conveyance, or group of conveyances whereby two persons or classes of persons holding property in common, divest themselves respectively of their own estates in favour of each other, and in lieu thereof respectively take the property of each other. There are five requisites by the Common Law to the validity of an exchange, that is to say,—

- (1.) The two properties must be of the same quality;
- (2.) The properties exchanged must be of the same quantity;
- (3.) The word "exchange" must be used;
- (4.) Entry is requisite, although not livery of seisin; and
- (5.) Writing since 29 Car. 2, c. 3, and a deed since 8 & 9 Vict. c. 106, s. 3.

The word "exchange" used to raise an implied warranty of title; and in case of the title so warranted being displaced either in whole or in part by an elder title, the exchanging party who was evicted used to have the right to re-enter upon the lands which he had given in exchange,—a right which belonged to himself and his heirs only, not also to his alienees. Any alienation by either exchanging person deprived him of the right of re-entering, although it left the other exchanging person the right of re-entering upon the lands even when in the hands of the alienee. But since the stat. 8 & 9 Vict. c. 106, this effect has been taken from the conveyance by exchange.

(7.) *Partition*.—This is a conveyance by which two or more joint tenants, co-parceners, tenants in common, or heirs in gavelkind, divide the property so as to give to each a distinct part, to be held in severalty. The arrangement to sever may be the result of agreement, in which case it is said to be *Voluntary*, or the result of a decree of the Chancery Division, in which case it is said to be *Compulsory*. In either case, the same conveyances are necessary to give complete effect to the partition; and for facilitating their execution the Trustee Act, 1850, s. 30, enables the Chancery Division to declare the interests of unborn persons, and also to declare that any particular persons are trustees of the lands, and direct accordingly. And by the stat. 31 & 32 Vict. c. 40, a sale may be directed in lieu of partition.

The modes of effecting a partition are the following:—

- I. As to freeholds or inheritances: either
 - (1.) All the co-tenants convey by separate deeds the particular allotments to releasees or grantees, to

CONVEYANCES—continued.

the use of the particular persons to whom they are respectively allotted; or,

- (2.) All the co-tenants convey by one conveyance, the entirety of the lands to a releasee, or grantee, to uses, and then by the same deed limit severally the particular allotments to the use of the particular persons to whom they are allotted.

II. As to personal estate: either

- (1.) The entirety is assigned by all the co-tenants to a third person upon trust, to assign the particular allotments to the particular persons to whom they are allotted; or,
- (2.) Each co-tenant assigns to the others his undivided share in the parts to be taken by them in severalty.

Co-parceners being compellable by the Common Law to make partition, the law provided in their case (but not also in the case of joint tenants or tenants in common), that if any co-parcener after partition and before alienation was evicted from the whole or from part of his or her allotted share, he or she might thereupon re-enter upon the other shares even when in the hands of an alienee or alienees of the other co-parceners. But by the 8 & 9 Vict. c. 106, s. 4, this right of re-entry is taken away.

(8.) *Release*.—This is a deed whereby either a right is extinguished, or an estate or interest in things real or personal is conveyed to a person who has already some estate or interest in possession in the same. The operation of the release is fourfold: either

- (1.) By way of passing an estate (*mitter l'estate*), e.g., when made by one co-tenant to another; or
- (2.) By way of passing a right (*mitter le droit*), e.g., where the disseisee releases to the disseisor; or
- (3.) By way of extinguishment, e.g., when the lord releases his seignior to the tenant; or
- (4.) By way of enlargement, e.g., where a remainderman or reversioner releases to the prior tenant of a particular estate, with whom he is in privity.

Besides express releases, or releases by deed, there are also releases in law; e.g., a release of the right to land, if made to a tenant in tail or for life, enures to the remainderman or reversioner.

(9.) *Confirmation*.—This is a deed whereby a conditional or voidable estate is made absolute and unavoidable by the confirmor,

CONVEYANCES—continued.

or whereby a particular estate is increased. The confirmee must also have an estate and not a mere interest in the lands confirmed; also the contract or other instrument which is confirmed must be at the most voidable and not void. A confirmation to one joint tenant enures to the other or others; and a confirmation to a remainderman or reversioner enures to the owner of the prior particular estate. Where a tenant for life and his remainderman or reversioner unite in making a lease (the tenant for life by himself alone being able to make only a voidable lease), the lease is considered during the life of the tenant for life as his lease, and as the confirmation thereof by the remainderman or reversioner; and after the death of the tenant for life, it is considered as the lease of the remainderman or reversioner, and as the confirmation of the tenant for life.

(10.) *Surrender*.—This conveyance is the converse of that species of release which operates by way of enlargement, the effect of the surrender being to merge the smaller estate in that of the surrenderee. A surrender may be either (a.) Express; or (b.) Implied, the former being in so many words, the latter arising in the following cases:—

- (aa.) A lessee for an unexpired term, or for life, accepting a new immediate lease for life or for years from his lessor;
- (bb.) A lessee being party to an act which is inconsistent with the continued existence of his estate, and which he is estopped from denying.

The estate of the surrenderor must be a *vested* estate; it must also be an estate that is capable of merger, and therefore it must not be an estate tail, nor of higher denomination than the estate of the surrenderee; there must also be a privity (or contiguity) between the estate of the surrenderor and that of the surrenderee.

(11.) *Assignment*.—This is the alienation by transfer of a personal chattel, or of a chattel interest in real estate. If it is for no consideration, it is a gift; if it is for value as being either by way of absolute sale or by way of mortgage, it is a bill of sale. Every assignment, if a gift, must be by deed; but if a bill of sale or transfer for value, it may, if a purely personal chattel, e.g., a debt, be assigned at least in Equity, and since the Judicature Act, 1873, even at law, by a simple writing, not necessarily a deed, although the assignment of chattels real must be by deed, 8 & 9 Vict. c. 106, s. 3. By the stat. 22 & 23 Vict. c. 35, s. 21, any one may assign personal property including chattels real directly to himself

CONVEYANCES—continued.

and another person by the like means as he might have assigned to another only, a provision which is found very useful upon a transfer of personal property by an old trustee to himself and a new trustee.

(12.) *Defeasance*.—This is a collateral deed, expressing the specified conditions upon which an interest created or transferred by another deed is to be defeated. In the case of an estate of freehold and other executed estates, a deed of defeasance must be made at the same time with the deed creating or transferring the estate; but in all other cases, it may be made at any time subsequently. A defeasance, excepting that it is contained in a separate deed, is in all other respects like a condition subsequent.

(13.) *Disclaimer*.—This is a deed whereby a grantee, devisee, or legatee renounces the grant, devise, or bequest, which renunciation he is competent to make at any time *before he has done any act to show his assent* to the grant, devise, or bequest. If one or more joint tenants short of all disclaim, the entire estate or interest vests in the other or others; but if all disclaim, the estate will, if real estate, descend to the heir, and, if personal estate, will vest in the administrator when appointed. An heir-at-law cannot disclaim.

(II) Statutory Conveyances, subdivided as follows:—

(A.) Conveyances under the Statute of Uses, and hereunder the following:—

(1.) *Covenant to stand seised*.—Whenever a covenant of this kind is entered into, if the consideration (which must be that of blood or natural affection) is sufficient, a use arises out of the seisin of the covenantor, and is immediately executed by the statute in the *cestui que use*, who thereby acquires the legal estate. The proper and technical words of this conveyance are, "Covenant to stand seised to the use of A.," &c., but any other words will have the same effect; *e.g.*, even the words "bargain and sale" (*Crossing v. Scudamore*, 1 Mod. 175; *Roe v. Tramarr*, Willes, 632). The covenantor must, however, be a person who is capable of standing seised to a use; and the property conveyed must be such as admits of a person being seised thereof.

(2.) *Lease and Release*.—This, until the years 1841-5, was the most common form of conveyance under the Statute of Uses. The mode of its operation may be explained by three steps or by two:

(a.) By three steps, consisting successively of lease, entry, and release.

(b.) By two steps, consisting successively of bargain and sale, and release.

CONVEYANCES—continued.

But whether explained in the one way or in the other, the manner of its operation was this: to create a tenant for a year or term of years in possession, and thereafter to release to him the reversion in fee simple. In this way, the tenant became seised of the legal estate in fee simple; and inasmuch as uses might afterwards be annexed to his seisin, he might become a "releasee to uses;" and in that case, all covenants were entered into by and with him, but otherwise, he was a mere conduit-pipe, or channel, through which the legal estate passed into the first usee, who again was held to be a trustee for the second or last usee in the ordinary way.

(3.) *Deeds leading or declaring Uses*.—Where it was intended to levy a fine or suffer a common recovery, it was usual to execute a deed either previously or subsequently to the fine being levied or recovery suffered; and if executed previously, the deed was said to be one *leading* the uses, but if executed subsequently, it was said to be one *declaring* the uses.

See title LEADING A USE.

(4.) *Deeds revoking Uses*.—Such deeds are executed in virtue of a power to revoke the existing uses and to declare new ones, such power being inserted in the deed or will that created the existing uses. Such deeds are used when the settled land or any portion thereof is sold, and it is necessary to convey same to the purchaser in fee simple.

(5.) *Appointment*.—This is a deed executed in virtue of a power of appointment. The power of appointment is conferred in these words: "To A. (the appointor) to such uses as he shall appoint;" and upon the grammatical construction of these words, it has been held that A.'s power is only over the uses. Consequently, if A. subsequently by deed or will appoints the lands to B. to the use of C., it is held that B. takes the legal estate under the Statute of Uses, and retains it as a trustee for C., who only takes the equitable estate. The power of appointment may be either general or special; and A.'s execution of it, if general, will date from the time of the actual execution, but if special will date from the time of the execution of the instrument creating the power (if a deed), and of the death of the testator (if a will).

(6.) *Common Law Deed to Uses*.—For example, a feoffment at Common Law expressed to be made to A. to the use of B., would first locate the seisin in A. by livery at Common Law, and would then operate to effect a further transfer of such seisin so as to locate same in B. by virtue of the Statute of Uses. And a bargain and sale at

CONVEYANCES—continued.

Common Law expressed to be made by X. to Y., to the use of W., would leave the seisin in X. at Common Law, and would then operate to effect a transfer of such seisin so as to locate same in Y. as the first (implied) usee, who would hold upon trust (or as a trustee) for W.

(B.) Conveyances under statutes other than the Statute of Uses, and hereunder the following:—

(1.) By the stat. 4 Vict. c. 21, s. 1, it is enacted that a deed of *release* of a freehold estate executed on or after the 15th of May, 1841, and expressed to be made in pursuance of that Act, shall be as effectual as a lease and release together would have been.

(2.) By the stat. 8 & 9 Vict. c. 106, s. 2, it is enacted that a deed of *grant* shall suffice for the conveyance of the immediate freehold of corporeal hereditaments.

(3.) By the stat. 3 & 4 Will 4, c. 74 (Fines and Recoveries Abolition Act), s. 15, it is enacted:—

(I.) With regard to land of *freehold* tenure.—That every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, may dispose of the entailed lands for an estate in fee simple absolute, or for any less estate [excepting, nevertheless, the following classes of tenants in tail, under ss. 16, 18, and 20, viz.:—

(aa.) Tenant in tail *ex provisione viri* under settlement dated on or before the 31st of December, 1833, excepting with the formalities required by the stat. 11 Hen. 7, c. 20;

(bb.) Tenant in tail restrained from such disposition by statute;

(cc.) Tenant in tail after possibility of issue extinct; and

(dd.) Tenant in tail in expectancy as being issue inheritable.]

But in every such disposition, the consent of the protector, where there is any such, either by appointment of the settlor or under the Act, is requisite (ss. 34, 35) to enable the tenant in tail to create a fee simple absolute, or any estate larger than a base fee; and the protector in giving or in withholding such consent is to be subject to no control whatsoever, nor is he to be liable in respect of his exercise of his own discretion in the matter (s. 36).

By s. 40 of the same Act, every disposition by a tenant in tail under the Act is to be made by deed, and not by contract or will; and the tenant in tail, if a married woman, is to procure her husband's concurrence in the deed, and is to acknowledge the same; and, in every case, the deed of disposition (not being a lease for or under

CONVEYANCES—continued.

twenty-one years, at or over five-sixths of a rack rent) is by s. 41 required to be *inrolled in the Court of Chancery within six calendar months from the date of its execution*; and by sect. 74 is to take effect upon such inrolment as from the date of its execution, excepting as against any intermediate purchaser for value.

By s. 38, a voidable estate created by a tenant in tail in favour of a purchaser is to be confirmed by a subsequent disposition of such tenant in tail, executed in accordance with the Act, but such confirmation is inoperative as against an intermediate purchaser for value without notice.

By s. 39, a base fee created as above, when united with the immediate fee simple reversion, is to be considered as enlarged, and not as merged.

(II.) With regard to lands of *copyhold* tenure.—That every actual tenant in tail,

(a.) Whose estate is an estate at Law, may by *surrender* dispose of the entailed lands; and

(b.) Whose estate is merely an estate in Equity, may either by *surrender* or by *deed* dispose of the entailed lands, s. 50.

The protector, if there be any such, either by appointment of the settlor, or in virtue of the Act, may signify his consent to such disposition either—

(1.) By *deed*, in which case he must produce the same to the steward of the manor for acknowledgment by the latter, and for entry by him on the Court rolls, s. 51; or

(2.) By personal oral statement made to the steward, who in the memorandum of surrender to be entered on the Court rolls is to state that such consent was so given.

The deed of disposition, where that form and not a surrender is used, must be executed on or subsequently to the day of the date of the deed whereby the protector signifies his consent, when there is any such latter deed, s. 53; and the deed of disposition must also be entered on the Court rolls of the manor within six months after the execution thereof (*Honeywood v. Foster* (No. 1), 30 Beav. 1), but no other inrolment of it is necessary; nor is any other inrolment necessary of the memorandum of surrender (where that form and not a deed is used), save only on the Court rolls, s. 54.

(III.) With reference to *bankrupt* tenants in tail.—By s. 56, in the case of an actual tenant in tail becoming bankrupt after the 31st of December, 1833, the commissioner in bankruptcy (and now the trustee in bankruptcy) may by deed, without the

CONVEYANCES—continued.

consent of the protector, dispose of the lands entailed to a purchaser for as large an estate as the actual tenant in tail, if not a bankrupt, could without such consent have disposed of the same; and by s. 57, in the case of a tenant in tail entitled to a base fee becoming bankrupt, the commissioner in bankruptcy (and now the trustee in bankruptcy) may, if there is no protector, dispose of the lands entailed to a purchaser for as large an estate as such tenant in tail could in such case, have created, if not a bankrupt. But, by s. 59, every such deed of disposition must be enrolled within six months from the execution thereof, if of freeholds, in the Court of Chancery, and if of copyholds, on the Court rolls. Also, by ss. 60, 61, the base fee (if any) created in the exercise of the power above conferred, enlarges into a fee simple absolute, so soon as there ceases to be a protector, although that event should not happen until some time subsequent to the date of the sale or conveyance to the purchaser. And, by ss. 62, 63, the disposition under ss. 56, 57 may either confirm or avoid, as the case may be, any voidable disposition made by the bankrupt himself; and the disposition under ss. 56, 57, may even be made, in certain cases, after the decease of the bankrupt (see s. 65).

And, generally, by s. 71, all the previous sections of the Act are made to extend to money subject to be invested in the purchase of lands to be entailed, whether such money arises from the sale of other entailed lands or not.

(4.) By the stat. 3 & 4 Wm. 4, c. 74, ss. 77-91, a married woman, not being tenant in tail, is enabled with her husband's concurrence (and, in certain special cases, without that concurrence), by deed to be acknowledged under the Act, to effect the following purposes:—

- (aa.) To dispose of lands or of any estate therein;
- (bb.) To dispose of money subject to be invested in lands, or of any estate therein;
- (cc.) To release powers; and
- (dd.) To extinguish powers;

but in the case of copyholds, where these purposes, or any of them, can be effected by surrender, she is to effect the same by surrender and her husband is to concur therein, and she is to acknowledge same in like manner as if the same were a deed. The deed or surrender so to be executed and acknowledged takes effect as from the date of the acknowledgment.

(5.) By the stat. 8 & 9 Vict. c. 119, intitled "An Act to facilitate the Conveyance of Real Property," and by numerous other subsequent Acts, certain concise forms

CONVEYANCES—continued.

of conveyances, leases, and assignments are introduced, which the respective Acts in general present in a schedule, and which they declare shall have the same effect as the longer but more customary forms. But these concise forms are little used.

CONVEYANCING. Is the science of preparing conveyances of property; also, the practice of such preparation.

CONVEYANCING COUNSEL. Are six barristers, usually chancery men, appointed by the Lord Chancellor as being men well qualified by their learning in real property and by their experience in dealing with same, to do such business as the Chancery Division of the High Court requires to be done in the process of working out the jurisdiction of that Court, *e.g.*, settling conditions of sale, conveyances of property sold, and marriage settlements of infants, and such like. They are appointed in virtue of the stat. 15 & 16 Vict. c. 80.

CONVICT. A person found guilty on a formal indictment for felony; the term is less appropriate when the conviction is summary, but even there it is applicable in the case of the graver offences, such as larceny.

CONVICTION. A conviction is defined to be a record of the summary proceedings upon any penal statute, before one or more justices of the peace, or other persons duly authorized, in a case where the offender has been convicted and sentenced, and consists, first, of an information or charge against the defendant; secondly, of a summons or notice of such information, in order that he may make his defence; thirdly, his appearance, or non-appearance; fourthly, his defence, or confession; fifthly, the evidence against him in case he does not confess; and sixthly, the judgment or adjudication. (*Boscaw. Pen. Con. 7; R. v. Green, Cald. Cas. 396, 397*). A conviction may be removed to the Queen's Bench by *certiorari*, with a view to the same being quashed.

CONVICTION, SUMMARY. Certain offences are summarily triable by virtue of particular statutes; and certain others by virtue of these statutes, but only at the option of the accused. In case the accused is convicted on such a trial, his conviction is called a summary conviction.

See title SUMMARY JURISDICTIONS.

CONVOCATION. In like manner as the Commons were represented from 1265, or at any rate from 1295, by deputies chosen from themselves, so the lower clergy were represented from 1255 by one proctor from the chapter of the cathedral and two proctors from the body of the clergy in each diocese. Also, the like cause which neces-

CONVOCAATION—*continued.*

sitated the early assembling of the Commons in Parliament, necessitated also the early assembling of the clergy in Convocation, namely, the principle of the English constitution that the subject has the exclusive right of self-taxation. Thus, in 11 Edw. 1, when the cathedral clergy of the province of York met at the town of York by their proctors, and the cathedral clergy of the province of Canterbury met at the town of Northampton by their proctors, but the body of the clergy were not represented at all in either assembly, no tax was imposed owing to the absence of the latter.

The clergy appear to have had no separate writ of summons, but to have been summoned originally by their respective archbishops, and subsequently, that is, from the reign of Edward I., by their respective bishops in virtue of the *præmunientes* clause contained in the writ of summons which was issued to these latter, the bishop acting in some sense as an ecclesiastical sheriff for this purpose. The archbishops having objected to the clergy being summoned by the bishops, their objection was neutralized by means of a compromise, according to which the bishops were permitted to summon the clergy to Parliament, and the archbishops to summon them to Convocation; but the two clerical assemblies, once summoned, were identical.

The functions of the clergy assembled in Convocation or in clerical Parliament (for the distinction is perfectly immaterial), were originally ill defined, judging at least from the language in which they are described, being sometimes the phrase "*ad ordinandum de quantitate et modo subsidii*," sometimes the phrase "*ad faciendum et consentiendum*," and latterly, i.e., from 5 Ric. 2, "*ad consentiendum*" only; and in fact their functions appear to have varied at different times. Thus, in 18 Edw. 3, there are instances of petitions of the clergy having been granted by the King and his Council, and thereby converted into statutes, and entered as such on the statute roll, notwithstanding that the Commons had not assented thereto. In 50 Edw. 3, the Commons remonstrated against this interference with their legislative rights, and prayed the king that for the future no statute should be made upon the petition of the clergy unless with the assent of the Commons thereto. However, notwithstanding this protest, the practice continued in subsequent reigns, and notably in those of Richard II. and Henry IV., e.g., the statute "*de hæretico comburendo*," 2 Hen. 4, was so passed; and Hallam concludes that in these reigns the clergy assembled in Convocation did exercise a legislative

CONVOCAATION—*continued.*

power with the King and his Council apart from the Commons.

These legislative acts of the clergy were confined to matters ecclesiastical; for in matters of a temporal nature, the clergy assembled in Convocation neither enjoyed nor exercised any legislative power at all apart from, or even (*semble*) in conjunction with, the Commons.

In the reigns of Henry VIII. and Elizabeth, the clergy assembled in Convocation were consulted upon all or most of the momentous questions of those reigns affecting the national religion; e.g., in 1533, they approved the doctrine of the Royal Supremacy over the Church, and in 1562, they confirmed the Thirty-Nine Articles of Religion. But in the former of these two reigns they were expressly deprived by statute of the power to enact fresh canons without the King's previous licence,—a disability which was confirmed and perpetuated by the doctrine of the Courts of Common Law, that new ecclesiastical canons are not binding on the laity until they are approved by both Houses of Parliament (*Croft v. Middleton*, 2 Atk. 669). Even the right of taxing themselves was made subject to the control of the House of Commons in the reign of Henry VIII., and the practice has been totally discontinued since the year 1664, since which year the clergy have been rated in the same manner and measure as the laity.

From the last-mentioned date the functions of Convocation were reduced to nothing; its assembling at the commencement of each Parliament was for some time afterwards kept up as a formality merely, being followed on each occasion of its so assembling with an immediate prorogation or adjournment. However, about 1690, when the High Church party attained to distinction and power, the attempt was made to revive Convocation as an active ecclesiastical body, and this attempt was successful during the reign of Queen Anne (1702–1714). But in the succeeding reign of George I., Convocation carried its debates in the Bangorian controversy with Bishop Hoadley of Bangor to such a degree of intolerance, it is said, that the king was compelled in 1717 to prorogue it, and from that date till the beginning of the present reign it never sat again; but in the beginning of the present reign, when the High Church party re-acquired reputation under Dr. Pusey and others of that school, Convocation was re-summoned for the despatch of matters purely ecclesiastical, and accordingly, but for the despatch only of these matters, it meets regularly at the present day with every fresh session of Parliament.

CONVOY. In times of war, it is frequently desired by a neutral country to protect its own merchant vessels from visit and search by either of the belligerents, and this object it usually endeavours to accomplish by sending one or more of its own ships of war to protect and escort, *i.e.*, *convoy*, the merchant vessels. But Sir Wm. Scott, in *The Maria* (1 Rob. 340), decided in effect that a neutral convoy cannot resist the right of visit and search, and that the resistance presented in that case was a reason for condemning the vessels. And it is now generally admitted that the protection of a convoying fleet does not extend to exclude the belligerent right of search; nor is the word of the commander of the squadron to be accepted as conclusive evidence of the neutrality of the vessels convoyed or of the goods that are stowed therein.

See titles CONTRABAND; VISIT AND SEARCH.

CO-CREDITORS: See title JOINT OWNERSHIP.

CO-OWNERS: See titles JOINT OWNERSHIP; JOINT TENANCY.

CO-PARCENERS. These are co-tenants entitled by descent, and by no other title. They become so either by the Common Law of England, as in the case of females that are co-heiresses; or by particular custom, as in the case of lands in Kent, which are of gavelkind tenure. Co-parcenary extends even to *collaterals*: and the husband of a deceased co-parcener, if entitled as tenant by the curtesy, holds as a co-parcener with the surviving sisters of his wife, as does also the heir-at-law of his deceased wife upon his own and his wife's death. Co-parceners might always effect compulsory partition of the lands held together.

See titles PARTITION; CONVEYANCES, sub-title PARTITION.

CO-RESPONDENT: See titles DIVORCE; DIVORCE, DAMAGES UPON; RESPONDENT.

CO-SURETIES: See titles CONTRIBUTION; SURETYSHIP.

COPY. When the original instrument is lost or is withheld, and its absence is in either of these ways accounted for, the Court is in the habit of admitting secondary evidence of it by looking at a copy. Office copies and examined copies of judgments and orders of the Courts are admissible, *semble*, to save expense of producing the original, and although the original is in existence and producible. Where an original will has been lost, a copy of it will be admitted to probate (1 Wms. Executors and Administrators, 364), even a copy made

COPY—continued.

from memory, where nothing better presents itself (*Sugden v. Lord St. Leonards*, 1 P. D. 154). But the rule of evidence is not extended so far as to admit the *copy of a copy* of an original instrument.

See title EVIDENCE.

COPYHOLDS. These are lands held by copy of Court roll (as the name partly denotes) and at the will of the lord according to the custom of the manor. It appears that in the reign of Edward I. copyholders were still in the purest state of villenage, cultivating the demesne lands of the lord as serfs merely, and having no certainty of tenure; but that in the reign of Edward III. they enjoyed a comparative certainty of tenure, so long as they performed the accustomed services; and that, finally, in the reign of Edward IV. they had an action against their lord for trespass or wrongful ejection.

But to the present day copyholds retain some traces of their frail original. Thus, the copyholder is still for some purposes a mere tenant at will of his lands, the freehold therein remaining in his lord, who, therefore, is owner of all the mines and minerals under the land, and also of the timber upon it; and the copyholder, although in fee simple, cannot, without a forfeiture, lease the lands for a longer term than one year, or commit any waste of the land.

Nevertheless, the copyholder when admitted is possessed of a *quasi-reisin* of his lands; in other words, he is seised of them as against all the world *other than his lord*.

There may be every variety of estates in copyhold lands, whether for life, *pur autre vie*, in tail, or in fee simple; but with reference to the estate tail in copyholds, a distinction is taken, some manors admitting, and some not admitting the estate tail.

Copyholds were first made liable for the debts of the owner in 1833 after his decease (3 & 4 Will. 4, c. 114), and in 1838 during his life (1 & 2 Vict. c. 110). They are also liable in bankruptcy to the same extent as freeholds. They are devisable, and (since Preston's Act, 1815, 55 Geo. 3, c. 192) without any previous surrender to the use of the will; and in case the owner dies intestate, they descend to his customary heir.

Upon the death of a tenant his lord is entitled to seize his best beast, and he is also entitled to many other fines and perquisites on different occasions. But by the Act 4 & 5 Vict. c. 35, provision has been made for the voluntary enfranchisement, and by the Acts of 1852 and 1858 (15 & 16 Vict. c. 51, and 21 & 22 Vict. c. 94) for the compulsory enfranchisement,

COPYHOLDS—*continued.*

of copyholds, such enfranchisement having the effect of converting them into freeholds, upon payment either of a fixed annual sum, or of a lump sum, by way of commutation or composition for the lord's fines, perquisites, and h-riots. And apart from these statutes the lord and his copyhold tenant, being respectively entitled in fee simple or (if for a less estate) by power in that behalf respectively authorized may enfranchise copyhold lands upon agreed terms by virtue merely of the Common Law.

See titles ADMITTANCE; ALIENATION; CONVEYANCES; ESTATES; ESTATE-TAIL; FEUDAL TENURES; PRESENTMENT; SEIZURE QUOUSQUE; SUBRENDER; VILLENAGE.

COPYRIGHT. Is the sole and exclusive liberty of multiplying copies of an original work or composition (*Jefferys v. Boosey*, 4 H. L. C. 920). It is a species of property founded on industrial occupancy, to wit, labour and invention bestowed on materials. The earliest evidence of a recognition of copyright is to be found in the charter of the Stationers' Company granted by Philip and Mary, and in the decrees of the Court of Star Chamber; and the first statute in the matter was the 8 Anne, c. 19, which professes to be passed for the encouragement and protection of learned men. This Act was repealed by the 5 & 6 Vict. c. 45, which, with some Acts amending same, now regulates the law of copyright. By the 3rd section of the principal Act it is enacted that the copyright in every book which shall be published in the lifetime of the author shall endure *for the natural life of such author, and for the further term of seven years from his death*, and shall be the property of such author and his assigns; *but if the said seven years shall expire before the end of forty-two years from the first publication of such book, then the copyright shall in that case endure for the full period of forty-two years*; and the copyright of every book which shall be first published after the death of its author shall endure *for the term of forty-two years from the first publication thereof*. But the right of property in copyright must be registered in the registry of the Stationers' Company; and after such registry it is assignable by a mere entry of the transfer in the same registry in the manner prescribed by the Act. International copyright is provided for by the 7 & 8 Vict. c. 12; but the provisions of that statute only go to secure to the authors of books published abroad the right of copyright when the same are re-

COPYRIGHT—*continued.*

published in Her Majesty's dominions, and do not of course oblige foreign countries to extend to British authors the like protection.

In addition to copyright in books there may also be copyright in music, engraving, sculpture, painting, photography, and generally in ornamental and useful designs.

For a full treatment of the whole law of copyright, see Copinger on the Law of Copyright, 1870.

COPYRIGHT, INTERNATIONAL: See title COPYRIGHT.

CORAM NON JUDICE (*before one who is not the judge*). When the judge of any Court of Law exceeds his jurisdiction, the subject matter with regard to which he has exercised such excess of jurisdiction is said to be *coram non judice*. Thus, in *Coles's Case* (Sir W. Jones, 170), it was held, by the whole Court, that if a justice does not pursue the form prescribed by the statute the party need not bring a writ of error, because all is void and *coram non judice*. This holding is in accordance with the maxim of the Roman Law, which is also a maxim of the English Law,—*Extra territoriam jus dicenti impune non parebitur*.

CORNAGE. Tenure by cornage was tenure by the service of blowing a horn when the Scots or other enemies entered the land, in order to warn the king's subjects, and was, like other services of the same nature, a species of grand serjeanty.

CORNWALL, CUSTOMS OF: See titles STANNARY COURTS; TIN-BOUNDS.

CORNWALL, DUCHY OF. The revenues of this duchy belong to the Prince of Wales for the time being (provided he is the first begotten son of the king), as Duke of Cornwall (*The Prince's Case*, 3 Jac. I., 8 Rep. 1), but his title is subject to the customs of Cornwall, and particularly to the mining rights of the tinnors (See title TIN-BOUNDS). The *Nullum Tempus Act* (9 Geo. 3, c. 16) was extended by the 23 & 24 Vict. c. 53, as between the duke and persons claiming or holding real property within the duchy. The tenure of lands within the duchy is a holding from seven years to seven years; but in modern times most of the holdings have been enfranchised (*Ustick v. Peters*, 4 K. & J. 437). The management of the Duchy Lands (as the duke's possessions are called) is regulated by the two principal stats. 7 & 8 Vict. c. 65, and 26 & 27 Vict. c. 49.

See title CONVENTIONARY TENEMENTS.

CORNWALL, SUBMARINE MINES ACT. An Act of 1858 (21 & 22 Vict. c. 109).

CORNWALL, SUBMARINE MINES ACT
—continued.

vesting in the Duke of Cornwall all the mines and minerals under the fore-shores of Cornwall theretofore belonging to the Crown, but retaining to the Crown the mines and minerals under the sea-bed, with incidental mining rights.

CORODY. Corodies were a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance; *e.g.*, a bishopric was at one time saddled with the maintenance of at least one royal chaplain. In lieu of which (especially when due from ecclesiastical persons) a pension or sum of money was sometimes substituted. And these might be reckoned a species of incorporeal hereditaments, though not chargeable on or issuing out of any corporeal inheritance, but only charged on the person of the owner in respect of his inheritance.

CORONATION OATH. Is the oath which is taken by the sovereigns of England on their coronation, promising "to govern the people of this kingdom, and the dominions thereunto belonging, according to the statutes in Parliament agreed on, and the laws and customs of the realm."

CORONER. Coroners are elected either for counties or for county districts or for such boroughs as have recorders of their own, *i.e.*, separate quarter sessions of the peace. The county coroner is required to be a man of sufficient substance (3 Edw. 1, c. 10); and his office is regulated by the statute *de officio coronatoris* (4 Edw. 1, stat. 2), and extends to inquiring, when any person is slain or dies suddenly or in prison, concerning the manner of his death; and this inquiry is *super visum corporis*, and is held at the place where the death happens, as nearly as may be; and his duties extend also to inquiring as to deodands and wreck and treasure trove. He is elected in the County Court by all persons having a legal freehold interest in land within the county or county district (28 Edw. 3, c. 6; 7 & 8 Vict. c. 92; 23 & 24 Vict. c. 116). Upon an inquiry for murder or manslaughter the coroner puts into writing the evidence given at the inquiry before him (which inquiry is always before a jury); and he also binds over the parties to prosecute or give evidence (as the case may be) at the next assizes of oyer and terminer or gaol delivery. When a coroner refuses to hold the necessary inquest, a rule for a mandamus may be obtained against him (23 & 24 Vict. c. 116) to shew cause why he refuses; and in certain cases the coroner's refusal may be proper, *e.g.* he has no right to

CORONER—continued.

interfere in the case of death from natural causes, where that fact is sufficiently ascertained without an inquiry (*Rex v. Justices of Kent*, 11 East, 231); neither has he any right to inquire into the origin of a fire (2 Inst. 31, 147; 4 Inst. 271). After holding one inquest, the coroner is *functus officio*, and cannot *mero motu* hold a second, notwithstanding that the first inquiry may have been unsatisfactory (2 Hale P. C. 59). The borough coroner (where there is one) is appointed by the council of the borough (5 & 6 Will. 4, c. 76, s. 62), and removable by the same authority. His duties and powers within the borough are similar in all material respects to those of the county coroner within the county or county district. In the case of boroughs which have no separate quarter sessions of the peace, and therefore no recorders or coroners of their own, the coroner of the county or county district in which the borough is situated acts for the borough as portion of the county or county district (5 & 6 Will. 4, c. 76, s. 64). The Lord Chief Justice of England is the supreme coroner of the kingdom.

CORONER OF THE KING'S HOUSE (usually called coroner of the verge). An officer appointed by the lord steward, or lord great master of the king's house for the time being. His office resembles that of a coroner of a county, only that his duties are limited to such matters as occur within the verge or within the precincts of the king's palace (1 Chitty's Bl. 137, note 20).

CORPORATION. Is a body created by Act of Parliament, or by charter, or by letters patent. It may be created either for trading or for other general purposes. It must have a common seal; and all its contracts originally required to be under that seal. But numerous relaxations of this rule have been latterly admitted; and the general state of the law now is, that for contracts of an ordinary every day occurrence a seal is not necessary, and that if such contracts have been executed, and the corporation has had the benefit of them, then the corporation is liable to be sued for the price (*Clarke v. Cuckfield Union*, 21 L. J. (Q. B.) 349); but that upon executory contracts of that sort, the corporation, *semble*, is not liable unless the contract is under seal. And the old law requiring the seal is still in force with regard to all contracts of an extraordinary kind, not within the usual business of the corporation, so that upon these latter kinds of contract the corporation cannot be sued, notwithstanding the contract is executed, and the corporation has had the benefit of

CORPORATION—*continued.*

it (*Arnold v. Mayor of Poole*, 4 Mun. & G. 860), and *à fortiori*, if the contract in such case is executory.

But the above rules do not apply to a corporation sole (e.g., a bishop or other parson of the Church), but only to a corporation aggregate. Moreover, where a corporation aggregate is constituted by Act of Parliament, the Act commonly defines the mode by which, and the purposes for which, it may contract; and if such a corporation exceeds the purposes so defined, it cannot, even by affixing its common seal, make a valid contract, inasmuch as that would be *ultra vires* (*Riche v. Ashbury Co.*, L. R. 7 H. L. 653).

A corporation is of course liable for torts (*Mersey Docks and Harbour Board v. Penhallow*, L. R. 1 H. L. 53).

See title COMPANIES.

CORPORATION ACT. An Act of 1661, whereby all magistrates and persons bearing offices of trust in corporations were obliged to swear against the legality of taking arms against the king, and also to forswear the solemn league and covenant; and future corporators were to have received the sacrament in the English Church within one year before their election. This Act (together with the Test Act) was repealed in 1828.

See titles TEST ACT; TOLERATION ACT.

CORPORATION AGGREGATE: See titles CORPORATION; CORPORATION SOLE.

CORPORATION, FOREIGN. May sue, and be sued, like a private foreign person (*Scott v. Royal Wax Candle Co.*, L. R. 1 Q. B. D. 404).

CORPORATION, LEASES BY. Municipal corporations, although the representatives of, and in a manner trustees for, the freemen of the municipality, either had, or assumed to have, the power to lease or otherwise alienate the municipal property at discretion; and many alienations having been made of an improvident kind, the Act of 1835 (5 & 6 Will. 4, c. 76), which was passed for the general regulation of municipal corporations, imposed certain restrictions upon the exercise of the aforesaid powers, and by s. 94 enacted that the municipal council might not [sell, alienate, or] lease the corporate real property for a longer period than thirty-one years from date, save and except with the approval of the Lords Commissioners of the Treasury; and a reasonable rent is to be reserved without any fine; and such terms and conditions are to be inserted in the lease or alienation as the Commissioners of the Treasury may direct (*Attorney-General v. Brecon (Mayor)*, 10 Ch. D. 204).

CORPORATION SOLE. Is a corporation consisting of one individual, and having individual successors.

See title CORPORATION.

CORPORATIONS, MUNICIPAL. Under the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), which is the principal Act, but which has been amended and extended by very many subsequent Acts, the corporate body is to be designated the mayor, aldermen, and burgesses of the borough, and by that name is to have perpetual succession, and by means of its council (consisting of the mayor, aldermen, and councillors) it is capable in law of doing and suffering all the acts and things of a corporation. The burgesses are the occupiers of houses and shops rated to the poor rate and being resident within the borough, and (in certain cases) non-resident occupiers who are so rated; and a roll of such burgesses is kept, and all names thereon are entitled to vote at the various elections for the borough. The councillors are elected by the burgesses, and the mayor and aldermen by the councillors. The mayor becomes *virtute officii* justice of the peace for the borough, and also returning officer at elections of members to serve in Parliament. The Crown may grant to any municipal corporation petitioning for same a separate court of quarter sessions of the peace, and also appoint a recorder as judge of such sessions; in which case the borough is to appoint a clerk of the peace, and also a coroner; but when a borough has no separate quarter sessions, the coroner of the county or county district within which the borough is situate is the coroner of the borough. The recorder of the borough is *ipso facto* a justice of the peace for the borough. The municipal council regulates the general management of the borough as regards watching (for which purpose they may appoint constables of the borough, and also special constables), and as regards lighting, &c., &c.; and they have power to make bye-laws. The corporate property is carried to the borough fund, and is administered by the council toward (in the first instance) the necessary expenses of the borough, and the surplus (if any) is applied for the public benefit of the inhabitants and the general improvement of the borough; and where the borough fund is deficient for necessary purposes, the council may order a rate to make up the deficiency. Any proposed misapplication of the borough funds may be questioned and prevented by removal of the council's order for payment into the Queen's Bench by *certiorari*; and improvident leases and alienation of the corporate property are forbidden. Under

CORPORATIONS, MUNICIPAL—contd.

the 141st section of the principal Act, the sovereign by advice of the Privy Council, may, by charter, create new municipal corporations; and by the stat. 40 & 41 Vict. c. 69, upon any such incorporation of a new borough, the provisions of the principal Act and of the amending and extending Acts may be applied to such new municipal corporation.

See titles BOROUGH RATES; MUNICIPAL ELECTIONS; PETTY SESSIONS; QUARTER SESSIONS; SESSIONS.

CORPOREAL. The division of things into corporeal and incorporeal is coincident with the division of the Roman Law into tangible (*quæ tangi possunt*) and intangible (*quæ tangi non possunt*). The nomenclature of the Roman Law division is derived from the sense of *touch*, which was the most important of the senses in the opinions of the ancient Democritean School, or School of Natural Philosophy; the nomenclature of the English division is derived from the equally natural distinction of what is sensible to the body (or bodily senses) generally. In itself, the distinction, as resting in nature, is necessarily permanent; in its consequences, it was chiefly remarkable in the diversity which it occasioned in the mode of the transfer of property, for things which were corporeal were capable of manual or bodily transfer, *e.g.*, by feoffment with livery, but things which were incorporeal were not capable of such a mode of transfer, and required for their transfer a deed of grant. Since the year 1845, and in consequence of the statute 8 & 9 Vict. c. 106, s. 2, the last-mentioned diversity has been mitigated, although not yet entirely removed, inasmuch as things corporeal are now capable of transfer by deed of grant, but things incorporeal are still (and must necessarily continue always to be) incapable of transfer by feoffment with livery.

See titles CORPOREAL HEREDITAMENTS; INCORPOREAL HEREDITAMENTS.

CORPOREAL HEREDITAMENTS. This phrase comprises all hereditaments which may be touched, *quæ tangi possunt*, *e.g.*, lands, houses, &c. It is used in contradistinction to incorporeal hereditaments.

See title INCORPOREAL HEREDITAMENTS.

CORPSE: See title BURIALS.

CORPUS DELICTI. Means literally the body of the offence or crime, that is, it means the substantial fact that a crime has been committed by some one: *e.g.*, in the case of a dead body, that it has come to a criminal death (which can only be proved in the presence of the dead body,

CORPUS DELICTI—continued.

super visum corporis). This inquiry is usually made before the coroner of the county or county district, or of the borough, in which the death occurred. In a secondary, but slightly abusive sense, the *corpus delicti* is used to denote the dead body itself. Until the fact of a criminal death is made out, it is of course fruitless to inquire who was the criminal.

CORREALITÉ: See titles JOINT LIABILITY; JOINT OWNERSHIP; REUS STIPULANDI.

CORROBORATIVE EVIDENCE. By the English Law, corroborative evidence is in some cases required, and that either by statute or by common law, *e.g.*, under 32 & 33 Vict. c. 68, in cases of action for breach of promise of marriage, and on the ground of adultery; and under the common law practice of the Courts, where plaintiff and defendant are in conflict as to the facts, neither of their oaths standing alone and without documentary or other corroboration is accepted as decisive.

CORRUPT PRACTICES AT ELECTIONS: See title BRIBERY.

CORRUPTION OF BLOOD. The immediate consequences of attainder used to be *corruption of blood*, both upwards and downwards; so that an attainted person could neither inherit lands or other hereditaments from his ancestor, nor retain those he already had, nor transmit them by descent to any heir, because his blood was considered in law to be corrupted. But by the Act for the Amendment of the Law of Descents (3 & 4 Will. 4, c. 106), s. 10, the doctrine of the corruption of blood has been abolished as to all descents happening after the 1st of January, 1834.

COSENAGE, or COSINAGE (Fr. *cousinage*). A writ that lay where the *tresail* (*i.e.*, the father of the *besail* or great-grandfather) was seised of lands &c., in fee on the day of his death, and afterwards a stranger entered and abated, and so kept out the heir (F. N. B. 221; Cowel).

COST BOOK MINING COMPANIES. These companies exist in virtue of a particular custom, and are in some few particulars controlled by statute. Under the cost book system, the mine is vested in one or more of the proprietors, in implied trust for the rest; it is divided into shares among all, and an agent (purser) is appointed to manage the mine. The agent keeps the cost book, in which he enters all the minutes of meetings, the profits and expenses of the mine, the names of the shareholders, the accounts of their respective interests and liabilities, and the transfers

COST BOOK MINING COMPANIES—
—continued.

of shares. Meetings of the owners are convened generally once in two months, at which those present consider the accounts and reports of the agent, make calls, or declare dividends, direct the mode of carrying on the mine, and exercise a general control over the affairs of the mine, all questions in case of difference being decided by a majority. Any owner is allowed to retire by giving notice in writing to the purser, and by settling his account. The transfer is usually effected by substituting one name for another, on the production of a proper authority in writing from the vendor as person entitled, and without the express consent of any of the other partners. These transfers are not within the Statute of Frauds, and a mere entry in the book by the purser completes the transfer. There is usually no deed of settlement dispensing with the *delectus personæ* or the restraint of transfer; but the freedom of transfer is presumed to be established by original consent or acknowledged usage, in the same way as if a deed of settlement had expressly authorized it.

By the Stannaries Act, 1869 (32 & 33 Vict. c. 19), the laws relating to the cost book system of mining in Devon and Cornwall has been declared, and in some respects amended. The Act has no application beyond these two counties, or beyond the mines therein that are subject to the jurisdiction of the Stannary Court.

Under the Act, in case of a winding-up of the company, a former shareholder, notwithstanding the provisions contained in the Companies Act, 1862, s. 200, is not liable to contribute to the assets of the company, if he has ceased to be a shareholder for a period of two years or upwards before the mine has ceased to be worked, or before the date of the winding-up order.

See titles COMPANIES; CONTRIBUTORIES; JOINT STOCK COMPANIES; LIMITED LIABILITY.

COSTS. The expenses which are incurred either in the prosecuting or in the defending of an action are called the costs. Costs between *solicitor and client* are those which the client always pays his solicitor or attorney, whether such client is successful or not, and over and above what the attorney gets from the opposing party in case of such party having lost the action. Costs between *party and party* are those which the defeated party pays to the successful one as a matter of course. The plaintiff's right to party and party costs used to depend on the Statute of Gloucester, that of the defendant to the same costs on the stat. 23 Hen. 8, c. 15; and under

COSTS—continued.

these statutes the amount recovered in the action was immaterial (*Beaumont v. Greathead*, 3 C. B. 494). But under more recent statutes, where the damages recovered were trivial, the judge must in general have certified for costs, *e.g.*, in an action of tort, when the damages are under 40s. (3 & 4 Vict. c. 21, s. 11); and it was a general rule in actions of libel and slander, that a successful plaintiff recovering merely nominal damages was entitled only to as much for costs as he recovered for damages. But now under the Judicature Acts (Order LV.; *Garnett v. Bradley*, 3 App. Cas. 944), the costs follow the event in every species of action, and all particular statutes to the contrary are repealed; the Court may, however, in its discretion refuse (by express order) costs to a successful party, whether plaintiff or defendant (*Ex parte Mercers' Co.*, 10 Ch. Div. 481). By certain rules as to costs issued in August, 1875, two scales of costs are provided, *viz.*, a higher and a lower scale, according to the nature of the action, and sometimes (although less often) according to the amount of the estate involved; and in particular, special allowances for special reasons are provided for.

See titles COSTS OF THE DAY; COSTS, SOLICITORS ACT, 1843; HIGHER AND LOWER SCALE, COSTS; SPECIAL ALLOWANCES; TAXATION OF COSTS.

COSTS OF THE DAY. Whenever one of the parties in an action (*i.e.*, the plaintiff or defendant) gives notice of his intention to proceed to trial at a specified time, and after having given such notice, neglects to do so, or to countermand the notice within due time, he is liable to pay to the other party such costs or expenses as the latter has been put to by reason of such notice, which costs are commonly called *costs of the day*, *i.e.*, the costs or expenses which have been incurred on the day fixed (by such notice) for the trial. These costs usually consist of the expenses incurred by witnesses and others in coming to the place of trial, and such other expenses as have necessarily been incurred in preparing for trial on the specified day (Arch. Prac.; Lush. Prac.; 6 Jur. 561).

COSTS, PARLIAMENTARY. Under the House of Commons Costs Taxation Act, 1847 (10 & 11 Vict. c. 69) as amended by the House of Commons Costs Taxation Act, 1879 (42 & 43 Vict. c. 17), the costs, charges, and expenses of parliamentary agents and solicitors in the promotion of or opposition to any private bill or any provisional order or provisional certificate, &c., may be taxed by the taxing officer of the House, in like manner (in nearly all

COSTS, PARLIAMENTARY—continued.

respects) as upon an order of taxation in the Court of Chancery: the Secretary of State or the Local Government Board may request the taxing officer of the House to tax or to assist in taxing any bill of such costs, charges, and expenses.

COSTS, SOLICITORS ACT, 1843. This Act is the 6 & 7 Vict. c. 73, which in its 37th to 43rd sections enacts (in effect) as follows:—The solicitor is to deliver his signed bill of costs, and (excepting as hereinafter mentioned) is to wait one month thereafter; during that month the party chargeable with the bill, and after that month and within twelve months, and before payment of or verdict for costs, either the solicitor or the party chargeable may obtain a reference of the bill to a taxing master or other the proper officer for taxation, but after twelve months or after payment of costs or verdict for costs the bill is not to be referred for taxation, unless on the ground of special circumstances (such as fraud, pressure, &c.); and if upon taxation one-sixth part is taxed off, i.e., disallowed, the solicitor pays the costs of the taxation, but otherwise the party pays same. The judge may shorten the month's waiting, for special reasons (38 & 39 Vict. c. 79). Persons other than the party chargeable, if they are liable to pay or (being so liable) have paid the bill, may also obtain a reference for taxation; likewise, a beneficiary may tax the bill to which his trustee or the executor of the will is liable. The bill of costs need not have been incurred in any action.

See title **TAXATION OF COSTS**.

COSTS, TAXATION OF: See title **TAXATION OF COSTS**.

COUNCIL, THE KING'S. This council, called also the *Aula Regis*, otherwise *Curia Regis*, was the parent of the Courts of Exchequer, Common Pleas, and Queen's Bench; but after the severance from it of those three Courts, it still retained a large original jurisdiction; and, as being in early times interchangeable with the House of Lords, it exercised also an appellate jurisdiction from the subordinate Courts. Besides its *judicial* authority, it possessed also *legislative* authority, in conjunction with the King, and apart from the Commons. Thus, in early times, the King and his council, sometimes upon the suggestion of the House of Commons, but more often without any such suggestion, and in both cases without the concurrence of the Commons, enacted laws which appear in the statute book; 2 Ric. 2 is an instance of a law so made. But in 13 Ric. 2, the Commons petitioned the King that his

COUNCIL, THE KING'S—continued.

council might not after the close of Parliament make any ordinance against the Common Law.

But the chief functions of the council were *executive*, the council forming (as it did) a body of assistance to the King in his administration. This appears from the list of the official members composing it, namely,—

- (1.) The Chancellor,
- (2.) The Treasurer,
- (3.) The Lord Steward,
- (4.) The Lord Admiral,
- (5.) The Lord Marshal,
- (6.) The Keeper of the Privy Seal,
- (7.) The Chamberlain of the Household,
- (8.) The Treasurer of the Household,
- (9.) The Controller of the Household,
- (10.) The Chancellor of the Exchequer, and
- (11.) The Master of the Wardrobe,

With a number of other assistant members of a subordinate character.

See titles **CONCILIUM ORDINARIUM**; **MAGNUM CONCILIUM**.

COUNCIL OF THE NORTH. A Court instituted by Hen. VIII. in 1537, to administer justice in Yorkshire and the four other northern counties. Under the presidency of Strafford, the Court shewed great vigour, bordering (it is alleged) on harshness. It was abolished by 16 Car. 1, the same Act which abolished the Star Chamber.

COUNSEL. A term frequently used to indicate *Barrister-at-Law*.

See titles **BARRISTER**; **QUEEN'S COUNSEL**; **SILK GOWN**; **STUFF GOWN**.

COUNSEL'S OPINION. Is in general a protection to an attorney acting upon it, against alleged negligence on his part (*Kemp v. Burt*, 4 B. & Ad. 424); but it is not always so.

COUNSEL'S SIGNATURE. In former times the appearance of the parties to an action at law was actual and personal in open Court, and the pleadings consisted of an oral altercation by themselves or their counsel in the presence of the judges; and although the pleadings in an action came afterwards to be delivered in writing between the parties out of Court, yet they were still *supposed* to be delivered orally as of old (at least for certain purposes), and required to bear the signature of some counsel, and in the Court of Common Pleas, of some serjeant even. And in the Court of Chancery, the signature of counsel to the pleadings was required in order to vouch to the Lord Chancellor that the case was a proper one for equitable relief, so

COUNSEL'S SIGNATURE—*continued.*

that the subpoena to the defendant to appear to and answer the bill of complaint might issue at once, without the Lord Chancellor having to personally read through the bill. But the signature of counsel to Common Law pleadings became unnecessary under the C. L. P. Act, 1852, s. 85, and such signature to Chancery pleadings has become unnecessary under the Judicature Acts, 1873-5 (Order XIX. 4); but although such signature is now unnecessary to any such pleadings, it is not unusual (and, for obvious reasons, it is extremely desirable) in all pleadings. Certain motions, also appeals to the House of Lords, still require counsel's signature as a security, and in each case as a guarantee of the propriety of the application.

COUNT. In Common Law pleadings, a section of a declaration was so called. Where a plaintiff had several distinct causes of action, he was allowed to pursue them cumulatively in the same action, subject to certain rules which the law prescribed as to joining such demands only as were of similar quality or character. Thus, he might join a claim of debt on bond with a claim of debt on simple contract, and pursue his remedy for both by the same action of debt. So, if several distinct trespasses had been committed, these might all form the subject of one declaration in trespass; but on the other hand, a plaintiff could not join in the same action a claim of debt on bond, and a complaint of trespass; these being dissimilar in kind. Such different claims or complaints, when capable of being joined, constituted different parts or sections of the declaration, and were known in pleading by the description of *several counts*. And under the C. L. P. Act, 1852, s. 41, a plaintiff might join in one and the same declaration a count in contract with one in tort, provided they were both by and against the same parties, in the same right, and, *semble*, of a kind to admit of being properly tried together. Thus, a count in contract for breach of warranty might be fitly joined with a count in tort for a false and fraudulent representation, so that the plaintiff if he failed on the one might succeed on the other, according to his evidence. Under the present practice, it can scarcely be said that there are different counts in the statement of claim, but there may be different causes of action joined together therein.

See title JOINER OF ACTIONS.

COUNTERCLAIM. In lieu of bringing a cross action or filing a cross bill, for the purpose of the defendant to the original action obtaining some substantive relief,

COUNTERCLAIM—*continued.*

i.e., relief beyond what he can fairly obtain on a mere defence, the defendant now adds a counterclaim to his statement of defence, wherein he states the circumstances out of which his right to the relief arises, and then claims that relief or other general relief. This relief is counterclaimed against the original plaintiff, with or without any other person or persons (Judicature Act, 1873, s. 24, sub-s. 3).

See title DEFENCE, STATEMENT OF.

COUNTERFEIT COIN.—Is any of the current coin of the realm which has been gilt, silvered, washed, coloured or cased over so as to resemble or pass for coin of a higher value (24 & 25 Vict. c. 99, s. 1); and uttering such coin knowing same to be counterfeit is a felony; and any one may apprehend the offender caught in the act (s. 31); and the offence is punishable with imprisonment with or without hard labour (s. 39), and with or without solitary confinement (s. 40). The proof of the coin being counterfeit may be given by any credible witness, and he need not be a manager or other officer of the Mint (s. 29). The punishment is either for life or for any period not less than five years for the principal offender; and every principal in the second degree and every accessory before the fact is similarly punishable (s. 35).

COUNTERMAND OF NOTICE: *See title TRIAL, NOTICE OF.*

COUNTERPART. Signifies little else than a copy of the original. Blackstone's definition of it is as follows:—When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original, and the rest are counterparts. The counterpart is for some purposes as good evidence as the original deed. Under the Leases and Sales of Settled Estates Act, 1877 (40 & 41 Vict. c. 18), a counterpart is required in the case of every lease granted under the powers thereby conferred. Usually the lessor in every case has to bear the expense of the counterpart.

COUNTER PLEA. All pleadings of an incidental kind, diverging from the main series of the allegations, were called *counter pleas*: as when a party demanded *oyer*, in a case where upon the face of the pleading his adversary conceived it to be not demandable, the latter might *demur*, or if he had any matter of fact to allege, as a ground why the *oyer* could not be demanded, he might plead such matter, and if he pleaded, the allegation was called a *counter plea to the oyer* (Stephen on Plead. 79). Such a plea is now obsolete.

COUNTIES CORPORATE. Are certain cities and towns, some with more, some with less, territory annexed to them: to which, out of special grace and favour, the kings of England have granted the privilege to be counties themselves, and not to be comprised in any other county, but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein. Such are London, York, Bristol, Kingston-on-Hull, Southampton, &c.

COUNTIES PALATINE were so called a *palatio*, because the owners thereof, e.g., the Duke of Lancaster, had therein *jura regalia*, as fully as the King had in his palace. They might pardon treasons, murders, and felonies; they appointed all judges and justices of the peace; all writs and indictments ran in their names, as in other counties in the King's; and all offences were said to be done against *their* peace, and not, as in other places, *contra pacem domini regis*. The principal counties palatine in England were the Earldom of Chester, the Bishopric of Durham, and the Duchy of Lancaster; but all except the last have ceased altogether; and the last has ceased also, excepting as regards civil actions in the Chancery.

COUNTS, COMMON. Common counts were of a simple character, e.g., for money lent; for work and labour; and so forth. Indorsements of a somewhat similar character may now be made on the writ of summons in the action (Judicature Act, 1875, App. A, pt. 2, sch. 2).

COUNTY. An ancient division of the country, co-extensive with a sheriff's shrievalty, and with corresponding consequences as to the execution of writs and other legal processes, but which consequences have been mostly now abolished.

COUNTY COURTS. These are a resuscitation of the shire-gemots, or County Courts of the Anglo-Saxon and Anglo-Norman times, but entirely remodelled to suit the wants of modern times. They were established on their present basis by the stat. 9 & 10 Vict. c. 95, intituled "An Act for the more easy Recovery of Small Debts and Demands in England," or shortly, "The County Courts Act, 1846." In pursuance of the provisions of this Act, the whole of England and Wales, with the exception of the City of London, was in the year 1847, by order in council, divided into districts, varying in extent and population, but contrived so as to suit the wishes and convenience of the inhabitants. There are now over 500 such Courts, and about as many districts. By the principal Act and subsequent Acts, the jurisdiction of

COUNTY COURTS—continued.

the County Courts has been settled as follows:—

I. Common Law Jurisdiction,—

- (1.) The recovery of debts, demands, and damages, not exceeding £50, a sum which may be reached either by abandoning the excess, or by striking a set-off, but not by splitting demands;
- (2.) Consent actions of every description (19 & 20 Vict. c. 108, s. 23);
- (3.) Ejectments, where the annual value and rent do not exceed the sum of £20 (30 & 31 Vict. c. 142);
- (4.) Actions for sums not exceeding £50 on contract transferred by order of a superior Court;
- (5.) Actions of tort transferred in like manner, upon affidavit of defendant, that plaintiff has no visible means of paying costs;
- (6.) The following applications under the C. L. P. Act, 1854;
 - (a.) Discovery of documents;
 - (b.) Interrogatories, and compelling an answer thereto;
 - (c.) Attachment of debts; and
 - (d.) Equitable defences and replications.

II. Equity Jurisdiction,—(under County Courts Act, 1865, 28 & 29 Vict. c. 99);

- (1.) Suits by creditors, legatees, heirs-at-law, and next of kin against, or for accounts, or administration of, personal or real estate, or both;
- (2.) Suits for the execution of trusts;
- (3.) Suits for foreclosure or redemption, or for enforcing any charge or lien;
- (4.) Suits for specific performance, or for the delivering up or cancelling any agreement for the sale or purchase of any property;
- (5.) Proceedings under the Trustee Relief Acts, or Trustee Acts;
- (6.) Proceedings relating to the maintenance or advancement of infants;
- (7.) Suits for the dissolution or winding up of partnerships; and
- (8.) Proceedings for orders in the nature of injunctions.

But in each of these cases the amount at stake must not exceed £500.

III. Miscellaneous Jurisdiction,—

- (1.) Grant and revocation of probate of wills, or of letters of administration, where personal estate is under £200 (21 & 22 Vict. c. 95);
- (2.) Jurisdiction in Admiralty (31 & 32 Vict. c. 71; and 32 & 33 Vict. c. 51);

COUNTY COURTS—continued.

(3.) Jurisdiction in Bankruptcy (32 & 33 Vict. c. 71).

The County Courts also exercise a limited ministerial jurisdiction to the superior Courts of Law and Equity.

All proceedings in the County Court are commenced by *plaint*. Under the Judicature Acts, 1873-5, the distinction between the Common Law and Equity jurisdiction of the County Courts is abolished; and every County Court is to grant in every proceeding before it all the relief or combination of relief as the High Court of Justice might do. And it has been held, that the County Court may in a proper case issue an injunction against the commission of a wrongful act, and even commit for breach of that injunction (*Ex parte Martin*, 4 Q. B. Div. 212): but the limits of the jurisdiction to the pecuniary amounts above stated are not altered. All appeals from the decision of a County Court are to a Divisional Court of the High Court, but not further excepting by leave; and no appeal from a County Court lies at all, excepting upon some ground of law or equity, or for some mistake or misdirection of the judge regarding the evidence.

COUNTY COURTS, JURISDICTION OF: See title COUNTY COURTS.

COUNTY FRANCHISE: See titles ELECTORAL FRANCHISE; REPRESENTATION IN PARLIAMENT.

COUNTY RATES. Are rates made by the justices at general or quarter sessions for the county, under the authority of the stat. 12 Geo. 2, c. 29, for county purposes, being generally the purposes referred to in the preamble of that statute, or other purposes of an analogous character, such as repair and maintenance of bridges, construction and repair of county buildings, such as gaols, assize courts, lunatic asylums, &c. The stat. 12 & 13 Vict. c. 82, relieves of these rates all boroughs having separate quarter sessions. The stat. 15 & 16 Vict. c. 81, and (for divisions of counties) the stat. 21 & 22 Vict. c. 33, regulate the assessment, collection, and distribution of these rates, the basis of assessment being the full and fair annual value of the property as rateable to the poor rate.

See titles BOROUGH RATES; POOR RATES; RATING.

COURT OF ADMIRALTY: See title ADMIRALTY, COURT OF.

COURT BARON. The *Court Baron* is a Court incident to every manor in the kingdom, and is held by the steward of the manor, and is of two natures: *the one* a customary Court, appertaining entirely to copyholders, in which their estates are

COURT BARON—continued.

transferred by surrender and admittance, and other matters transacted relative to copyhold property; *the other* a Court of Common Law, which is the baron's or freeholder's Court, and used to be held for determining by writ of right all controversies relating to the right of lands within the manor; and also for personal actions, where the debt or damages did not amount to forty shillings.

COURT OF CHIVALRY: See titles CHIVALRY, COURT OF; HERALDS' COLLEGE.

COURT CHRISTIAN. The various species of Ecclesiastical Courts which took cognizance of religious and ecclesiastical matters were called *Courts Christian*, as distinguished from the Civil Courts.

COURT, COUNTY: See title COUNTY COURTS.

COURT OF DELEGATES: See title COURTS ECCLESIASTICAL.

COURT OF DIVORCE: See titles DIVORCE; MATRIMONIAL CAUSES.

COURT OF HUSTINGS. This was the highest Court of record held at Guildhall for the City of London, before the mayor, recorder, and sheriffs. It determined pleas, real personal and mixed; and in this Court all lands, tenements, and hereditaments, rents, and services, within the City of London and suburbs, were pleadable in two hustings, one called *hustings of pleas of lands*, and the other *hustings of common pleas*. The Court for these purposes is now quite obsolete. But in the city (as in other towns) members of the House of Commons are said to go to the hustings to be elected; which seems to suggest that the Court of Hustings was a Court in which the freemen or freeholders were both the suitors and the judges, as in the old County Courts of the country.

COURT-LEET. This was a Court of record held once or twice in every year within a particular hundred, lordship, or manor, before the steward of the *leet*, for the preservation of the peace, and the chastisement of divers small offences. One of its functions was to view frank-pledges, that is, freemen within the liberty, who, according to the institution of Alfred the Great, were all mutually pledges for the good behaviour of each other.

See title COURTS OF JUSTICE.

COURT OF THE LORD STEWARD OF THE KING'S HOUSEHOLD, or (in his absence of the treasurer, comptroller, and steward of the *Marshalsea*), was erected by stat. 33 Hen. 8, c. 12, with a jurisdiction to inquire of, hear, and determine, all

COURT OF THE LORD STEWARD OF THE KING'S HOUSEHOLD—*contd.*

treasons, misprisions of treason, murders, manslaughter, bloodsheddings, and other malicious strikings, in or within the limits (*i.e.*, within 200 feet of the gate) of any of the palaces and houses of the king, or any other place where he resided (4 Inst. 133).

See title MARSHALSEA, COURT OF.

COURT OF MARSHALSEA: *See title MARSHALSEA, COURT OF.*

COURT MARTIAL. A military Court for trying and punishing the military offences of soldiers in the army.

These Courts were occasionally (*e.g.*, by Elizabeth), resorted to unconstitutionally, *i.e.* without sufficient justification, for the trial of alleged offenders.

See title MARTIAL LAW.

COURT OF PECULIARS: *See title COURTS ECCLESIASTICAL.*

COURT OF PROBATE. A Court established by the stat. 20 & 21 Vict. c. 77, and which has taken over all the business, in matters testamentary and intestacies, of the old Prerogative Courts of the Archbishops and Consistorial Courts of the Bishops. It is now called the Probate Division of the High Court, with a president and an ordinary judge. Divorce and Admiralty cases are associated with the strictly proper business of the Court,—which is to make grants of probates and administrations, or to refuse probates according to the evidence.

COURT OF RECORD. Is a Court the judgment and proceedings of which are carefully registered and preserved, under the name of *records*, in public repositories; and to them frequent recourse is had when any critical question arises, in the determination of which former precedents may give light or assistance, and for other causes. By stat. 1 & 2 Vict. c. 94, the public records of the kingdom are now in general placed under the superintendence of the Master of the Rolls for the time being, and a public record office has been established.

COURT OF REQUESTS: *See title CONSCIENCE, COURTS OF.*

COURT OF REVIEW: *See title REVIEW, COURT OF.*

COURT OF STAR CHAMBER. A Court of very ancient original, with jurisdiction extending to riots, perjuries, misbehaviour of sheriffs, and other misdemeanours contrary to the laws of the land, and assuming also occasionally the purposes of a Court of revenue. It was finally abolished by 16 Car. 1, c. 10.

See title STAR CHAMBER, COURT OF.

COURTS OF APPEAL. Under the Judicature Acts, 1873–5, there are two Courts of Appeal, namely,

(1.) The Court of Appeal distinctively so called, for appeals from the High Court; and

(2.) The Divisional Court, for appeals from County Courts and other inferior Courts (including the Lord Mayor's Court of London, and of course also the City of London Court which is merely a County Court for the city).

The House of Lords is a Court of Appeal from the above mentioned Court of Appeal; and the Privy Council (Judicial Committee) is the Supreme Court of Appeal for colonial matters, and for lunacy and ecclesiastical matters, and for the Isle of Man, and generally whenever reasons of state or some distinctively executive functions enter into the case.

See title APPEALS, CIVIL, VARIETIES OF.

COURTS, COLONIAL: *See title COLONIES.*

COURTS OF CONSCIENCE: *See title CONSCIENCE, COURTS OF.*

COURTS ECCLESIASTICAL. The Ecclesiastical Courts were Courts held by the king's authority, as supreme head of the church, for the consideration of matters chiefly relating to religion. The causes usually cognizable in these Courts were of three sorts, *pecuniary*, *matrimonial*, and *testamentary*. (1.) *Pecuniary* causes were such as arose either from the withholding ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby some damage accrued to the plaintiff: (2.) *Matrimonial* causes were such as had reference to the right of marriage, as suits for the *restitution of conjugal rights*, for *divorces*, and the like; (3.) *Testamentary* causes were such as related to wills and testaments, &c. The various species of Ecclesiastical Courts were as follows:—

(1.) *The Archdeacon's Court*, which was and is the lowest Court in the whole ecclesiastical polity. It is held, in the archdeacon's absence, before a judge appointed by himself, and called his official; and its jurisdiction is sometimes in concurrence with, sometimes in exclusion of, the bishop's Court of the diocese.

(2.) *The Consistory Court* of every diocesan bishop, which is held in the cathedral of the diocese, for the trial of all ecclesiastical causes arising within the diocese, whereof the bishop's chancellor or his commissary is the judge. Its jurisdiction in causes testamentary including intestacies, has been transferred to the Court of Probate, now the Probate Division of the High Court, which has a District Registry in the diocese.

COURTS ECCLESIASTICAL—continued.

(3.) *The Court of Arches*: See titles ARCHBISHOP; ARCHES, COURT OF,

(4.) *The Court of Peculiars*, which is a branch of, and annexed to, the Court of Arches. It has jurisdiction over all those parishes dispersed through the province of Canterbury, in the midst of other dioceses, which are exempt from the ordinary's jurisdiction, and subject to the metropolitan only. All ecclesiastical causes arising within these peculiar or exempt jurisdictions are originally cognizable in this Court.

(5.) *The Prerogative Court*, which was established for the trial of all testamentary causes, where the deceased had left *bona notabilia*, within two different dioceses; in which case the probate of wills belonged to the archbishop of the province. And all causes relating to wills, administrations, or legacies of such persons, were originally cognizable therein before a judge appointed by the archbishop, called the Judge of the Prerogative Court; but all this jurisdiction has now been transferred to the Court of Probate.

(6.) *The Court of Delegates*, appointed by the king's commission, under his great seal, and issuing out of Chancery, was the great Court of Appeal in all ecclesiastical causes. The power and franchises of this Court were, by 2 & 3 Will. 4, c. 92, transferred to the Privy Council, where they remain.

(7.) *A Commission of Review* was a commission sometimes granted in extraordinary cases, to revise the sentence of the Court of Delegates, when it was apprehended they had been led into a material error. This appeal, however, is now to the king in council.

COURTS OF JUSTICE. In Anglo-Saxon times, the Courts of Justice possessing (A.) *Civil* jurisdiction were the following:—

(1.) Wittenagemot, — which was the Court of Appeal:

(2.) Council of Wittenagemot, — being the prototype of the Privy Council;

(3.) Shire-gemot, *i.e.*, County Court, called also Sheriff's Tourn, and being the Court of first instance for general civil cases;

(4.) Hundred Court; being the two
 Courts for cases
 and of smaller and
(5.) Tything Court; merely local im-
 portance.

And the Courts of Justice of those times, which possessed (B.) *Criminal* jurisdiction were the following:—

(1.) Wittenagemot;

COURTS OF JUSTICE—continued.

(2.) Shire-gemot, *i.e.*, County Court, called also Sheriff's Leet;

(3.) Hundred Court; and

(4.) Tything Court:

being the Courts of these several names enumerated above as having civil jurisdiction.

In Anglo-Norman times, the above-mentioned Courts, called respectively County Court, Hundred Court, and Tything Court, remained; but in addition to them, a new Court was introduced, being the Court called the *Aula Regis*, or *Curia Regis*, and which supplied the place of the Anglo-Saxon Wittenagemot, being, in fact, in those early times interchangeable with the House of Lords, which thereupon became the supreme Appellate Court, and had in those times and for centuries afterwards an original jurisdiction also.

From this *Aula Regis* have been successively developed, in addition to,—

(1.) The House of Lords,—the following Courts, namely,

(2.) The Judicial Committee of the Privy Council, which, however, has not even yet been permanently severed from the *Aula Regis*, but remains a committee still;

(3.) The Court of Exchequer,—the separation of which from the *Aula Regis* is commonly assigned to the reign of Richard I., when the purposes of the king's revenue, for which exclusively it was set apart, necessitated its more permanent constitution as a Court;

(4.) The Court of Common Pleas,—the separation of which from the *Aula Regis* is commonly assigned to a date anterior to the date of Magna Charta (1215) at which latter date the Court was fixed at Westminster, and received as the subject matters of its jurisdiction all civil causes between subject and subject, and in which the king had no interest; and inasmuch as such matters related in early times almost exclusively to real property questions, so it happened that, until the recent changes, the Court of Common Pleas was primarily and properly concerned with freehold issues only;

(5.) The Court of Queen's Bench,—which was the then residuum of the *Aula Regis* after the severance therefrom of the Courts of Exchequer and Common Pleas. The separation of the Court of Queen's Bench from the *Aula Regis* and its constitution into a separate isolated Court is commonly as-

COURTS OF JUSTICE—continued.

signed to the reign of Edward I., that reign having been the epoch at which the Common Law Procedure, as it existed prior to 1852-60, was established in its principal features;

- (6.) The Court of Chancery, which was the then residuum of the *Aula Regis* after the Queen's Bench had been isolated from it. This Court acquired consistency as a Court in the reign of Edward III, under an ordinance 22 Edw. 3, which directed the Lord Chancellor to inquire of matters of "*grace*," and the Court was furnished in the succeeding reign (Richard II.) with its chief weapon, namely, the *subpœna*, which was invented in that reign by Bishop Waltham, of Salisbury; and, in spite of strenuous opposition, the Chancery procedure by *bill* and *subpœna*, as it existed until the year 1852, was fully established in the reign of Edward IV.;
- (7.) The Court of Exchequer Chamber. This Court was established by the stat. 31 Edw. 3, st. 1, c. 12.
- (8.) The Star Chamber. This was the residuum of the *Aula Regis* remaining after the isolation of the Court of Chancery; and inasmuch as the Courts already established did not appropriate all matters of jurisdiction, and inasmuch as in particular the Court of Chancery never possessed any jurisdiction in criminal matters, so the Court of Star Chamber of those times had a jurisdiction partly civil but principally criminal, being supplementary to the other Courts, and interposing where those Courts were from any cause, whether from want of jurisdiction or from obstructions to their jurisdiction, incapable of doing justice or of giving redress;
- (9.) The Court of Admiralty, being the
- (10.) The Court-Martial, } Courts which were latterly developed respectively out of the jurisdiction of the Constable (over maritime causes), and of the Earl Marshal (over military causes).

In addition to the Courts before enumerated, there are two other jurisdictions, namely:

- (11.) Judges of Assize and Gaol Delivery, being the descendants of the Justices Itinerant or Justices in Eyre, who were appointed for the

COURTS OF JUSTICE—continued.

first time in the year 1176, by an Act of the Parliament held at Northampton in that year; and

- (12.) The Courts Ecclesiastical, which (it is uncertain whether they) emanated from the royal person as supreme head of the Church, or from the person of the Church itself, or of the Pope, the representative and vice-gerent of the Church of Christ on earth. At any rate, they did not emanate from the *Aula Regis*; although subsequently to the Reformation of Religion in the reign of Henry VIII, when that monarch assumed to be, and was recognized at law as being, supreme head of the Church of England, the Courts Ecclesiastical clearly derived their efficacy, like all other Courts and institutions, from his royal person, as the source of law and justice. The Courts Ecclesiastical were of many orders and varieties; but at the present day they are principally the Consistory Courts of the bishop of each diocese, and the Court of Arches.

By the Judicature Act, 1873 (36 & 37 Vict. c. 66), which took effect on the 1st of November, 1875, it is provided with reference to the Superior Courts of Justice that the numbers of such Courts and their gradations shall be as represented in the following statement, that is to say,—

(1.) The Act (as amended by the Acts of 1875, 1877,) unites and consolidates into one Supreme Court of Judicature in England the following Courts, viz. (s. 3):

- (a.) High Court of Chancery,
- (b.) Court of Queen's Bench,
- (c.) Court of Common Pleas,
- (d.) Court of Exchequer,
- (e.) High Court of Admiralty,
- (f.) Court of Probate, and
- (g.) Court of Divorce and Matrimonial Causes.

(2.) It subdivides the said Supreme Court into two permanent divisions, to be called respectively (s. 4),

- (a.) Her Majesty's High Court of Justice, and
- (b.) Her Majesty's Court of Appeal.

The former of these two subdivisions has original and some appellate jurisdiction, and the latter of them appellate and some original jurisdiction.

(3.) It constitutes as members of the High Court of Justice the following persons, namely (s. 5):

- (a.) The Lord Chancellor,
- (b.) The Lord Chief Justice of England,
- (c.) The Master of the Rolls,

COURTS OF JUSTICE—continued.

- (d.) The Lord Chief Justice of the Common Pleas,
 - (e.) The Lord Chief Baron of the Exchequer,
 - (f.) The Vice-Chancellors of the High Court of Chancery, and (under the Judicature Act, 1877), the Additional Judge in Chancery,
 - (g.) The Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes,
 - (h.) The Puisne Judges of the Court of Queen's Bench,
 - (i.) The Puisne Judges of the Court of Common Pleas,
 - (j.) The Junior Barons of the Court of Exchequer, and
 - (k.) The Judge of the High Court of Admiralty,
- making the Lord Chancellor, and in his absence the Lord Chief Justice of England, president of the said Court.

(4.) It appoints as judges of the Court of Appeal the following persons, namely (s. 6):

- (a.) The Lord Chancellor,
- (b.) The Lord Chief Justice of England,
- (c.) The Master of the Rolls,
- (d.) The Lord Chief Justice of the Common Pleas, and
- (e.) The Lord Chief Baron of the Exchequer;

which five persons are to be the five *ex officio* judges of the said Court; also,

- (f.) The Lords Justices of Appeal (six in number).

The Lord Chancellor is president of the Court of Appeal.

(5.) It enables any judge of the Supreme Court (other than the Lord Chancellor) to resign his office therein by writing under his hand addressed to the Lord Chancellor; and provides that the appointment of any judge of the High Court of Justice to be a judge of the Court of Appeal shall *ipso facto* vacate the former office (s. 7).

(6.) It makes eligible for the office of judge of the High Court of Justice (s. 8),—

- (a.) Any barrister of not less than ten years' standing; also, it makes eligible for the office of judge of the Court of Appeal.—
- (b.) Any person having the qualifications to be appointed a Lord Justice of Appeal in Chancery as that office existed and was qualified for at the date of passing of Act; and
- (c.) Any judge of the High Court of Justice of one year's standing.

And after providing for the tenure of the office of a judge of the said Supreme Court, and rendering every such judge incapable of sitting in the House of Commons, and prescribing the oaths to be taken by every

COURTS OF JUSTICE—continued.

such judge when he enters on the execution of his office (s. 9):

And after providing for the precedence of judges (s. 10), and for the non-judicial extraordinary duties of any judges (s. 12), and for the rights and obligations of existing judges (s. 11), and for the salaries of future judges (s. 13), and for the retiring pensions of future judges (s. 14), and for the mode of payment of the salaries and pensions of judges (s. 15), it goes on to make further provision as follows, that is to say,—

(7.) It constitutes the High Court of Justice a Superior Court of Record, and vests in it the following jurisdictions, namely (ss. 16, 17):

- (a.) The High Court of Chancery,—all the jurisdiction thereof, as well in its Common Law as in its Equity side, and including therein the ordinary and also the special jurisdiction of the Master of the Rolls, other than and except the following jurisdictions, that is to say,—
 - (aa.) The appellate jurisdiction of the Court of Appeal in Chancery, or of the same Court sitting as a Court of Appeal in Bankruptcy;
 - (bb.) The jurisdiction of the Court of Appeal in Chancery of the county palatine of Lancaster;
 - (cc.) The jurisdiction, whether of the Lord Chancellor or of the Lords Justices, over idiots, lunatics, and persons of unsound mind;
 - (dd.) The jurisdiction of the Lord Chancellor in the matter of letters patent and in the matter of commissions or other writings under the Great Seal;
 - (ee.) The jurisdiction of the Lord Chancellor over colleges and charities; and
 - (ff.) The jurisdiction of the Master of the Rolls over records in England.
- (b.) The Court of Queen's Bench,—all the jurisdiction thereof;
- (c.) The Court of Common Pleas at Westminster,—all the jurisdiction thereof;
- (d.) The Court of Exchequer,—all the jurisdiction thereof;
- (e.) The High Court of Admiralty,—all the jurisdiction thereof;
- (f.) The Court of Probate,—all the jurisdiction thereof;
- (g.) The Court for Divorce and Matrimonial Causes,—all the jurisdiction thereof;

COURTS OF JUSTICE—continued.

- (h.) The London Court of Bankruptcy, (repealed by Judicature Act, 1875);
- (i.) The Court of Common Pleas, at Lancaster,—all the jurisdiction thereof;
- (j.) The Court of Pleas at Durham.—all the jurisdiction thereof; and
- (k.) The Courts created by Commissioners of Assize, Oyer and Terminer, and Gaol Delivery,—all the jurisdictions thereof;

including in such jurisdictions the respective jurisdictions exercised by all or any one or more of the judges of the said Courts respectively, whether sitting in Court, or in chambers, or elsewhere, and all powers ministerial and other of such respective Courts and of their or any of their said respective judges, and all duties and authorities incident to the same jurisdictions, or any part thereof respectively.

(8.) It constitutes the Court of Appeal a Superior Court of Record, and vests in it the following jurisdictions and powers, namely (s. 18):—

- (a.) The appellate jurisdiction (with the powers incident thereto) of the Lord Chancellor and of the Court of Appeal in Chancery, and of the same Court sitting as a Court of Appeal in Bankruptcy;
- (b.) The jurisdiction (with the powers incident thereto) of the Court of Appeal in Chancery of the County Palatine of Lancaster, and of the Chancellor of the Duchy and County Palatine of Lancaster when sitting alone or apart from the Lords Justices of Appeal in Chancery as a judge of re-hearing or appeal from decrees or orders of the Court of Chancery of the County Palatine of Lancaster;
- (c.) The jurisdiction (with the powers incident thereto) of the Court of the Lord Warden of the Stannaries and his assessors, and of the Lord Warden in his capacity of judge;
- (d.) The jurisdiction (with the powers incident thereto) of the Court of Exchequer Chamber; and (s. 19),
- (e.) An appellate jurisdiction in respect of all judgments and orders of the High Court of Justice or of any judges or judge thereof with such powers incident thereto as are necessary for the exercise of the same jurisdiction, and as are before given to the High Court of Justice.

(9.) It abrogates the several jurisdictions which in the Act are mentioned to

COURTS OF JUSTICE—continued.

be transferred to the High Court of Justice and the Court of Appeal respectively, subject to the following provisions as to the existing business of the said several jurisdictions on the 2nd of November, 1874, now extended to the 1st of November, 1875, namely (s. 22):—

- (a.) As to causes, matters, &c., fully heard, but being as to the judgments therein imperfect in any respect,—

The judgments in all such causes, matters, &c., are to be perfected by the said several jurisdictions respectively; and

- (b.) As to causes matters, &c., fully heard, and being as to the judgments therein perfect in every respect,—

The judgments in all such causes, matters, &c., may be executed, amended, or discharged by the High Court of Justice or Court of Appeal as the case may be; also,

- (c.) As to causes, matters, &c., pending:—

(1.) All proceedings in error or on appeal therein, and also all proceedings before the Court of Appeal in Chancery are to be continued and concluded in the Court of Appeal;

(2.) All proceedings other than those above mentioned are to be continued and concluded in the High Court of Justice; and for these purposes the Court of Appeal and the High Court of Justice respectively are to have the same jurisdiction in respect of all such pending causes, matters, &c., as if the same had been commenced in the two last-mentioned Courts respectively, and may direct the continuance and conclusion of the same either according to the old mode of procedure or according to the new mode of procedure.

(10.) It defines that the new procedure and practice shall be regulated by the Judicature Acts and by certain rules and orders of Court made pursuant thereto, and in the absence of such regulation upon any special point, shall be as nearly as may be the same as the old procedure and practice (s. 23.)

(11.) It constitutes Divisional Courts of the High Court, being any two or more judges of that Court sitting together; and it assigns to such Divisional Courts various

COURTS OF JUSTICE—continued.

special jurisdictions, chiefly the following:—

- (1.) All appeals (from Petty or Quarter Sessions) from a County Court, or from any other inferior Court, which, before the Judicature Acts, 1873–5, lay to the Superior Courts of Law or Equity (Judicature Act, 1875, s. 45; Order LVII a., 1);
- (2.) Cases, or points in cases, reserved at trials for the consideration of the Divisional Court, and cases or points in cases directed at trials to be argued before the Divisional Court (Judicature Act, 1873, s. 46);
- (3.) Applications for new trials, from a trial before a judge *with* a jury (Order XXXIX., 1; Order LVII a., 1, December, 1876); and also applications for new trials from a trial in the County Court, even without a jury (*London v. Roffey*, 3 Q. B. Div. 6; *Davis v. Godbehere*, W. N. 1879, p. 62);
- (4.) Applications for orders charging stock or shares (Order XLVI., 1); and
- (5.) The following civil (besides certain election and criminal) proceedings, viz.:—
 - (a.) Proceedings directed by Act of Parliament to be taken before the Court, when the Court's decision is final;
 - (b.) Cases stated by the Railway Commissioners;
 - (c.) Special cases, by agreement of all parties; and
 - (d.) Appeals from the Common Law Chambers to the Court (Order LVII a., 1).

COURTS OF PRINCIPALITY OF WALES.

A species of private Courts of a limited though extensive jurisdiction; which, upon the thorough reduction of that principality and the settling of its polity in the reign of Henry VIII., were erected all over the country. These Courts, however, have been abolished by 1 Will. 4, c. 70; the principality being now divided into two circuits, which the judges visit in the same manner as they do the circuits in England, for the purpose of disposing of those causes which are ready for trial.

COURTS OF THE UNIVERSITIES. The Chancellor's Courts in the two universities of England used to enjoy the sole jurisdiction, in exclusion of the King's Courts, over all civil actions and suits whatsoever, when a scholar or privileged person was one of the parties, excepting in matters

COURTS OF THE UNIVERSITIES—continued.

where a right of freehold was concerned. These privileges were granted in order that the students might not be distracted from their studies by legal process from distant Courts. And these University Courts were at liberty, at their discretion, to try and determine either according to the Common Law of the land, or according to their own local customs. These privileges are still in part exercised at Oxford, but by a recent private statute have been taken away from Cambridge. In pursuance of the stats. 17 & 18 Vict. c. 45, and 25 & 26 Vict. c. 26, s. 12, the procedure is as in the County Courts; and the rules of the Statute Law of England have taken the place of the rules of the Civil Law.

COURTS AT WESTMINSTER. The superior Courts, both of Law and Equity, were for centuries fixed at Westminster, an ancient palace of the monarchs of this country. Formerly all the superior Courts were held before the king's capital justiciary of England, in the *Aula Regis*, or such of his palaces wherein his royal person resided, and removed with his household from one end of the kingdom to another. This was found to occasion great inconvenience to the suitors, to remedy which it was made an article of the great charter of liberties both of King John and King Henry III., that "common pleas should no longer follow the King's Court, but be held in some certain place," in consequence of which they have ever since been held (a few necessary removals in times of the plague excepted) in the palace of Westminster only. The Courts of Equity also sit at Westminster nominally during term time, although actually only during the first day of term, for they generally sit in Courts provided for the purpose in, or in the neighbourhood of, Lincoln's Inn.

COVENANT. Is a mere agreement or promise under seal, and may be either to pay a liquidated sum of money or unliquidated damages, or to do, or abstain from doing, any particular act.

Covenants are of various kinds, the principal of which are the following:—

(1.) *Express and Implied Covenants*,—the former being in so many words, the latter arising by inference from the use of other words, e.g., "demise," which implies a covenant for quiet enjoyment, "grant, bargain, and sell," which, as regards lands in the East and North Ridings of Yorkshire, imply covenants for title;

(2.) *General and Specific Covenants*,—the former relating to land generally and placing the covenantee in the position of a

COVENANT—continued.

specialty creditor only, the latter relating to particular lands and giving the covenantee a lien thereon:

(3.) *Inherent and Collateral Covenants*,—the former affecting the particular property immediately, the latter affecting some property collateral thereto;

(4.) *Joint and Several Covenants*,—the former binding both or all the covenantors together, the latter binding each of them separately. A covenant may be both joint and several at the same time, as regards the covenantors; but as regards the covenantees, they cannot be joint and several for one and the same cause (5 Rep. 19 a), but must be either joint or several only. Covenants are usually joint or several according as the interests of the covenantees are such; but the words of the covenant, where they are unambiguous, will decide: although where they are ambiguous, the nature of the interests as being joint or several is left to decide. (*Bradburne v. Batfield*, 14 M. & W. 559).

(5.) *Real and Personal Covenants*.—These covenants being also sometimes called respectively covenants which run with the land and covenants which lie against the personalty. The former, whether beneficial or burdensome, attach to the successive owners of the property in virtue of their being such; but both varieties of covenant, i.e., as well the real as the personal, form the basis of an action for damages against the covenantor himself, or, if he is dead, against his executors or administrators, and even against his heir, if the heir is specially named in the covenant. If the covenant does not concern the land itself, but only a particular mode of occupying or using the same, it does not run with the land, and the assignee of the lease (not being expressly named in the covenant) cannot sue the lessor upon it (*Thomas v. Hayward*, L. R. 4 Ex. 311); but if the assignee have notice of such a covenant, he will be bound thereby in equity (*Catt v. Tourle*, L. R. 4 Ch. App. 654; *Renals v. Cowlishaw*, 9 Ch. Div. 125; and distinguish *Master v. Hunsard*, 4 Ch. Div. 718).

The benefit of real covenants passes to the heirs of the covenantee, although entered into with him and his executors and administrators only; also, the benefit of such covenants entered into with the covenantee, his heirs and assigns, or even with the covenantee and his heirs only, passes to all persons taking the estate of the covenantee, or any estate derived out of such estate. Hence, when covenants are entered into with the *releasee to uses* and his heirs and assigns, or with him and his heirs only, they run with the land for the

COVENANT—continued.

benefit of all the *cestuis que use* whose estates are derived out of the momentary seisin of such releasee, whether such *cestuis que use* are or are not parties to the conveyance, and whether they claim immediately under it or by virtue of an appointment made under a power contained in that conveyance. But when the covenants are made with the *cestui que use* and his heirs and assigns, or with him and his heirs only, although they run with the land for the benefit of any person who claims as alienee of his estate, yet they do not run with the land for the benefit of an APPOINTEE of the *cestui que use*, the reason being that such appointee, although the alienee of the *cestui que use*, is not the alienee of his estate, but of a new estate which is substituted for it, and which takes effect, not out of the seisin of the *cestui que use*, but out of the original seisin of the releasee to uses. Wherefore it is better, when the releasee to uses and the purchaser are different persons, for the covenants to be made with the releasee to uses and not with the *cestui que use*.

Again (6.), *Covenants, Dependent or Independent*. Thus, if A. covenant with B. to serve him for a year, and B. covenant with A. to pay him £10, the covenants are independent, and A. may maintain an action of debt or covenant against B. for the money before any service; on the other hand, if B. had in the case before mentioned covenanted to pay A. £10 *for the service*, the three words in italics would have made the second covenant dependent on the first, and the service becoming in that way a condition precedent, A. could not have enforced payment of the money without averring and proving the performance of the service. By the C. L. P. Act, 1852, s. 57, such averment may now be general. Again, where A. covenanted with B. to marry B.'s daughter, and B. covenanted with A. to convey an estate to A. and the daughter in tail special, it was held that the covenants were independent, and that A. might marry another woman and yet have an action of covenant against B.; on the other hand, if B. had covenanted with A. in the last-mentioned case to convey the estate to him and the daughter *for the cause aforesaid*, the words in italics would have made the second covenant dependent on the first, and A. could not have had his action of covenant against B. without having first married the daughter of B. See 1 Wms. Saund. (ed. 1871), p. 549.

The distinction between covenants dependent and covenants independent, together with the practical importance of that distinction, being apparent, the follow-

COVENANT—continued.

ing are the rules for deciding whether in any given case a covenant is dependent or independent:—

(1.) If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to (or may) happen *before* the thing which is the consideration for the money or other act is to be performed, an action may be brought for the money or to enforce doing the other act, before the performance of the consideration (*Ughtred's Case*, 48 Edw. 3, 2, 3; *Thorpe v. Thorpe*, 12 Mod. 461). But it is otherwise, if the day is to happen after the consideration. (*Thorpe v. Thorpe*, 2nd resolution, 12 Mod. 462; and see *Portage v. Cole*, 1 Wms. Saund. (ed. 1871), p. 548.)

(2.) Where a covenant goes only to part of the considerations on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without any averment of performance in the declaration; a very remarkable illustration of such an action will be found in *Boon v. Eyre* (1 H. Bl. 273, n. (a)). And it is a general rule of law, that where the consideration has been executed in part, that which was at first a condition precedent, becomes for the purposes of pleading a warranty merely, for the breach of which a compensation must be sought in damages (*Behn v. Burgess*, 3 B. & Sm. 751); unless indeed the consideration is entire and indivisible, in which case there can be no partial failure, but the consideration if it fail at all must fail altogether (*Chanter v. Leese*, 4 M. & W. 295; 5 M. & W. 698). But it is otherwise where the mutual covenants go to the whole consideration on both sides; for in that case they are mutual conditions precedent, and performance must be averred (*St. Alban's (Duke) v. Shore*, 1 H. Bl. 270).

(3.) Where two acts are to be done at the same time, neither party can maintain an action against the other, without shewing performance of, or an offer to perform, his part, although it be not defined which of them is obliged to do the first act; and this third rule applies more especially to all cases of sale (*Peeters v. Opie*, 2 Wms. Saund. (ed. 1871), 742).

See title CONDITIONS.

COVENANT TO STAND SEISED: See title CONVEYANCES, sub-title II. A 1.

COVENANTS FOR TITLE. The usual covenants for title in the case of freehold lands are five in number, viz. (1) that the grantor is seised in fee; (2) that he has good right to convey; (3) for quiet enjoyment; (4) free from incumbrances; and

COVENANTS FOR TITLE—continued.

(5) for further assurance; and in the case of the grantor retaining any of the title deeds, then (6) a covenant to produce such title deeds. A vendor gives all these covenants, but limits them to the acts and defaults of himself and his ancestors (i.e., since the last purchase); a mortgagor also gives all these covenants, but absolutely and without any such qualification or limitation as aforesaid. A trustee, or mortgagee transferring the estate, merely covenants that he personally has not incumbered. The covenant for further assurance does not extend to including a covenant to produce, which latter covenant should therefore be expressly added, where it is wanted. Eviction would be a breach of the covenant for seisin in fee free from incumbrances; and for such a breach the damages are usually much more considerable than for mere breach of the covenant for quiet enjoyment (*Child v. Stenning*, 11 Ch. Div. 82). The covenants for title in the case of copyholds are substantially the same. The covenants for title in the case of leaseholds are that the lease is valid and subsisting, and not become void or voidable.

See titles EVICTION; QUIET ENJOYMENT.

COVERTURE: See title MARRIED WOMEN.

COVIN. An old name for fraud.

See titles FRAUD; FRAUDULENT CONVEYANCE.

CREDIBILITY OF WITNESS. All objections to the competency of witnesses on the ground of interest having now (with immaterial exceptions) been removed (see title COMPETENCY OF WITNESSES), the objection has become a mere circumstance affecting, or which (it may be suggested) affects their credibility, i.e., their trustworthiness as narrators of the circumstances given in evidence. Besides pecuniary interest, other grounds for questioning the credibility of a witness are relationship (moral or social), anxiety for witness's own reputation, and such like.

CREDIT, LETTERS OF. Are instruments in common use among bankers for the transmission of money either within the United Kingdom, or to the colonies, or to foreign countries. They are not negotiable as cheques, but are mere authorities from the banker who signs them to the banker [or other person] to whom they are addressed upon advice to honour the drafts of the person named therein upon his producing the letters. If the letters of credit are stolen or lost, the banker upon whom they are drawn is liable in case he honours the drafts or pays the amounts upon a

CREDIT, LETTERS OF—*continued.*

forged indorsement. The 16 & 17 Vict. c. 59, s. 19, does not apply to these letters, as it does to drafts.

See title **CHEQUES**.

CREDITORS. In the most general sense are persons entitled to any money or equivalent for money, either liquidated or unliquidated; but in its proper sense, are persons entitled to money only, and that of a liquidated amount. Their form of action was debt (*see* title **DEBT**). They may be either sole creditors or joint creditors; and in either case, either secured creditors or unsecured creditors; and they may be either by simple contract, or by specialty (*e.g.*, bond or covenant), or upon a judgment. And in the case of partnerships, they may be either joint creditors (*i.e.*, partnership creditors) or separate creditors (*i.e.* claiming against any individual partner separately). In connection with companies, creditors are commonly distinguished from contributories.

See titles **CONTRIBUTORIES**; **JOINT OWNERSHIP**.

CREDITOR'S DEED: See titles **COMPOSITION DEED**; **CREDITORS, TRUSTS FOR**.

CREDITORS, FRAUDS ON. Such frauds may exist either at the Common Law or under particular statutes. *Twyne's Case*, 3 Rep. 82 a., is the leading case on Common Law frauds on creditors; the particular statutes relating to (and in some instances creating) frauds on creditors are the 13 Eliz. c. 5, the Bills of Sale Act, 1878, and the Bankruptcy Act, 1869 (*see* title **FRAUDULENT CONVEYANCES**). There are some frauds on creditors which are not always relievable, *e.g.*, in the case of married women having separate property, but restrained from anticipating it, and in the case of infants.

See titles **SEPARATE ESTATE**; **INFANTS**.

CREDITORS, TRUSTS FOR. Deeds of trust in favour of creditors, even where they contain no express power of revocation, are (unlike other deeds, and unlike even voluntary deeds) revocable by the settlor as a general rule, they being arrangements for the debtor's own convenience merely, and not investing his creditors with the character of *cestuis que trustent* (*Garrard v. Lord Lauderdale*, 3 Sim. 1). Made one day, they may be unmade the next, on a happier thought. Nevertheless, such deeds become irrevocable in certain cases, being principally two, viz. (a.) Where the creditors or some of them are parties to the deed and execute it, it becomes irrevocable as regards the executing creditors (*Mackinnon v. Stewart*, 1 Sim. (N.S.) 89); and (b.) Where the creditors are not parties,

CREDITORS, TRUSTS FOR—*continued.*

but the deed is communicated to them, and after such communication they, in reliance upon the deed, have materially altered their positions relatively to the debtor, *e.g.*, by abandoning some action which they had commenced against him for the recovery of their debts (*Acton v. Woodgate*, 2 My. & K. 495); but mere communication, not followed by such an alteration of position, does not make the deed irrevocable (*Biron v. Mount*, 24 Beav. 649). A creditor to whom the deed has not been communicated has no equity under it (*Johns v. James*, 8 Ch. Div. 744); but if it contain all the debtor's property, he may make him a bankrupt on the ground of it.

See title **BANKRUPTCY**.

CRETIO. In Roman Law, was the choice made by a Haeres, to take the estate; and it came naturally to denote the time limited for the heir to choose. Where the time so limited ran on, whether the heir knew or did not know that he was heir, it was called *continua* or *certorum dierum*; when it only ran after he knew of the fact of his being heir, it was called *vulgaris*, because that was the commoner way.

See titles **INSTITUTIO HAEREDIS**; **SUBSTITUTIO HAEREDIS**.

CRIER. An officer attached to the Courts of Common Law, whose duty it was to call a plaintiff who was nonsuited at the trial (*see* title **CALLING THE PLAINTIFF**); and his present duties are to call the jury, &c. Usually one of the judge's clerks acts as crier of the Court (15 & 16 Vict. c. 73, s. 8; Judicature Act, 1873, s. 79).

CRIME. The distinction between a crime and a tort, or civil injury, is, that the former is a breach and violation of the public rights and duties due to the whole community, considered as such, in its social aggregate capacity, and is said to be committed against the king's peace; whereas the latter is merely an infringement or privation of the civil rights which belong to individuals considered merely in their individual capacity.

See title **CRIMINAL LAW**.

CRIMEN FALSI. Was fraudulently affixing the seal of the Court to any purported legal process, *e.g.*, signing writs or charters with the king's seal, or a summons with the seal of the county court.

CRIMINAL CASES RESERVED. The Court for the decision of points of law raised upon criminal trials and reserved was constituted by the stat. 11 & 12 Vict. c. 78; and the jurisdiction vested in it is now exercised by the judges of the High Court of Justice, or any five of them of

CRIMINAL CASES RESERVED—contd.

whom the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, or one of them, shall form part (Judicature Act, 1873, s. 47).

CRIMINAL CONVERSATION. This was the name of an action in which a husband proceeded for damages sustained by him in his wife by the act of an adulterer of her body. It was abolished by the stat. 20 & 21 Vict. c. 85. s. 59, but the husband may at the present day petition the Court of Probate for damages in such a case, without asking for a divorce also.

See title **DIVORCE, DAMAGES FOR.**

CRIMINAL INFORMATION. This is a mode of proceeding available in cases of alleged libellous publication, and in some other matters. It is within the discretion of the Court to grant or refuse it according to the circumstances (*Anon.*, Lofft. 323); and the Court will not entertain an application for it on light or trivial grounds, but will leave the party to his remedy (if any) by action or indictment (*Reg. v. Mead*, 4 Jur. 1014). The Attorney-General or (during the vacancy of that office) the Solicitor-General may, however, file such an information *ex officio*, and without application to the Court (*Rex v. Plymouth Mayor*, 4 Burr. 1087); and he may even stop the proceedings upon his first information, and file a second one (*Rex v. Stratton*, 1 Doug. 238). To an information for a libel, the defendant may, under 6 & 7 Vict. c. 96, s. 6, plead in his justification the truth of the matter published, and that the publication thereof was for the public good.

A criminal information also lies against a magistrate who acts from corrupt motives, or who improperly grants or refuses an alibi; but the magistrate must have notice of the intention to apply for the information against him. And the party applying for an information must in all cases come with clean hands.

CRIMINAL LAW. (1.) *The persons concerned in the commission of a crime may be concerned in it either as Principals, or as Accessories, or as Abettors.*

(2.) *The varieties of crimes are innumerable; they are, however, distinguished generally into three classes, viz., Treasons, Felonies, and Misdemeanors; but the distinction between treasons and felonies is nearly obsolete, most (if not all) treasons being now prosecutable as felonies; and the distinction between felonies and misdemeanors is partly obsolete, and is threatened with extinction under the Criminal Law Codification Bill, 1880.*

CRIMINAL LAW—continued.

Particular crimes (such as Arson, Bigamy, Burglary, Murder, &c.) will be found explained under each particular head.

(3.) *The mode of procedure in criminal cases is various, being either (1) by indictment, which is the regular course (see title INDICTMENT); or (2) by summary proceedings before a magistrate (see title SUMMARY CONVICTIONS); or (3) by Criminal Information (see title CRIMINAL INFORMATION).*

(4.) *The evidence adduceable in support of and against the charge, is in general governed by the same strict rules of evidence that are (or ought to be) applied in civil actions; but there are the following rules of evidence exclusively applicable to criminal matters, that is to say,—Estoppels against the accused are not to be readily made; Presumptions against him are not to be lightly raised, but if there is any reasonable hypothesis or material circumstance tending to infirm the presumption, the accused is to have the benefit of the doubt; the *onus probandi* invariably rests on the prosecutor; in all matters of presumption and circumstantial evidence, there can be no conviction without proof of the *corpus delicti*; evidence of motive is receivable, and of conduct as well antecedent to as subsequent to the alleged crime committed.*

(5.) *Appeals and proceedings in the nature thereof in criminal cases are allowed or not according to the following distinctions,—*

(a.) *No new trial can be granted in cases of felony; but with respect to misdemeanors, it is entirely discretionary with the Court whether it will grant or refuse a new trial (Rex v. Mawbey, 6 T. R. 638).*

(b.) *It is contrary to the policy of the English Law that there should be an appeal in cases of felony (Ex parte Eduljee Byramjee, 5 Moo. P. C. C. 276); nevertheless the stat. 11 & 12 Vict. c. 78, enables the judge to reserve any point arising on the trial for the consideration of the Court for Crown Cases Reserved, which is established by that Act, and the constitution of which is not materially modified by the Judicature Acts, 1873–5; but*

(c.) *After judgment the record may be removed by writ of error, in any case where an error, either of law or of fact, appears on the record; this writ of error lies from quarter sessions to the Queen's Bench, and from the Queen's Bench to the Court of Appeal. But, *semble*, in a case of misdemeanor (as distinguished from felony) the previous fiat of the Attorney-General is requisite, and it is in his discretion to grant or refuse his fiat (Reg. v. Newton, 4 El. & Bl. 869).*

CROGATE'S CASE: See title DE INJURIA, REPLICATION.

CROSS ACTION. Where A. having brought an action against B., B. brings an action against A. upon the same subject-matter, or arising out of the same transaction, this second action is called a *cross action*. And this double action used sometimes to be necessary to insure justice to both parties; as in the case of a contract in which neither of the contractors was subjected to any condition precedent to his right to enforce performance by the other of his part, but the promises on each side were independent of what was to be done upon the other. In such a case the non-performance of the plaintiff's promises would be no defence to an action for the non-performance of the defendant's, whose sole remedy, therefore, against the plaintiff was by a cross action (6 T. R. 570; 9 B. & C. 259). However, a cross action is rendered unnecessary in all cases, and the party may now by means of a counterclaim obtain all the benefit which formerly arose from a cross action.

See title COUNTERCLAIM.

CROSS BILL. A suit in Equity used to be commenced by the plaintiff filing his bill, wherein were stated all circumstances which gave rise to the complaint; the defendant's mode of defence was then usually by *answer*, wherein he controverted the facts stated in the bill, or some of them, &c. But when he was unable to make a complete defence to the plaintiff's bill without disclosing some facts which rested in the knowledge of the plaintiff himself, he then filed what was called a *cross bill*, which differed in no respect from the plaintiff's original bill, excepting that the occasion which gave rise to it proceeded from matter already in litigation. A cross bill was in many cases necessary in aid of a defence, which could not properly be raised by answer merely, as in cases of alleged fraud. However, under the Judicature Acts, 1873-75, no defendant need now file any cross bill or institute any cross action (unless the Court should direct him to do so), but may raise by counter-claim (and in that way obtain all the benefit of) what would formerly have required a cross bill or cross action.

See title COUNTERCLAIM.

CROSS DEMANDS. These arise where one man against whom a demand is made by another, in his turn makes a demand against that other, and of such cross demands a *set-off* is in law the most familiar instance, a *set-off* being a statutory right of balancing mutual debts between the plaintiff and defendant in an action.

See titles COUNTERCLAIM; SET-OFF.

CROSS EXAMINATION: See title EXAMINATION OF WITNESSES.

CROSS REMAINDER: See title REMAINDER, CROSS.

CROSSED CHEQUES: See title CHEQUES.

CROWN COURT. Is the Court in which the Crown or criminal business of the assizes is transacted.

See titles CIVIL SIDE; PLEA SIDE.

CROWN DEBTS. These are debts due to the Crown, usually from persons who are or were accountants to the Crown, but also on record, bond, or specialty, generally to the Crown. The liability of lands to Crown debts attached to the lands even in the hands of *bona fide* purchasers for value without notice, and notwithstanding the purchaser had no means of notice. But latterly, by the stats. 2 & 3 Vict. c. 11, s. 8, and 22 & 23 Vict. c. 35, s. 22, it was enacted, that lands should not be charged in the hands of purchasers with Crown debts unless or until such debts were duly registered and re-registered, whether or not the purchaser had notice thereof. And now, by the stat. 28 & 29 Vict. c. 104, s. 4, a writ of execution in respect of the debt must also have been issued and registered, in order to affect a purchaser, in addition to the registration and re-registration of the debt itself under the former Acts, whether or not the purchaser have notice of the debt.

In the administration of the estates of deceased persons, Crown debts have priority over all other debts; and in the case of an administration in bankruptcy, Crown debts have the like priority, the Bankruptcy Act, 1869, or the Judicature Acts, 1873-75, not affecting Crown debts with that equality of payment which it has introduced in the case of all other debts (*Ex parte Postmaster-General, In re Bonham*, 10 Ch. Div. 595; *Attorney-General v. Constable*, 4 Exch. Div. 152).

CROWN LANDS: See title CIVIL LIST, SETTLEMENT OF.

CROWN LEASES. Are regulated by the General Management Act, 10 Geo. 4, c. 50, and as regards minerals by the Crown Lands Acts, 1866 and 1873 (29 & 30 Vict. c. 62; 36 & 37 Vict. c. 36,—as regards *public* Crown lands). The Queen is like any one else as regards her *private* estates (25 & 26 Vict. c. 37).

CROWN OFFICE. An office of the Court of Queen's Bench, the master of which is usually called Clerk of the Crown, and in pleading and other law proceedings is styled "coroner and attorney of our Lady the Queen." In this office, the Attorney-General and Clerk of the Crown exhibit

CROWN OFFICE—continued.

informations for crimes and misdemeanours, the former *ex officio*, the latter commonly by order of the Court. And by 4 & 5 W. & M. c. 18, the master of the Crown Office may file criminal informations, with leave of the Court, upon the complaint or relation of a private subject (1 Arch. Pract. 9).

CROWN PAPER. A paper containing the list of criminal cases which await the hearing or decision of the Court, and particularly of the Court of Queen's Bench; and it then includes all cases arising from informations *quo warranto*, criminal informations, criminal cases brought up from inferior Courts by writ of *certiorari*, and cases from the sessions (Bagley's Pr. 559).

CROWN, POWER OF : See title **PREBOGATIVE**.

CROWN, PRESCRIPTION AGAINST. Formerly, no time ran against the Crown, upon the maxim *Nullum Tempus occurrit regi*; but by stat. 9 Geo. 3, c. 16, the *Nullum Tempus* principle was abolished, and a limit of sixty years introduced, which is exactly five times the length of the prescription that runs against private individuals. By the stats. 23 & 24 Vict. c. 53, and 24 & 25 Vict. c. 62, the Act of 9 Geo. 3, c. 16, was extended to the Duke of Cornwall; and the stat. 7 & 8 Vict. c. 106, ss. 71-74, already in part applied to him.

CROWN, SUCCESSION TO : See title **SUCCESSION TO CROWN, LAW OF**.

CRUELTY : See titles **ANIMALS ; DIVORCE**.

CUCKING-STOOL. An engine of correction for common scolds; in the Saxon language it is said to signify the scolding-stool; it was frequently corrupted into *ducking-stool*, because the judgment was, that when the woman was placed therein, she should be plunged in the water for her punishment. It was also variously called a trebucket, tumbrel, and castigatory (3 Inst. 219).

CUI ANTE DIVORTIUM. A writ which lay for a woman, when a widow or when divorced, to recover her estate, which her husband, during her coverture (*cui in vita sua, vel cui ante divortium, ipsa contradicere non potuit*), has aliened (Britton, c. 114, fol. 264). The present remedy would be an ordinary action.

CUI IN VITÂ : See title **CUI ANTE DIVORTIUM**.

CUILIBET IN SUÂ ARTE. The maxim *cuilibet in suâ arte perito credendum est*, meaning that one who is experienced in

CUILIBET IN SUA ARTE—continued.

any art or science should be believed in, is the foundation upon which the evidence of experts (*e.g.*, in handwriting) is admitted by the Courts in evidence.

See title **EXPERTS, EVIDENCE OF**.

CUILIBET LICET JURI PRO SE INTRODUCTO RENUNCIARE. Any one may waive or renounce the benefit of a principle or rule of law that exists only for his protection; *e.g.*, an ambassador may waive his extra-territoriality or exemption from the jurisdiction of the local courts, a witness may waive his privilege, and generally a party may waive any relief to which he is entitled when successful in an action, *e.g.*, his right to costs out of the other or defeated party.

CUJUS EST DARE. Whose is the power to give (*cujus est dare*), his also is the power to annex qualifications or conditions to his gift (*ejus est disponere*), provided such conditions or qualifications are good in law.

CUJUS EST SOLUM. Whose is the land (*cujus est solum*), his is also up to the firmament (*ejus est usque ad coelum*) and down to the centre of the earth (*et usque ad centrum vel inferos*).

See title **MINES AND MINERALS**.

CULPA : See title **DOLUS**.

CULPRIT. Besides its popular sense of a prisoner accused of some crimes, it used formerly to be made use of in the following manner. When a prisoner had pleaded not guilty, *non culpabilis*, or *nient culpable*, which used to be abbreviated upon the minutes thus, "*non (or nient) cul*," the clerk of the assize, or clerk of the arraigns, on behalf of the Crown, replied that the prisoner is guilty, and that he was ready to prove him so. This was done by two monosyllables in the same spirit of abbreviation, "*cul prit*," which signifies, first, that the prisoner was guilty (*cul, culpable, or culpabilis*), and then that the king was ready to prove him so, *prit, præsto sum, or paratus verificare*; for apparently the Crown assumes (and of necessity) that the accused is guilty, although the common law for his protection assumes that he is innocent until his guilt is established by strict evidence.

CUM TESTAMENTO ANNEXO. Where a deceased person has made a will, but without naming any executor, or has named incapable persons; or where the executors appointed refuse to act, or die intestate, in any of these cases the Court of Probate must grant administration *cum testamento annexo* (with the will annexed) to some other person, in the choice of whom the

CUM TESTAMENTO ANNEXO—contd.

Court usually prefers the residuary legatee to the next of kin. 1 Wms. Exors. 348.

See title ADMINISTRATION, GRANT OF.

CUMULATIVE LEGACY. Legacies are said to be cumulative as contradistinguished from such as are merely repeated. Where the testator has twice bequeathed a legacy to the same person, it becomes a question whether the legatee is entitled to both, i.e., whether the second legacy shall be regarded as a repetition merely of the prior bequest, or as an additional bounty and cumulative to the other benefit. On this point the intention of the testator is the general rule of construction, but there are the particular rules following:—

(a.) If the two legacies are given in and by one and the same instrument, then if they are unequal in amount the legatee takes both, but if they are equal in amount he takes one only, unless there are express words of cumulation.

(b.) If the two legacies are given in and by different instruments, then whether they are equal or unequal in amount, the legatee takes both, unless where the legacies are equal in amount and the same motive is in each case expressed and is in each case the same, or unless there are express words excluding cumulation.

See title SATISFACTION IN EQUITY.

CURACY. Under the stat. 1 & 2 Vict. c. 106 (the Act for the restriction of pluralities) curates are required to be appointed by the incumbent in certain cases, and upon the incumbent's failing to appoint a curate, the bishop is authorized to do so. Generally, non-resident clergymen must appoint one or more curates (s. 75); also, in the case of clergymen incapacitated from performing or (upon inquiry) found to be inadequately performing the duties of their benefices, a curate is to be appointed (s. 77); also, in large benefices, an assistant curate may be required (s. 78). Many clergymen employ curates optionally. The Act also regulates the stipend to be paid to the curate, which is (in general) according to the population.

CURATOR. Is the person appointed by the laws of some countries to manage or supervise the estates of infants, lunatics, and other persons labouring under incapacity. His title is recognised in England, subject to the limit of comity as in other cases.

See title COMITY.

CURE OF SOULS: See titles CURACY; SINECURE.

CURE BY VERDICT, TO. After a cause has been sent down to trial, the trial had,

CURE BY VERDICT, TO—continued.

and the verdict given, the Courts overlook defects in the statement of a title, which would have been available if taken at an earlier period. This is what is meant by the term *to cure by verdict*; and the reason of it is, that the Courts presume that all circumstances necessary in form to complete a title imperfectly stated were proved before the verdict was given; which reason explains the limitation laid down as to the effect of the verdict, viz., that it cures the statement of a title defectively set out, but not of a defective title; for where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for the usual presumption (1 Smith, L. O. 614, *Rushton v. Aspinall*).

See title AID BY VERDICT.

CURIA REGIS: See title AULA REGIS.

CURIOSA INTERPRETATIO REPROBANDA. Excessive subtlety in interpretation is to be rejected, as not likely to have been in the mind of the legislator.

CURSITORS. Were officers connected with the Court of Chancery, of very ancient institution, and twenty-four in number. They used to make out all original writs; and the business in the several counties in England in this respect was distributed among them by the Lord Chancellor, by whom they were also appointed. They were called cursitors, from the writs *de cursu*; in stat. 18 Edw. 3, c. 5, they are also called clerks *of course*. They have ceased to exist, and their duties are now discharged by the Masters and their clerks in the Common Law Divisions and by the Record and Writ Clerks and the Chief Clerks and their clerks in the Chancery Division.

See title WRITS, ISSUE OF.

CURTESY, TENANT BY THE. When a man marries a woman seised of an estate of inheritance, i.e., of land and tenements in fee simple, or fee tail, and has by her issue born alive, which was capable of inheriting her estate; in this case he shall, on the death of his wife, hold the lands for his life as *tenant by the curtesy of England* (Litt. 35, 52; 2 Bl. 126). In copyhold lands, the husband's right depends on the custom, but is usually found to exist. This estate arises also out of the equitable estates of the wife. And this right is left unaffected by the M. W. P. Act, 1870 (33 & 34 Vict. c. 93), except to this extent, viz., that the wife may defeat it by alienation *inter vivos* or by her will, in all cases where that Act applies.

See title SEPARATE ESTATE.

CURTILAGE (*curtilagium*, from the Fr. *cour*, court, and Sax. *leah*, locus). A piece of ground lying near and belonging to a dwelling-house, as a court, yard, or the like. Cowel.

CUSTODY. Literally means care or charge. A person given in charge is in custody, although hardly in prison. A lunatic is in the custody of the committee of his person (*see* title COMMITTEE OF LUNATIC). Goods taken under a distress for rent are said to be *in custodia legis*. Likewise, the Crown is said to have the custody of the temporalities of a bishopric or archbishopric during vacancies in the office.

CUSTOM. Is a law not written, but established by long usage, and the consent of our ancestors. Customs are either *general* or *particular*; general customs are the universal rule of the whole kingdom, and form the Common Law in its stricter and more usual signification, *e.g.*, primogeniture: particular customs are those which for the most part affect only the inhabitants of particular districts, such as gavelkind in Kent, and the like. The Courts are bound to take notice of general customs, but particular customs must be both pleaded and proved before they are judicially noticed. Moreover, a general custom is always good, but a particular custom, in order to be good must present the following characteristics:—

- (1.) It must be reasonable,
- (2.) It must be certain,
- (3.) It must be compulsory,
- (4.) It must be immemorial, and
- (5.) It must be possible in law.

See title CUSTOMARY LAW.

CUSTOM OF MERCHANTS. A particular system of customs used only among one set of the king's subjects, which, however different from the general rules of the Common Law, is yet engrafted into it, and made part of it, being allowed for the benefit of trade to be of the utmost validity in all commercial transactions, it being a maxim of law *culibet in sua arte credendum est*. This *lex mercatoria*, or *custom of merchants*, comprehends the laws relating to bills of exchange, mercantile contracts, sale, purchase, and barter of goods, freight, insurance, &c. The statute law has adopted many of these customs of merchants; and it has even been suggested that a large part of mercantile customs have had their origin in forgotten statutes.

See title LEX MERCATORIA.

CUSTOMS. Are the duties payable upon merchandise exported and imported. They were originally on exports only, and on three commodities only, *viz.*, wool, skins, and leather (the three *staple* com-

CUSTOMS—continued.

modities), and were called *custuma antiqua sive magna*, the merchant stranger paying half as much again as the English merchant, and the merchant stranger being liable besides to the *custuma parva et nova*, or alien's duty (as it was called). Prisage was a customs tax on wine imported. Other customs were (1.) Subsidies, being additional impositions upon the three staple commodities exported; (2.) Tonnage, being an additional duty on all wines imported; and (3.) Poundage, being an *ad valorem* duty of twelve pence in the pound on all other merchandise whatsoever. Tonnage and poundage were made perpetual by 9 Anne, c. 6. In the year 1788, a Customs Consolidation Act was passed defining the amount of the customs duties, and the articles on which they were leviable; and further Acts in the reign of William IV. And at the present day, the customs duties have been further defined and consolidated by the stat. 39 & 40 Vict. c. 35 entitled, "The Customs Tariff Act, 1876;" and the laws relating to these duties has been codified in the stat. 39 & 40 Vict. c. 36, entitled "The Customs Consolidation Act, 1876," which repeals the previous Consolidation Act, 16 & 17 Vict. c. 107, excepting the few sections thereof that are specified in Schedule A of the repealing Act.

See title EXCISE.

CUSTOMS AND SERVICES annexed to the tenure of lands are those which the tenants thereof owe unto their lords, and which, if withheld, the lord might anciently have resorted to a *writ of customs and services* to compel them (Cowel). But at the present day he would merely proceed to eject the tenant as upon a forfeiture, or claim damages for the subtraction.

CUSTOMS OF LONDON. These are particular customs relating to the government of the City of London, and also to trade, apprentices, widows, orphans, &c., within the city. They differ from all other customs in point of trial, for if the existence of the custom is brought in question it is not tried by a jury but by certificate from the lord mayor and aldermen by the mouth of their recorder, unless the corporation is itself interested in the alleged custom, *e.g.*, in an alleged right of taking toll, &c., in which latter case the law does not permit them to certify on their own behalf.

See title ORPHANAGE PART.

CUSTOMS OF MANORS. Besides the general customs of manors (the aggregate of which customs constitutes in fact the

CUSTOMS OF MANORS—continued.

general law of copyhold lands), there may be also special customs of any particular manor or group of manors within a well defined ambit, and the effect of which special customs is sometimes to enlarge the rights or privileges of the copyholders, and sometimes to enlarge the rights of the lord. Of these special customs, the court rolls are the evidence both for and against the lord and the copyholders (*Barnes v. Mason*, 1 M. & S. 84; *Marquis of Salisbury v. Gladstone*, 6 H. & N. 123). Documentary evidence frequently displaces the alleged special customs (*Duke of Portland v. Hill*, L. R. 2 Eq. 766).

CUSTOMS OF PARLIAMENT. As every court of justice has laws and customs for its own guidance and direction, so hath the High Court of Parliament its own proper *lex et consuetudo parliamenti*, which is part of the unwritten law of the land, and as such is only to be collected "out of the rolls of Parliament and other records, and by precedents and continued experience" (4 Inst. 15.) Hence it follows, that whatever the Parliament has constantly declared to be a privilege, is the sole evidence of its being part of the ancient law of Parliament; and that no new privilege can be created. In 1704, the Lords communicated a resolution to the Commons at a conference, "That neither House of Parliament have power, by any vote or declaration, to create to themselves new privileges, not warranted by the known laws and customs of Parliament;" which was assented to by the Commons (14 Com. Jour. 555).

CUSTOMARY COURT: See title COURT BARON.

CUSTOMARY FREEHOLDS. Are freeholds held of a manor by customary tenants; they are distinguished from the feudal freeholds, otherwise called ancient freeholds of the manor, which have always been held by freehold tenants. Under customary freeholds the mines and minerals usually (if not invariably) belong to the lord of the manor; but under ancient freeholds to the freehold tenant.

See titles ANCIENT FREEHOLDS; COPYHOLDS; MANOR.

CUSTOMARY LAW. In the opinion of Justinian and Gaius, and in the general opinion of all English lawyers of eminence, is law in the positive sense of that word as fully as statute law, and that before it is either recognised or declared and enforced by the Courts of Justice; but according to Austin and his school of jurisprudence, customary law only exists as law, upon such recognition or declaration, and until

CUSTOMARY LAW—continued.

then is merely the occasion and not the source of law. But Austin's opinion is plainly erroneous. *Nam quid interest utrum suffragio populus voluntatem suam declaret an rebus ipsis et factis?*

See titles CUSTOM; CUSTOM OF MERCHANTS.

CUSTOMARY TENANTS. Tenants who hold their estates according to the custom of the manor. A copyhold tenant is so called because he holds his estate by copy of Court roll at the will of the lord according to the *custom of the manor*; and although a distinction has been made between a copyholder and a *customary tenant*, yet they both agree in substance, and the difference, if any, between them consists only in this, that a copyhold proper is expressly stated in the grant to be at the will of the lord of the manor, whereas a customary freehold is not so stated, but the same thing is implied.

See titles COPYHOLDS; MANOR.

CUSTOS MORUM. Was the Court of Star Chamber until the dissolution of that Court in the year 1640, after which date the Queen's Bench became the general guardian of the good conduct of subjects, so far as their conduct has a public aspect.

CUSTOS ROTULORUM. A special officer to whose custody the *records or rolls* of the sessions are committed; he is always a justice of the *quorum*, and is usually selected for his wisdom, countenance, or credit: his nomination is by the king's sign manual.

CUSTOS OF THE SPIRITUALITIES. He who exercises spiritual or ecclesiastical jurisdiction in a diocese during the vacancy of the see. Cowel.

CUSTOS OF THE TEMPORALITIES. He to whose custody a vacant see or abbey was committed by the king as supreme lord, and who, as steward of the goods and profits thereof, was to give an account to the king's *escheator*, who rendered an account thereof into the exchequer. His trust continued till the vacancy was supplied by a successor, who obtained the king's writ *de restitutione temporalium*, which was sometimes after and sometimes before consecration, though more frequently after. Cowel.

CUSTUMA ANTICUA SIVE MAGNA (*ancient or great duties*). Duties payable by every merchant, as well native as foreign, on wool, sheepskins, or woollens, and leather exported; the foreign merchant had to pay an additional toll, viz., half as much again as was paid by the natives.

See title TAXATION, HISTORY OF.

CUSTOMA PARVA ET NOVA (*small and new duties*). Imposts of threepence in the pound, due from merchant strangers only, for all commodities as well imported as exported, and usually called the alien's duty. These customs were first granted in 31 Edw. 1. 4 Inst. 22.

See title **TAXATION, HISTORY OF**.

CY-PRÈS (*near thereto*). In cases where an attempt is made to create a perpetuity, i.e., to limit the estate to several successive lives *in futuro*, there is a material difference between a deed and a will; for in the case of a deed all the limitations are totally void; but in the case of a will, the Courts do not, if they can possibly avoid it, construe the devise to be utterly void, but explain the will in such a manner as to carry the testator's intention into effect, as far as the rule respecting perpetuities will allow, which is called a construction *cy-près* (6 Cruise, Dig. 165). For example, where a life estate is given by will to an unborn person, with remainder in tail to the child of such unborn person, the Courts will give the estate tail to the first unborn person in lieu of his estate for life, so as to leave to the second unborn the chance of the estate tail in that way descending upon him, which it will do if not barred. But this application of the *cy-près* doctrine does not apply to personal property, there being no estate tail in such property. Similarly in the case of gifts to charities, when there is, or grows to be, a surplus after answering the purposes of the specified charity or charities, the Court will apply the surplus to other charitable purposes, as being *cy-près* the charitable intentions of the donor.

See title **CHARITABLE TRUSTS**.

D.

DAMAGE-FEASANT. This means doing damage (*damnum facio*), and is commonly applied to the beasts of a stranger wandering in another man's grounds, and doing him damage, i.e., hurt, by treading down his grass, eating his growing crops, and the like, in which case the owner of the land may distrain them until satisfaction is made him for the injury.

See titles **DISTRESS**; **LEVANT AND COUCHANT**; **POUND**; **REPLEVIN**.

DAMAGES. Are a pecuniary compensation recoverable by action for breach of contract or for tort. The measure of damages, or test by which the amount of damages is to be ascertained, is in general the same both in contract and in tort, with this single distinction, that the intention

DAMAGES—continued.

with which a contract is broken is perfectly immaterial, while the intention with which a tort is committed may fairly be regarded by the jury in assessing the amount of damages; in other words, the Court is not particularly careful to weigh "in golden scales" the damages recoverable in tort.

However, in both cases, the general rule is, that damages are and ought to be, purely compensatory, and "exemplary" or "vindictive" damages are a mistake in principle, although they are sometimes given in fact. Occasionally, therefore, only nominal damages will be recovered, (*West v. Houghton*, 4 C. P. Div. 197). But usually the damages are a substantial sum, and that sum is either an ascertained or an unascertained but ascertainable sum, being in the former case called liquidated and in the latter case unliquidated damages.

It is usual in bonds and other specialty contracts to fix the damages for breach of the contract at a liquidated sum. If, however, the sum so fixed is a penal sum, the Courts, both of Law and of Equity, will relieve against the full amount thereof, and allow the injured party to recover only such an amount as will compensate him. The Courts carry this relief so far that even if the parties to the contract expressly stipulate that the sum fixed as damages shall be regarded as liquidated damages and not as a penalty, the Courts will, if they can find any ground for doing so, hold that the amount so fixed is a penalty notwithstanding, and will deal with it accordingly (*Kemble v. Farren*, 6 Bing. 141).

Where the damages do not even profess to be liquidated, but are left altogether uncertain in the contract (as they necessarily are in cases of tort), then the amount is to be ascertained by the jury, or (in some cases) upon a reference either to the chief clerk or to some referee. But by whomsoever the amount is to be ascertained, there are certain particular rules of law which must be observed, the principal of which are the following:—

(1.) In contracts for the sale of goods (being goods for which there is a market),—

- (a.) If the vendor fails to deliver, then the amount of damages is the difference between the contract price and the market price of the goods at the time of the breach; and
- (b.) If the vendee refuses to accept, then the amount of damages is the like difference.

See title **MARKET**.

DAMAGES—continued.

- (2.) Upon breach of a contract to replace stock, the amount of damages is the price of the stock on the day on which it ought to have been replaced or (at the plaintiff's option) its price on the day of the trial;
- (3.) In an action for the price of goods which have been delivered and received, but which are of inferior quality to those contracted for,
- (a.) If the full price has been paid, the amount of damages (to be recovered by the purchaser) is the difference between the price given and the actual value of the goods as ascertained by reselling them; and
- (b.) If the price has not yet been paid, the amount of damages (to be recovered by the vendor) is the price agreed on *minus* the difference between that price and the actual value ascertained as before.
- (4.) In the case of a contract of hiring and service, where the breach consists in a wrongful dismissal, the amount of damages is the usual rate of wages in the particular employment, multiplied by the time that will be required for finding new employment of the same character; and
- (5.) In the case of a contract for the sale of land, where the breach of contract arises from the vendor's failing to make a good title, then,—
- (a.) If the vendor was unaware at the time of contracting of the defect in his title, the amount of damages is the expense incurred by the vendee in investigating the title, and nothing more (*Flureau v. Thornhill*, 2 W. Bl. 1078); and even
- (b.) If the vendor was aware at that time of the defect of title, the amount of damages is the same, (*Bain v. Fothergill*, L. R. 7 H. L. 158, overruling *Hopkins v. Grazebrook*, 6 B. & C. 31, which had allowed in addition damages for the loss of the bargain),
- (6.) In the case of the sale of land with the usual covenants for title,—
- (a.) If the covenant broken is that for quiet enjoyment merely, then the damages are estimated only up to the date of the action commenced; but
- (b.) If the covenant broken is that for

DAMAGES—continued.

seisin or right to convey, the damages are general, because that amounts to an eviction (*Child v. Stenning*, 11 Ch. Div. 82.)

The following distinctions are also taken in respect of damages, viz.:—

(1.) Some damages are *general* and some are *special*; and the rule of law with respect to the latter class of damages is that they must be both pleaded and proved, whereas neither of these things is necessary with respect to the former class of damages; for these as being general are implied by the law; and

(2.) Some damages are direct, and some are indirect, remote, or consequential. Now, the law permits no damages as a general rule to be recovered excepting such as are the *natural* consequences, and also the *legal* consequences, of the breach of contract or of the tort (*Vicars v. Willcox*, 2 Sm. L. C. 487); but under special circumstances, if those special circumstances have been pointedly, *i.e.*, sufficiently, brought to the knowledge of the offending party, and he has in fact contracted to be liable for same, then other damages of a remoter or consequential nature which have arisen from the breach of contract or from the tort will be recoverable (*Hadley v. Baxendale*, 9 Ex. 341; *Horn v. Midland Ry. Co.*, L. R. 8 C. P. 131; *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. Div. 670); and it is in respect of this class of damages when they arise from the commission of a tort that the Court is inclined to be more liberal in the amount which it awards. See generally Mayne on Damages, by Lumley Smith, 1872.

See title MARKET.

DAMNUM ABSQUE INJURIA. This phrase denotes the happening of some loss or damage to one person, without any wrong done to him on the part of the person who has caused the loss or damage. A familiar instance of this is the case of a rival schoolmaster who sets up a school near to an existing school, and by so doing draws away by competition merely some or all of the scholars of the latter school. And in the case of one landowner who, by digging a well in his own ground for his own farm, thereby draws off the underground water which supplied a well previously dug in another person's land, we have another instance of a *damnum* unaccompanied with an *injuria* (*Acton v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 7 H. L. Ca. 349). The converse phrase, *injuria sine damno*, is on the other hand, always actionable, upon the ground that every *injuria* being an inter-

DAMNUM ABSQUE INJURIA—*contd.*

ference with another person's right, necessarily and in the very nature of it importeth a *damnum* (*Ashby v. White*, 2 Ld. Raym. 953). Most torts are, however, examples of *damnum cum injuriâ*, and in that case the damages must be both alleged and proved, being an essential constituent in the action.

DAMNUM INFECTUM. In Roman Law, was damage not yet committed but threatened or impending. A preventive interdict might be obtained to prevent such damage from happening: and it was treated as a *quasi-delict*, because of the imminence of the danger.

See title QUASI-DELICT.

DAMNUM INJURIA: See title INJURIA CUM DAMNO.

DANBY, IMPEACHMENT OF. The Earl of Danby, minister of Charles II., was cognisant of that sovereign's secret treaty with France, and for his complicity therein was impeached. Upon his impeachment three questions of a technical legal importance were raised:—

(1.) Whether the Lords, upon a mere general charge of treason, were able to commit the accused to prison without bail:—*Held*, that they might.

(2.) Whether a minister might plead in bar to an impeachment the fact that the king had subsequently pardoned the offence, if any:—*Held*, that such plea was not so admissible, although the king's pardon after conviction or attainder would be a good deliverance. This opinion was only hesitatingly arrived at on the occasion of Lord Danby's impeachment, and was not finally adopted or declared by the legislature until 13 Will. 3, c. 2 (Act of Settlement).

And (3.) Whether an impeachment abated by a *dissolution* of Parliament:—*Held*, that an impeachment did not abate upon a prorogation merely, nor yet upon a dissolution. This decision was not, however, final, for the contrary was held in 1685; and it was not till 1717 (in the case of the Earl of Oxford), that a prorogation, and not until 1791 (in the case of Warren Hastings) that a dissolution, was finally declared to be no abatement of an impeachment in parliament.

DANE-GELT, OR DANE-GELD. This means Dane-tribute, and was a tax of 1s. (afterwards 2s.) upon every hide of land throughout the kingdom. It was originally imposed by the Danes, and was afterwards levied for clearing the seas of Danish pirates; sometimes it was applied by way of bribing these pirates to abstain from their invasions. The tax was released by

DANE-GELT, OR DANE-GELD—*contd.*

Edward the Confessor, but was again imposed by William I.; it was again released by Henry I., and re-imposed in the form of ship-money by Charles I.

See title SHIP-MONEY.

DANGEROUS GOODS. Under the Carriage and Deposit of Dangerous Goods Act, 1866 (29 & 30 Vict. c. 69), it is required that all goods of a dangerous character (petroleum, nitro-glycerine, and the like), delivered to any warehouseman or carrier, or sent by any railway or ship, shall be distinctly marked "dangerous," and also notified as such to the warehouseman or carrier, subject to fine (£500) or imprisonment (two years), and subject also to forfeiture of the goods. And by the Petroleum Act, 1871 (34 & 35 Vict. c. 105), numerous very special provisions are made for the carriage of petroleum (as defined in sect. 3 of the Act), and for the storage of same; and a search-warrant may be granted by any Court of summary jurisdiction upon a sworn information of reasonable suspicion that petroleum is being carried or stored contrary to the Act. The Tramways Act, 1870 (33 & 34 Vict. c. 75), s. 53, provides similar (but additional) regulations for the carriage of dangerous goods by tram. And with regard to the carriage thereof by ships, the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), enacts a penalty of £100 for carrying dangerous goods (as defined by sect. 23), unless the same are marked on the outside, and notified as such; and the goods may be thrown overboard, or forfeited to the Crown, for any violation of the Act. See *Kay's Shipmasters*, 278-280.

DARNELL'S CASE. In 1627, wherein it was decided that, Darnell and four others having been imprisoned for refusing to contribute to a forced loan, and having sued out their writ of *habeas corpus*, the king's return to that writ in the form by "*special command of the king*," was a sufficient return to prevent their being enlarged.

See title HABEAS CORPUS.

DARREIN CONTINUANCE: See title PUIS DARREIN CONTINUANCE.

DARREIN PRESENTMENT: See title ASSISE OF DARREIN PRESENTMENT.

DATE. Of a deed is presumed to be the date of its execution, until the contrary is proved; date of a record is conclusive in itself upon production of record. In other cases, the date whenever material must be proved by independent evidence. *Taylor on Evidence*.

DAUGHTERS: See title CO-PARCENERS; SEDUCTION.

DAY: See titles MONTH; TIME; YEAR.

DAYS OF GRACE. Are extra days allowed as an indulgence for the payment of money, or generally for doing any other act. The days are three in the case of bills of exchange, and on a promissory note. There are no such days on a cheque.

DEAD FREIGHT. This is freight payable by the charterer of a vessel under his charterparty, in every event, even though the cargo has for some cause not been conveyed as intended.

See title CHARTERPARTY.

DEAD RENT: See title SLEEPING RENT.

DE AESTIMATO. In Roman Law, was one of the innominate contracts, and was in effect a sale of land or goods at a price fixed (*a-stimato*), and guaranteed by some third party, who undertook to find a purchaser.

See title INNOMINATE CONTRACTS.

DEAF AND DUMB. Such persons may lawfully intermarry (*Harrod v. Harrod*, 1 Kay & J. 4); and, if married women, may make acknowledgments (*In re Harper*, 6 M. & G. 732). But their wills are regarded with much suspicion (*In the Goods of Owston*, 2 S. & T. 461). If deaf, dumb, and blind they are idiots, and have no capacity, *sed quære*.

DEAN. An ecclesiastical dignitary who presides, or originally presided, over *ten* (*δεκά*) canons or prebendaries. He is next in rank to the bishop, and is head of the chapter of a cathedral. He superintends the conduct of public worship in the cathedral, but has no general jurisdiction similar to that of a rural dean.

See title RURAL DEAN.

DEAN AND CHAPTER. A dean and chapter is a spiritual corporation, and forms the council of the bishop, assisting him with advice and management in spiritual matters, and also in the temporal concerns of the diocese.

Deans of the *old* foundation—*e.g.*, St. Paul's—are elected by the chapters of cathedrals upon a *congé d'élire* from the sovereign; deans of the *new* foundation—*i.e.*, deans created by Henry VIII., *e.g.*, Canterbury—are appointed by the letters patent of the sovereign. Deaneries of the former class are thence called *elective*, those of the latter *donative*; but some are *representative*, *i.e.*, in the gift of private patrons.

DE ASPORTATIS RELIGIOSORUM: See title CHURCH AND STATE.

DEATH. Where a person has not been heard of for seven years, and his absence is not explainable, the law raises a *prima*

DEATH—continued.

facie presumption that he is dead (*Row v. Hasland*, 1 W. Bl. 406); but that presumption does not in any way fix the time of death, of which strict evidence must be given by the party who derives any interest therefrom (*Doe v. Nepean*, 2 Sm. L. C. 510).

DEATH, ASSIGNMENT ON. Upon the death of any one intestate, all his or her personal property vests in the Judge of the Probate Division until grant of administration, and afterwards in the administrator, unless indeed the deceased was joint tenant with some one else, in which latter case the property would survive to the survivor. The vesting aforesaid is called an assignment on death, and is a devolution arising by operation of law and not by the act of the party. This assignment is subject to all debts, &c. It usually necessitates an order of revivor, if an action is pending.

See title REVIVOR, ORDER OF.

DEATH-BED GIFTS. Of real estate or of property savouring of the realty were forbidden by the Mortmain Act (9 Geo. 2, c. 36), so far as the objects of the gift were charitable (see title MORTMAIN ACTS). One of the commonest species of death-bed gifts is the *donatio mortis causâ* (see title DONATIO MORTIS CAUSÂ). Nuncupative wills were another species of such gifts; but are now obsolete (see title NUNCUPATIVE WILL). All such gifts are looked upon with distrust, even when the law does not set them aside altogether or in part. In Scotch Law, a death-bed deed if it affect heritage may be set aside *ex capite lecti*; and the expressed object of this law is to protect rich persons from importunity and to save their heirs from mischief (*Newton v. Newton*, L. R. 2 Sc. App. Ca. 13).

DEATH, DAMAGES FOR. Even at the Common Law, an action lay in the case of death caused by negligence, but only in respect of the damage (if any) to the property of the deceased, and not in respect of his personal loss. And under Lord Campbell's Act (9 & 10 Vict. c. 93), and the amending Act (27 & 28 Vict. c. 95), damages for the personal loss strictly so called are given,—to the family of the deceased.

See titles ACTIO PERSONALIS MORITUR CUM PERSONÂ; CAMPBELL'S (LORD) ACT.

DEATH, PUNISHMENT OF. Was unknown to the Anglo-Saxon Law, money compensation (*wergild*) having supplied its place. William II. re-introduced the punishment for offences against the Forest

DICTIONARY.

—continued—
shall be presumed to give in satisfaction of
the debt as he should first be just before
he can be asked to be generous.
THE SATEVATION IS EQUITY.
ADMINISTRATION : So

IN DEPT. ADMINISTRATION: See
THE ADMINISTRATION GRANT OF.
THE ASSOCIATES: See title

IN DEEDS ASSOCIATES: See title

DEBT This means a sum of money due to some person and express agreement to pay it at a certain rate of exchange, &c., within the amount of a term, and for the non-payment thereof an action of debt can be brought.

SPECIALTY

... (see title) SPECIALTY
... (see title) SIMPLE
... (see title)

... only one made by ... for the

There was only one mode by which a man could become liable for the debts of his estate after his decease, and that was by giving a bond to the creditor as well as himself. This course he could not do until the Statute of Mortmain was established, which was in 1285. But the power to give a bond in that sort is expressly reserved to the King who wrote in the Statute of Mortmain. But this specialty bond was only available as a charge on the debtor's land as distinguished from the word "charge" which is not suitable for this purpose. The Statute of Mortmain (1285) and the Statute of Westminster (1285) Will 3, c. 14) were passed at that time. The last-mentioned Statute, after binding his heirs, gave the creditor the lands away from the debtor, and the obligee of his bond was bound to the debtor, the Statute of Mortmain, the Statute of Westminster, and the Statute of Mortmain, unless in virtue of the Statute of Mortmain, taken against the Statute of Mortmain. It was necessary to give up mortgages against the debtor for the Statute of Mortmain; and the creditor was enabled to take the Statute of Mortmain. (Statute of Westminster, c. 14) to obtain an order that he might take one moiety of the Statute of Mortmain, and so far as the Statute of Mortmain, it was competent to a creditor to charge his lands with the

DEBT—continued.

payment of his debts; and in the Court of Chancery such a charge was construed to extend to debts arising out of simple contract, as well as by specialty, so that, in case of such a charge, all debts were payable out of the land rateably according to their respective amounts.

And the present liability of lands to the payment of debts is as follows:—

(1.) During the lifetime of the debtor,—Upon entering up judgment, and duly registering same, execution may be sued out and registered, and under that execution lands, whether freehold, copyhold, or leasehold, and whether legal or equitable, may be taken possession of and sold in satisfaction of the debt.

(2.) After the decease of the debtor,—By the stat. 3 & 4 Will. 4, c. 104, it is enacted that the lands of a deceased person, even although not charged with debts, shall be assets in Equity for payment of *all* his just debts, as well owing by simple contract as by specialty.

See titles ADMINISTRATION OF ASSETS; CROWN DEBTS; JUDGMENT DEBTS, &c.

DEBTORS ACTS, 1869 and 1878. Under the Debtors Act, 1869, imprisonment for debt was abolished, and in the case of fraudulent debtors provision was made for their prosecution, and upon conviction their imprisonment. The Act of 1869 nevertheless preserved the liability to imprisonment (without conviction) in the following six cases, viz.:—

- (1.) Default in payment of a penalty (not being a penal sum in any contract);
- (2.) Default in payment of any sum recoverable summarily before a justice;
- (3.) Default by trustee in paying any sum ordered by a Court of Equity to be paid;
- (4.) Default by solicitor in paying costs ordered to be paid by him personally for misconduct as a solicitor, or in paying any sum of money ordered to be paid by him as an officer of the Court;
- (5.) Default in paying instalment of salary ordered by Court of Bankruptcy to be paid; and
- (6.) Default in paying any sum of money (say, not exceeding £50, due on judgment or order, the judgment debtor being shewn to have had the means of payment) in respect of the payment of which the Act authorizes orders to be made.

The Debtors Act, 1878 (41 & 42 Vict. c. 54), gives the Court a discretion as

DEBTORS ACTS, 1869 and 1878—continued.

regards orders on the third and fourth of the above specified grounds.

See titles ABSCONDING DEBTOR; IMPRISONMENT FOR DEBT.

DECEIT. A writ of deceit used formerly to lie, and now an action on the case in the nature of a writ of deceit lies, where the plaintiff has received injury or damage through the *deceit* of the defendant or of his agent, where the defendant was privy thereto.

See titles CONCEALMENT; FRAUD; MISREPRESENTATION; WARRANTY, BREACH OF.

DECENNARY. A tithing or civil division of the country composed of ten freeholders with their families. The institution was introduced, it is believed, by the earliest Saxon settlers in England, and some say by Alfred. The members of a tithing were mutually responsible for each other's good behaviour (*see* title FRANKPLEDGE). Ten decennaries formed a *hundred* (*see* title HUNDRED).

DECENNIERS. Persons having the oversight of *ten* free burghs (Holthouses), or possibly only of *ten* free households (Tomlins), for the conservation of the king's peace therein, with power to try causes and give redress by judgment, and for these purposes to administer oaths.

DECISORY OATH: See titles OATHS; SUPPLETORY OATH; WAGER OF LAW.

DECLARATION. At Law was a pleading which corresponded to the bill of complaint in Equity. It contained a succinct statement of the plaintiff's case, and generally comprised the following parts:—

- (1.) *Title* } In the Queen's Bench,
and *date* } the 10th July, 1874;
- (2.) *Venus*,—Middlesex, to wit;
- (3.) *Commencement*,—A. B. by C. D., his attorney [*or* in person], sues E. F. for
- (4.) *Body of declaration*,—consisting of the following parts (which, however, were not all necessary in every form of action) viz.:—
 - (a.) *Inducement*,—being introductory merely, and rarely requiring proof;
 - (b.) *Averments*,—being usually the allegation of the performance of all precedent conditions, &c., on the plaintiff's part; and
 - (c.) *Counts*,—containing a statement of defendant's breach of contract or other injury;
- (5.) *Conclusion*,—"And the plaintiff claims £—"

The time for the plaintiff to declare was

DECLARATION—continued.

immediately after the defendant had appeared; if the plaintiff did not declare within one year after the writ of summons was returnable, he was deemed out of Court. But the defendant might at the end of the term next after his appearance give the plaintiff four days' notice to declare, and thereafter, upon default of the plaintiff's declaring within the time limited for that purpose, might sign judgment of *non pros* against him (*See Bull. & L. Pl. 1*). In lieu of a declaration, the plaintiff now prepares a statement of claim, as well in a Common Law as in a Chancery action.

See title STATEMENT OF CLAIM.

DECLARATIONS OF DECEASED PERSONS. Are receivable in evidence,—

(a.) In legal proceedings between third persons in the following cases,—

(1.) If they are against the interest of the declarant (*Higham v. Ridgway*, 10 East, 109)—extending even to collateral matters;

(2.) If they are made in the regular course of business (*Price v. Earl of Torrington*, 1 Salk. 285),—not extending to collateral matters.

(b.) In legal proceedings against the party declarant,—in all cases where it appears to tell against him. But when the deceased is suspected of charging himself with a less liability in order to escape a greater, the declaration would only be taken as far as it went, and other evidence would be adduccable.

Such declarations may be either written or oral.

DECLARATIONS, DYING. Are receivable in evidence, although not made on oath, in the case only of *homicide*, and never in any civil proceeding (*Stobart v. Dryden*, 1 M. & W. 615), unless, *semble*, they would be admissible as "declarations of deceased persons" against interest.

DECLARATIONS, STATUTORY. Have been substituted for oaths in certain cases, *e.g.*, the following:—

(1.) In the case of persons called upon to give evidence in an action and conscientiously objecting to be sworn, *e.g.*, Quakers, Moravians, Separatists, &c. (3 & 4 Will. 4, cc. 49, 82: 1 & 2 Vict. c. 77); and generally all people in civil actions (17 & 18 Vict. c. 125, s. 20), and in criminal prosecutions (24 & 25 Vict. c. 66). And the law in all such cases is now regulated by the stat. 32 & 33 Vict. c. 68, s. 4; but before substituting the statutory declaration, the judge must be satisfied that the

DECLARATIONS, STATUTORY—contd.

taking of an oath would have no binding effect on the witness's conscience, and the witness must either himself object or have been objected to as incompetent to take an oath.

(2.) In matters other than actions (civil or criminal), *e.g.*, in supporting the title to lands, *e.g.*, a declaration affirming the identity of parties or of parcels and such like (5 & 6 Will. 4, c. 62, s. 18).

DECLARATORY ACT. This is an Act which, by profession at least, declares no new law, but only the formerly existing law, removing certain doubts which have arisen on the subject; *e.g.*, the Statute of Treasons, 25 Edw. 3, stat. 5, c. 2, professes to create no new treasons, but only to enumerate the already existing treasons.

See title STATUTES.

DECREE. This is the judgment of a Court of Equity, and is to most intents and purposes the same as a judgment of a Court of Common Law. A *decree* as distinguished from an *order* is final, and is made at the hearing of the cause, whereas an order is interlocutory, and is made on motion or petition; wherever an order may, in a certain event resulting from the direction contained in the order, lead to the termination of the suit in like manner as a decree made at the hearing, it is called a *decreeal order*.

DECREE NISI. All decrees for divorce or nullity of marriage are *nisi* in the first instance, and after six months are made absolute if cause to the contrary be not sooner shewn.

DECREEAL ORDER: *See title DECREE.*

DECRETALS. These are the papal decrees of various popes as the same were collated in five books by Pope Gregory IX., whence also they are called *Decretalia Gregorii Noni*, about the year 1230. A sixth book (called *Sextus Decretalium*) was added by Pope Boniface VIII. about the year 1298.

See title CANON LAW.

DECRETUM. Was a constitutio of the emperor, enacted by him (according to the theory of the Roman Law) as supreme judge, after argument of the case brought before him by way of appeal from the inferior magistrates and Courts.

See title CONSTITUTIONES.

DE CURSU, PROCEEDINGS. Are the formal proceedings in an action, as opposed to those incidental proceedings that may be taken therein on summons, petition, or motion, all which latter are called summary proceedings.

DEDL. The proper word (give) in a deed of feoffment, and implying formerly a warranty of title, but implying no such warranty at the present day, since 8 & 9 Vict. c. 106.

DEDIMUS POTESTATEM. A writ issuing out of Chancery empowering certain persons therein named to perform certain acts.

DEDIMUS POTESTATEM DE ATTORNATO FACIENDO. At Common Law the parties in an action were obliged to appear in Court in person, unless allowed by a special warrant from the Crown (bearing the above title) to appoint an attorney; or unless after appearance they had appointed a deputy, called a *responsalis*, to act for them, and which the Court allowed them to do in some instances. But now a general liberty is given to parties in an action to appear by attorney (F. N. B. 25; 1 Arch. Pract. 84).

DEDITICIUS. In Roman Law, was a freedman who, prior to his liberation, had been punished with some infamous punishment for some offence committed by him. He was incapable of ever bettering his condition; and he could not stay within 100 miles of Rome.

See title **LIBERTINUS**.

DE DONIS. This is the name of a celebrated statute (13 Edw. I., or Statute of Westminster the Second, c. 1), in virtue of which an estate in freehold lands, which was formerly known as a *donum conditionale* (whence the name of the statute), was converted into an estate tail, and required to descend according to the formdon (*formam doni*), so as to be inalienable as well against the lord in prejudice of his reversion as against the issue in prejudice of their succession. A *donum conditionale*, on the other hand, was alienable, immediately upon the birth of issue, that being construed as the condition of the gift (whence the name); the condition being discharged, the estate, of course, became absolute.

See title **ESTATE TAIL**.

DEDUCTIO. In Roman Law, was a species of compensatio, but instead of being of money against money, or of debt against debt, it might be of articles of a different nature, e.g., wool against wheat, or wheat against money, and so forth.

See title **COMPENSATIO**.

DEED ACKNOWLEDGED. Is the conveyance applicable to the case of married women disposing of their estates, not being separate estate and not being powers. When fines were abolished, this species of deed was introduced in their place (3 & 4 Will. 4, c. 74); the married woman acknowledges the deed either in Court upon

DEED ACKNOWLEDGED—continued.

examination there by the judge, or more usually before two solicitors being respectively authorized by the Lord Chancellor to take such acknowledgments. The deed is not complete until it is acknowledged. By Malin's Act (20 & 21 Vict. c. 57), this deed was extended to include pure personal property to which the married woman is entitled in reversion under any instrument (not being her own marriage settlement) dated after the 31st December, 1857.

See titles **CONVEYANCES**; **FINE**; **MARRIED WOMEN**; **REVERSIONARY INTEREST**.

DEED ENROLLED. Some deeds require to be enrolled before they are complete. Thus, a disentailing deed must be enrolled in the Court of Chancery within six months after its execution, unless it be of copyhold lands, when it is merely entered on the Court rolls of the manor (3 & 4 Will. 4, c. 74). Again, a deed of bargain and sale in fee simple, or for any other estate of freehold, must be enrolled within six months after execution in one of the Courts at Westminster (27 Hen. 8, c. 16). A deed of gift of lands to, or purchase of lands by, a charity must be enrolled within six months after date in the Court of Chancery (9 Geo. 2, c. 36). Prior to 18 & 19 Vict. c. 15, a deed granting annuities charged on land required to be enrolled in the Court of Chancery within thirty days after date under the Annuity Act (53 Geo. 3, c. 151); but now such a deed is merely registered in the Court of Common Pleas.

See titles **CONVEYANCES**; **FINES**; **RECOVERY**.

DEED STAMP. Is now 10s. under Stamp Act, 1870, in lieu of 35s., its previous amount.

See title **STAMPS**.

DEEDS. These are of two kinds, being either deeds-poll or indentures.

(1.) A deed-poll was a bald or shorn deed, and was made by one person only, beginning with the words, "Know all men," &c. Under such a deed, any person may accept a grant.

(2.) An indenture was an indented deed, and was made between two or more parties, beginning with the words, "This indenture," &c., and stating the parties at the outset. Formerly no person who was not a party could take any *immediate* estate, interest, or benefit under such a deed; but now, by the 8 & 9 Vict. c. 106, such an estate, interest, or benefit may now be taken under it by a person not a party to it.

DEEDS—continued.

A deed may be made either on paper or on parchment.

DEER. Deer in a park when reclaimed become personal chattels, and cease to be parcel of the inheritance (*Forde v. Tynte*, 2 J. & H. 150; *Morgan v. Abergavenny (Earl)*, 8 C. B. 769).

By the stat. 24 & 25 Vict. c. 96, it is made a criminal offence to wilfully course, hunt, snare, or carry away, or kill, or wound deer in an uninclosed forest, the penalty for a first conviction being not above £50, and for a second or other subsequent offence being imprisonment not exceeding two years, with or without hard labour (s. 12). Doing the like to deer in inclosed ground is punishable even for a first offence with the like imprisonment (s. 13). Setting engines for taking or killing deer, whether in an uninclosed or in an inclosed place is punishable with a fine not exceeding £20.

DE FACTO. A king *de facto* is one actually reigning, as opposed to one *de jure* merely, who, although having the lawful succession, has either been ousted from, or never actually taken, the possession of the sovereignty. The constitutional stat. 11 Hen. 7, c. 1, enacts that obedience to the king for the time being *de facto* shall be a protection to the subject against all forfeitures under any succeeding sovereign claiming adversely.

See title ALLEGIANCE.

DEFAMATION: See title LIBEL.

DEFAULT, JUDGMENT BY. This judgment may be either for default of appearance to the writ of summons or for default of pleading, or even (although less properly) for default of appearance at the trial of the action. For default of appearance to writ, judgment is not usual in the Chancery Division, but in the Common Law Divisions it is far from unusual, and in all the divisions it may be obtained in the following cases,—In actions for the recovery of land (Order XIII., 7) with or without mesne profits and damages; in actions for the detention of specific chattels (Order XIII., 6); in actions for damages generally (Order XIII., 6); and in actions of debt or liquidated damages, whether writ is specially indorsed (Order XIII., 3) or not (Order XIII., 5). For default of pleading, judgment may be obtained,—(1.) dismissing action when plaintiff is bound to deliver and fails to deliver a statement of claim (Order XXIX., 1); (2.) allowing action against defendant in default of his delivering statement of defence (Order XXIX., 10); and particularly in all the varieties of action above specified in

DEFAULT, JUDGMENT BY—continued.

which judgment may be given for default of appearance to writ.

See title TRIAL, APPEARANCE AT.

DEFEASANCE: See title CONVEYANCES, sub-title DEFEASANCE.

DEFENCE ACTS. Are the stats. 5 & 6 Vict. c. 94; 23 & 24 Vict. c. 112; and 36 & 37 Vict. c. 72, under which certain lands have been and are vested in the Secretary of State for War upon trust for the Crown and for the better defence of the realm; and so long as these are used for any reasonable *bona fide* military purpose, such user cannot, *semble*, be controlled by the High Court, even although it may produce grave private injury to the owners of property adjoining such lands (*Hawley v. Steele*, 6 Ch. Div. 521).

See title HILL v. BIGGE, CASE OF.

DEFENCE, STATEMENT OF: See title STATEMENT OF DEFENCE.

DEFENDANT: See title PARTIES.

DEFORCEMENT. This is the holding of any lands or tenements wrongfully as against any person who has the right thereto but who has not as yet at any time been in the possession thereof: *e.g.*, where a lessee for years or *pur autre vie* holds over after the determination of his interest and refuses to deliver up the possession to the reversioner or remainderman. But when such a tenant holds over without any such refusal to deliver up, he is not a deforciant, but only a tenant by sufferance. The deforciant must have come in by right in the first instance; for if the person wrongfully holding came in by wrong in the first instance, he is not a deforciant, but either,

- (1.) An intruder (see title INTRUSION);
- (2.) A disseiser (see title DISSEISIN); or
- (3.) An abator (see title ABATEMENT).

Deforcement in respect that the deforciant comes in by right in the first instance is like *discontinuance*.

See title DISCONTINUANCE.

DEGRADATION. This phrase was applied: (1.) To the case of a peer deprived of his nobility, *e.g.*, the case of the Duke of Bedford, of Edward IV.'s reign, who was deprived by that sovereign on account of his poverty. And at the present day, a peer who becomes a bankrupt ceases for the time being to be capable of sitting in the House of Lords (Bankruptcy Disqualification Act, 1871). (2.) To the case of an ecclesiastic who is divested of his holy orders: degradation is a greater punishment than deposition or deprivation, being not merely the displacing one from his office (which deposition or deprivation also

DEGRADATION—continued.

is) but also the divesting him of all his badges of honour, privileges, &c. (which deposition or deprivation is not).

See titles DEPOSITION OF CLERGYMEN; DEPRIVATION.

DE HÆRETICO COMBURENDO: See title CHURCH AND STATE.

DE INJURIÂ, REPLICATION. This was a form of taking issue, but which has been superseded by the C. L. P. Act, 1852, s. 79. The exact nature of the form may be collected from *Crogate's Case* (8 Rep. 66), and appears to have been in substance the following;—It was a general replication putting in issue all the material averments in the plea. Properly, therefore, it was to be replied to a plea of the defendant where, and only where, that plea consisted of matter of excuse, as that the plaintiff, *e.g.*, in an action of trespass for driving the plaintiff's cattle, was himself in fault in the first instance in so doing; to which plea it is of course proper for the plaintiff to reply that the defendant's act was of his (the defendant's) own proper wrong (*de injuriâ suâ propriâ*), and without any such ground of excuse as the defendant alleged (*absque tali causâ*). But where, as in *Crogate's Case*, the defendant justified under the command of his master, the replication *de injuriâ* was held inapplicable, not being accompanied with a traverse of the command.

See titles NEW ASSIGNMENT; REPLICATION.

DELAY: See title DEMURRAGE.

DELAY DEFEATS EQUITIES. Is a maxim of equity, which is commonly expressed in the Latin phrase, *Vigilantibus non dormientibus æquitas subvenit*; it is by virtue of this maxim that *laches* is so often fatal to equitable claims.

See title LACHES.

DEL CREDERE. In mercantile transactions, if a factor or agent agrees with his principal, in consideration of some additional compensation, to guarantee to the latter the debt to become due from the buyer, the excess of this compensation over the ordinary compensation is that which distinguishes a *del credere* commission from an ordinary one. Of course the *del credere* commission agent is liable on his guarantee in case of the purchaser's default to pay the price.

See title PRINCIPAL AND AGENT.

DELECTUS PERSONÆ. Is the right of a firm of partners to prevent the admission of any third person into the firm against the wish of the partners, although nomi-

DELECTUS PERSONÆ—continued.

nated or put forward by one of the partners.

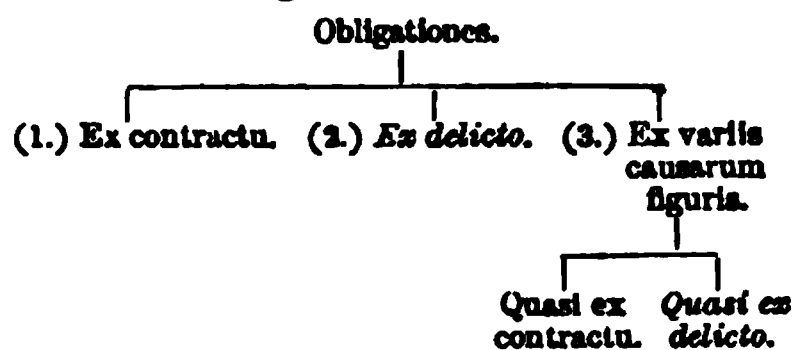
See title PARTNERSHIP.

DELEGATUS NON POTEST DELEGARE.

An attorney cannot appoint a substitute; *aliter*, an agent cannot appoint a sub-agent, —*scil.* in discharge of his own responsibility. But the original power of attorney may of course (and usually does) authorize the appointment of a substitute.

See title ATTORNEY, POWER OF.

DELICTO, ACTIONS EX. These are actions arising from a tort, or wrong independent of contract, C. L. P. Act, 1852. The wrong must not amount to a crime, otherwise it is no tort in English Law. The division of obligations in Roman Law is the following:—



The same division is substantially adopted in English Law; and the C. L. P. Act, 1852, s. 74, provides that in the case of actions which are founded upon obligations which are *doubtfully ex contractu* and *doubtfully ex delicto*, the defendant may treat the declaration as framed in either he pleases, and may plead accordingly. Also, in general, wherever there is a contract, and some breach growing thereout, the plaintiff may sue in tort or for breach of contract at his option (*Brown v. Boorman*, 11 Cl. & Fin. 44).

DELIVERY. The *traditio* of Roman Law, and a natural mode of the acquisition of corporeal property whether real or personal. Where the property passes otherwise or without delivery, as in some cases of *sale*, there the delivery of the thing merely confers the possession according to the title.

DELIVERY ORDER: See title DOCK-WARRANTS.

DELIVERY OF PLEADINGS: See title PLEADINGS.

DELIVERY, WRIT OF. Is a writ of execution which issues to enforce any judgment or order for the recovery of any specific chattel or "property other than land or money" (Order XLII., 4). It issues and is enforced in the manner in which it used (prior to the Judicature Acts, 1873–75) to issue and be enforced in an action of detinue at Common Law (Order XLIX.), that is

DELIVERY, WRIT OF—*continued.*

to say, it issues only by leave of the Court (O. L. P. Act, 1854, s. 78), and directs the sheriff to deliver the specific property if it can be found, and (if it cannot be found) then to distrain all the lands and chattels of the defendant until he do render up the specific property, or until the assessed value of such specific property is obtained, the cost of the action and execution being levied on the same as on some subsequent execution (1 Chitty's Pract. 12th edit., pp. 710-713).

See title POSSESSION, WRIT OF.

DEMAND. Should usually precede the commencement of an action, and is a necessary preliminary to commencing an action of trover. On the other hand, in money-claims demandable at a certain day, and on promissory notes payable on demand, no express demand need be made, upon the principle *Dies interpellat pro homine*.

DEMANDANT: See title RECOVERY.

DEMESNE LANDS. These were such parts of the lands of a manor as the lord kept to himself as being necessary for his own use. Ancient demesne lands are those which were so kept by the king as lord in the reigns of Edward the Confessor and William I., being the lands referred to in Domesday Book as *Terræ Regis*, or *Terræ Regis Edwardi*.

Of such lands, one part was retained by the lord in his actual occupation for the purposes of his family; a second part was held in villenage, and out of it the tenures of Copyhold, Customary Freehold, and Ancient Demesne have arisen; and the remaining part was left uncultivated, and was called the *waste* lands of the manor, serving for public roads and for common of pasture to the lord and his tenants.

See titles ANCIENT DEMESNE; COPYHOLDS; WASTE.

DE MINIMIS NON CURAT LEX. Is a maxim of Law and also of Equity, intended to protect the Court from invasions of its dignity, and the litigants from invasions upon one another. Literally it means "concerning trifles, the law does not trouble;" and five pounds as the outside amount coming to a plaintiff if successful in his action would be a *trifle* within the meaning of the maxim, unless of course the action were brought to try a right of property, or were representative of other (and larger) claims. But the maxim has little (if any) application to the inferior Courts, the very object for which these Courts were established having been and being to administer justice in matters of small amount.

DEMISE. A word used in leases for terms of years, and being synonymous with lease, or let, from which it differs only in this respect, namely, that demise *ex vi termini* implies a covenant for title, and also a covenant for quiet enjoyment, whereas lease, or let, implies neither of these covenants. Where there are mutual leases of the same land, or of something out of the same land, made from one party to another on each side, it is said to be a conveyance by *Demise and Re-Demise*, e.g., where A. grants a lease to B. at a nominal rent and B. re-demises the same property to A. for a shorter term at a substantial rent.

The word "demise" is also frequently used as a euphemism for decease or death, e.g., the demise of the king, more properly, of the Crown, which means, speaking strictly, that in consequence of the king's natural body having by reason of the death thereof become disunited from his politic body, the kingdom is transferred or demised to his successor, for the king, as a corporation sole, never dies. The word *demise* should not be confounded with the word *devise*.

DEMISE AND RE-DEMISE: See title DEMISE.

DEMISE OF CROWN: See title DEMISE.

DEMONSTRATIO: See title FORMULÆ.

DEMONSTRATIO FALSA NON NOCET: See title FALSA DEMONSTRATIO NON NOCET.

DEMONSTRATIVE LEGACIES: See title LEGACIES.

DEMURRAGE. This term is occasionally used to signify the delay or period of delay of a vessel in port (from the Latin *demorari*); but in law, it is more commonly used to denote the sum which is fixed by the contract of carriage as a remuneration to the shipowner for the detention of his ship beyond the number of days allowed for loading or unloading. It is usual to calculate this sum at so much per day, and also to specify in the contract the allowed days of demurrage; in which case, if the ship is delayed beyond the agreed demurrage, the freighter becomes liable to pay damages for the excess, which damages are usually estimated at the demurrage rate per day.

If the ship after sailing puts back owing to contrary winds, and is detained in port by frost or bad weather, no demurrage is payable for that unavoidable delay; and when the ship is to be unloaded in the usual and customary time, no demurrage is payable for a detention caused merely by the crowded state of the docks (*Jamieson v. Laurie*, 6 Bro. P. C. 474; *Burmester v. Hodgson*, 2 Camp. 488). Where, however, the parties enter into a positive con-

DEMURRAGE—continued.

tract, that the goods shall be taken out of the ship within a specified number of days from her arrival, as such a contract is construed strictly, demurrage is payable for any delay beyond the specified period, although the shipper is powerless to remove the causes of the delay, provided only the shipowner is not to blame. (*Randall v. Lynch*, 2 Camp. 352; *Bessey v. Evans*, 4 Camp. 131).

The contract to pay demurrage, which is contained in the charterparty, is made between the shipowner and the shipper, and the latter is therefore the person liable to pay the demurrage; but where, as is usually the case, the bill of lading mentions the demurrage, a consignee who accepts the goods under it may, and generally does, become liable for it on a new contract, to be implied from his acceptance of the goods under these circumstances; and such implied contract may arise, although the receiver at the time of receiving the goods states that he will not pay demurrage (*Smith v. Sieveking*, 4 E. & B. 945). But a mere reference in the bill of lading to the terms of the charterparty in which demurrage is specified, will not of itself render the consignee receiving the goods liable for demurrage (*Smith v. Sieveking*, *supra*).

DEMURRER. In pleading, is the formal mode of disputing the sufficiency in law of the pleading of the other side.

Before the C. L. P. Act, 1852, demurrers were either general or special; but by s. 51 of that Act, special demurrers were abolished. There came, therefore, to be but one kind of demurrer, namely, the general demurrer, which was admissible under s. 50 of the C. L. P. Act, 1852, but only when the pleading of the opposite party was bad in substance; for if the pleading was bad for argumentativeness, generality, repugnance, duplicity, or other like reason not also amounting to matter of substance, it was to be objected to under s. 52 of the C. L. P. Act, 1852, by summary application to the Court to strike out or amend. Under s. 89 of the same Act, the form of a demurrer was this:—

“The defendant [or the plaintiff, as the case may be], by his attorney [or in person, as the case might be] says that the declaration [or the plea, &c., as the case might be] is bad in substance.” And in the margin of the demurrer book the matter of law intended to be relied on was to be stated. The other side might thereupon join in demurrer in this form:—“The plaintiff [or the defendant, as the case might be] says that the declaration [or plea, &c., as the case might be] is good in substance.”

DEMURRER—continued.

Before the C. L. P. Act, 1852, a party was not at liberty both to plead and to demur to the same pleading; but by s. 80 of that Act, he might by leave do so.

In Chancery, whenever the statements contained in a plaintiff's bill of complaint (assuming them all to be true as stated) were insufficient to entitle him to the relief prayed, the defendant might demur to the plaintiff's bill, either to the relief (which would include the discovery) sought, or to the discovery alone (exclusive of the relief). The most usual grounds of demurrer were the following:—

- (1.) Want of equity, whether
 - (a.) In respect of the subject matter; or
 - (b.) In respect of the plaintiff personally; or
 - (c.) In respect of the defendant personally;
- (2.) Want of parties;
- (3.) Multifariousness; and
- (4.) Insufficiency in Law of case made by plaintiff.

The demurrer in Chancery commenced with a formal protestation of the falsehood of the statements in plaintiff's bill, and then demurred to the bill, or to the part of it which it specified for the cause which it also specified, concluding with a general allegation of other good causes of demurrer, and praying to be dismissed from the suit with costs, and without being compelled to answer the plaintiff's bill.

Twelve days after the date of his appearance to the bill was allowed the defendant for demurring alone; and twenty-eight days if he demurred as to part, and pleaded or answered as to the rest.

Under the present procedure introduced by the Judicature Acts, 1873–5, and the orders and rules thereunder, the differences between Law and Equity as regards demurrers are abolished; but some defects which were formerly grounds of demurrers have now ceased to be so, e.g., want of parties, multifariousness, &c.; and the defendant [or plaintiff, as the case may be] would now make a summary application in such latter cases for an order to amend the opposite pleading. The present form of demurrer is the following:—

“The defendant [plaintiff] demurs to the [plaintiff's statement of complaint, or defendant's statement of defence, or of set-off, or of counter-claim], [or to so much of the plaintiff's statement of complaint as claims . . . , or as alleges as a breach of contract the matters mentioned in paragraph seventeen, or as the case may be], and says that the same is bad in law on the ground that [here state a ground of demurrer] and on other grounds, sufficient in law to sustain this demurrer.”

DEMURRER—continued.

Either party may demur to any prior substantive pleading of the other party on the ground that the facts therein alleged do not shew any cause of action (claim or counter-claim) to which effect can be given by the Court against the party demurring (Order xxviii. 1). The demurrer may be to the whole or to some (specifying what) part of the action; and it must state some substantial ground for the demurrer; and where the demurrer is to part only, the demurring party may, without any leave, plead to the other part or parts, combining both pleadings in one document (Order xxviii. 4). He may even demur and plead at one and the same time (but only by leave) to the whole or to one and the same part of the action (Order xxviii. 4); and when he demurs first, he may, after the demurrer is disposed of, have liberty to plead to the same matter (Order xxxviii. 5, 12).

In case a demurrer is allowed, it puts the demurring party wholly out of Court unless he obtains leave to amend; on the other hand, if a demurrer is overruled, the demurring party must plead matter of substance in his defence or *quasi* defence.

See titles ANSWER; PLEA; PLEADINGS.

DENIZEN. A denizen is an alien by birth, who has obtained, *ex donatione regis*, letters patent making him an English subject. The king may denizenize but not naturalize a man, the latter requiring the consent of Parliament, either *pro re natâ* or under a general Act, such as the Naturalization Act, 1870 (33 & 34 Vict. c. 14). A denizen holds a middle position between an alien and a natural-born or naturalized subject, being able to take lands by purchase or devise (which an alien could not until 1870 do), but not having been able to take lands by descent (which a natural-born or naturalized subject might do).

See titles ALLEGIANCE; ALIENS; NATURALIZATION.

DENOMINATIO FIT A DIGNIORIBUS. The proper name is the more worthy (*dignior*) of all denominations, and should be the ruling element in the construction of wills, &c., *e.g.*, in the ascertainment of the parcels devised.

DE NON APPARENTIBUS. The maxim *de non apparentibus et non existentibus, eadem est ratio* means that things not alleged (or at all events not proved in evidence) are as good as not existing at all, and therefore cannot be entertained.

See title SECUNDUM ALLEGATA ET PROBATA.

DEODAND. Is any personal chattel that is the immediate occasion of the death of

DEODAND—continued.

any reasonable creature, and which by reason thereof precisely was forfeited to the king, to be applied to pious or charitable uses,—being in Roman Catholic countries, the expiation by masses, and otherwise, of the sins of the deceased; and in Protestant countries, the relief of the deserving poor. Where the person killed was an infant under the age of discretion, no deodand arose, there being in his case no sins of commission to expiate. The stat. 9 & 10 Vict. c. 62, abolished altogether this species of forfeiture.

DE ODIO ET ATIA. A writ so called, where by a person imprisoned on a charge of homicide could obtain a speedy trial, or else his release, as upon a writ of *Habeas Corpus*: By Magna Charta, chap. 36, this writ was to be given *gratis*. The literal signification of the writ, viz., "from hatred and ill-will," shews that it was aimed against capricious and tyrannical imprisonments.

DEPARTURE. In pleading, where a man departs from one line of defence, and has recourse to another line of defence either inconsistent with or not confirmatory of his former defence, this is called a departure, and the effect of it used to be to render the entire pleading demurrable (*Bartlett v. Wells*, 1 B. & S. 836); but under the present practice, the plaintiff would probably move to strike out the inconsistency as embarrassing (Order xxvii., 1).

DEPENDENT AND INDEPENDENT COVENANTS: See title COVENANTS.

DEPORTATIO VEL RELEGATIO: See title RELEGATIO VEL DEPORTATIO.

DEPOSIT: See titles BAILMENT; CONDITIONS OF SALE.

DEPOSIT OF TITLE DEEDS: See title EQUITABLE MORTGAGE.

DEPOSITION. This word is used generally to denote any affidavit on oath, or solemn affirmation in lieu thereof. But it is more commonly used in a more particular sense, as meaning,—a statement written down by an officer of the Court (called an examiner), embodying the substance of the answers obtained from the deponent in the course of his examination. It was competent for either party to a suit which was intended to be heard upon motion for decree to examine his own unwilling witness in this way, but only upon notice to the other side, who then and there might cross-examine the deponent, the side who had called him in that case re-examining him. Also in a suit in which replication

DEPOSITION—*continued*.

had been filed, such depositions might be taken, but in this case *ex parte*. In either case the deposition was to be regarded as the reluctant affidavit of the deponent. Under the present practice, evidence may be taken by deposition under an order of the Court for that purpose, as upon a commission, whenever either from illness or absence abroad it is convenient and desirable to take the evidence in that manner. The examiner may be either a special examiner or one of the official examiners or referees.

Depositions are also taken before magistrates for the purposes of a criminal prosecution; and in case the deponent should die before the trial, or be too ill to attend, these depositions may be used in evidence, subject to certain restrictions mentioned in the stat. 11 & 12 Vict. c. 42. The dying deposition of the injured person may also be taken by any policeman, without the solemnity of an oath, and is admissible in the subsequent prosecution of the offender (*see* title DECLARATIONS, DYING). And the sworn deposition of the offender is also admissible.

DEPOSITION OF CLERGYMEN: *See* title DEGRADATION.

DEPOSITUM. One of the four real contracts specified in Justinian, — and having the following characteristics, — (1.) The depositary or depositee is not liable for negligence, however extreme, but only for fraud (*dolus*); (2.) The property remains in the depositor, the depositary having only the possession. *Precarium* and *Séquestre* were two varieties of the *depositum*, presenting, however, material distinctions. The *depositum* is the English *deposit*.

See titles BAILMENT; PRECARIUM; SÉQUESTRE.

DÉPÔT. In French Law, is the *depositum* of Roman and the deposit of English Law. It is of two kinds, being either (1.) *Dépôt* simply so called, and which may be either voluntary or necessary; and (2.) *Séquestre*, which is a deposit made either under an agreement of the parties, and to abide the event of pending litigation regarding it, or by virtue of the direction of the Court or a judge, pending litigation regarding it.

See title DEPOSITUM.

DEPRECIATION: *See* title ALLOWANCES AND DEDUCTIONS.

DE PRÆROGATIVÂ REGIS. Is the stat. 17 Edw. 3, c. 11, whereby the revenue and other prerogative rights of the Crown were declared. But the statute was not an exhaustive declaration of these rights.

See title PRÆROGATIVE.

DEPRIVATION: *See* title DEGRADATION.

DERELICT. Anything thrown away or abandoned, with the intention of quitting the ownership thereof. Goods thrown out of a vessel to lighten same in time of distress are not derelict, for want of the intention. *See* Just. Inst. ii. 1, 48.

DERIVATIVE CONVEYANCES: *See* title SECONDARY CONVEYANCES.

DERIVATIVE EVIDENCE. Is such evidence as hearsay; and strictly speaking, it is not admissible as evidence at all, excepting in those cases enumerated under the title HEARSAY, in which that evidence would be admissible. But for the purpose of testing the credit or credibility of witnesses derivative evidence may always be resorted to. Derivative evidence is second-hand evidence, that is, evidence transmitted through some channel not itself evidentiary; and it is, strictly speaking, distinguishable from secondary evidence.

See titles EVIDENCE; PRIMARY EVIDENCE; SECONDARY EVIDENCE.

DERIVATIVE SETTLEMENT (POOR LAW): *See* title SETTLEMENT, POOR LAW.

DESCENDER, FORMEDON IN. This writ used to lie where a tenant in tail, having aliened the land otherwise than by fine or common recovery, or having been disseised thereof, died, and the heir in tail claimed to recover the land as against the person in possession thereof under the alienation or disseisin.

DESCENT. Where the title to land vests in any one by mere operation of law, such title is said to vest in him by descent. As thus used, the term is distinguished from *purchase*, which may be either *devise* or *grant*.

See title DESCENTS.

DESCENTS. Estates descend from ancestor to heir, as the blood trickles.

The following stages in the growth of the present law of descents may be indicated:—

- (1.) Fee simple estates were originally confined to the issue or lineal descendants of the ancestor;
- (2.) By the reign of Henry II., collateral descendants were admitted to the succession upon the failure of lineals;
- (3.) By the time of Henry III., *primogeniture*, i.e., descent to the eldest son in exclusion of the others, was established;
- (4.) By the time of Henry III., the doctrine of representation was established, whereby the issue of the eldest son who was dead stood in his place, to the exclusion of the

DESCENTS—continued.

- other sons (being the uncles of such issue);
- (5.) In the year 1833, the lineal ancestors were as such rendered capable of being heirs;
- (6.) In the year 1833, the half-blood of the purchaser became admissible to succeed as heir; and
- (7.) In the year 1859, the widow of the purchaser became admissible to succeed as heir.

The following are the canons which at present regulate the descent of lands:—

- (1.) The inheritance is to descend to the lineal descendants of the purchaser *in infinitum* (see title **PURCHASER**);
- (2.) And to the male issue in preference to females;
- (3.) And to the eldest male issue in exclusion of the others (see title **PRIMOGENITURE**); but if there are no male issue, then to the female issue altogether (see title **COPARCENERS**);
- (4.) Lineal descendants *in infinitum* are to represent their ancestor (see title **REPRESENTATION**);
- (5.) Failing lineal descendants of the purchaser, the inheritance is to go to the nearest lineal ancestor, the father succeeding before the brother or sister of the purchaser, and every more remote ancestor succeeding before his issue other than any less remote ancestor or ancestors, and his or their issue;
- (6.) In the application of the 5th canon, the succession is to be according to the following order,—
- (a.) The father and all male paternal ancestors and their descendants *in infinitum*;
- (b.) All the female paternal ancestors and their heirs;
- (c.) The mother and all male maternal ancestors, and her and their descendants *in infinitum*; and
- (d.) All the female maternal ancestors and their heirs;
- (7.) The half-blood of the purchaser shall inherit,—
- (a.) Where the common ancestor is a male, next after a kinsman in the same degree of the whole blood, and the issue of such kinsman *in infinitum*; and
- (b.) Where the common ancestor is a female, next after that female;
- (8.) In the application of the 6th canon,—
- (a.) In the admission of female paternal ancestors, the mother of the more remote male paternal an-

DESCENTS—continued.

- cestor and her heirs are to be preferred to the mother of the less remote and her heirs; and
- (b.) In the admission of female maternal ancestors, the mother of the more remote male maternal ancestor and her heirs are to be preferred to the mother of the less remote one and her heirs;
- (9.) Failing the discovery of an heir after the application of all the first eight canons, the land is to descend to the heir of the person last entitled, although he was not the purchaser thereof; and such heirs will of course have to be ascertained by the renewed application of the first eight canons, starting only from a different point of departure, or *propositus*.

DESCRIPTION NOT ANSWERED. Where goods are ordered to be procured by an intending purchaser, and the seller supplies goods not corresponding with the order, e.g., imitation Brussels for real Brussels carpets,—the right of the purchaser is to return the goods and recover his entire purchase money if paid, or to refuse payment thereof being unpaid. In this respect, a "description not answered" is like fraud or misrepresentation as opposed to breach of warranty; but like a warranty, the description may not have been answered either from dishonesty or in perfect honesty, whereas fraud is necessarily dishonest.

See titles **FRAUD**; **WARRANTY, BREACH OF**.

DESERTION. (1.) In the case of married women, desertion coupled with adultery by her husband is a ground for obtaining a divorce; and without adultery, desertion was a ground for obtaining an order to protect her own earnings, even before the Married Women's Property Act, 1870. (2.) In the case of soldiers and marines, desertion is an offence against the Law Military, punishable with imprisonment and branding; and inciting to desert is a felony. (3.) In the case of children, desertion is abandonment.

See titles **ABANDONMENT**; **CHILD, ABANDONMENT OF**.

DESIGNS, COPYRIGHT IN. The first Act granting protection to the inventor of designs on fabrics was passed in 1787 (27 Geo. 3, c. 38); and that Act was followed by some subsequent Acts. But these Acts not affording any protection to designs on fabrics composed of animal products, such as wool, silk, or hair, or mixtures of those materials with the vegetable products flax and cotton, in 1839 by the stat. 2 Vict. c. 13, the like protection was

DESIGNS, COPYRIGHT IN—continued.

given to designs on fabrics of animal substances or of mixed animal and vegetable substances. English copyright in designs is either in designs of an ornamental or in designs of a useful character. (1.) Copyright in *ornamental* designs is regulated by the 5 & 6 Vict. c. 100, amended by 6 & 7 Vict. c. 65, 13 & 14 Vict. c. 104, 21 & 22 Vict. c. 70, and 24 & 25 Vict. c. 73. The 5 & 6 Vict. c. 100, repeals all the previous Designs Acts, and enacts that the proprietor of every new and original design not previously published shall have the sole right of applying the same to any article of manufacture, or to any artificial or natural substance, during the respective terms (to be computed from the time of the design being registered) specified in the Act, and which vary according to the nature of the article from nine months to three years; but such times may be extended under 13 & 14 Vict. c. 104. (2.) Copyright in *useful* designs is regulated by the 6 & 7 Vict. c. 35, which gives the proprietor of such designs not previously published in the United Kingdom or elsewhere, the sole right to apply his design to any article, or make or sell any article according to such design, for the term of three years, to be computed from the time of the design being registered. The Act has been amended by the further Acts, 13 & 14 Vict. c. 104, and 24 & 25 Vict. c. 73.

See title COPYRIGHT.

DE SON TORT DEMESNE. These are words which were once commonly used in the replication to a defendant's plea in an action of trespass *quare clausum fregit* as thus:—A. sues B., B. pleads that he committed the alleged trespass by the command of X.; A. replies that B. did it *de son tort demesne, sans ceo que X. lui command modo et formâ*. The phrase amounted in effect to a traverse of the command which was attempted to be justified under. Since the cases of *Trevelian v. Pyne* (Salk. 107), and *Chambers v. Donaldson* (11 East, 65), such a traverse has been permitted, without involving any implied admission in another of a title justifying the alleged command.

DETAINEE. This word was used in two kindred senses. Firstly, it signified the forcibly keeping another out of possession of lands or tenements, an injury which was not only of a civil nature, entitling the dispossessed party to damages, but also of a criminal nature, rendering the dispossessor liable to a fine to the king for his breach of the king's peace. Secondly, it signified a writ which lay against persons imprisoned for debt in the Marshalsea or the Fleet, and which was directed to the

DETAINEE—continued.

marshal or warden (as the case might be), and directed him to *detain* the prisoner in his custody until he should be lawfully discharged therefrom. In this latter sense, detainer is becoming mainly obsolete, in consequence of the Debtors Act, 1869 (32 & 33 Vict. c. 62).

See titles ABATEMENT OF POSSESSION;
DETINUE; IMPRISONMENT FOR DEBT.

DE TALLAGIO NON CONCEDENDO. An informal statute (25 Edw. 1) reformulating illegality of taxation (for home purposes) without the assent of Parliament.

DETERMINATION. This word, as used in Law, denotes the ending or expiration of any estate or interest in property; e.g., an estate during widowhood determines upon re-marriage, and an estate during minority upon attaining twenty-one years of age, and so forth.

See title EFFLUXION OF TIME.

DETINUE. An action which lies for the recovery of specific goods wrongfully detained by any one: e.g., for a horse lent. The judgment in this action, where the plaintiff was successful, was for recovery of the articles or their value, together with the damages and costs found by the verdict, and the costs of increase (see title INCREASE, COSTS OF), the defendant having the option prior to the C. L. P. Act, 1854, either to pay the value or to restore the goods; but now, by s. 78 of that statute, such option belongs to the plaintiff, who, upon application to the Court or a judge, might (at the discretion of the Court or judge) have execution for the goods detained, enforceable by distress. But Courts of Equity could always upon bill filed order the delivery up of chattels improperly detained, e.g., deeds, court rolls; also, old family pictures, horns, snuff-boxes, &c. (*Fells v. Read*, 3 Ves. 70); and now in all the divisions, execution may issue for the delivery up of specific chattels, according to the tenor of the judgment, and there is now no distinction between Law and Equity in that respect (Order XLII. 4; XLIX.).

DEUS, SOLUS, HÆREDEM FACERE POTEST: see title SOLUS DEUS HÆREDEM.

DEVASTAVIT. In an action against an executor or administrator, where the plaintiff has obtained judgment for recovery of his debt and costs out of the assets of the testator (if any), and, failing these, for recovery of his costs out of the executor or administrator's own goods, the usual writ of execution is a *fi. fa. de bonis testatoris*; but if the sheriff returns to this *nulla bona testatoris neo propria*, AND a *devastavit*, the plaintiff may forthwith upon the return sue out a *fi. fa. de bonis*

DEVASTAVIT—*continued.*

propria, or (at his election) an *elegit* against the property of the executor or administrator, in as full a manner as in an action against him in his own right. A *devastavit* is therefore strictly such a return by the sheriff; however, the word is commonly employed in the general sense of wasting the goods of the deceased, or in Equity in the sense of a breach of trust or misappropriation of the assets.

DE VENTRE INSPICIENDO. Where a widow is suspected of feigning herself with child, the heir may have a writ *de ventre inspiciendo*, to examine her womb whether it be as feigned or not; and in case her womb be as feigned, the heir may until her delivery keep her under *surveillance*.

DEVIATION. Departing from the certain course of navigation prescribed by custom and long usage as the safest, most direct, and most expeditious mode of proceeding from one specified terminus to another. Such departure or deviation can only be justified by overwhelming necessity, or by express provision of the charter-party or policy of assurance, and such like circumstances. In a voyage-policy, there is implied a condition not to deviate, unless the contrary is expressed. For loss sustained during an unauthorized and unjustifiable deviation, the master and owners are liable, although not otherwise blameable for the loss (*Davies v. Garrett*, 6 Bing. 723).

DEVICE: See titles **DESIGNS**, **COPYRIGHT** IN; **TRADE-MARKS**.

DEVISAVIT VEL NON. This was an issue directed not unfrequently by the Court of Chancery, to be tried before a jury at Common Law; and a like issue may be tried by that Court itself at the present day in a proper case. The object of the issue is to ascertain whether or not certain properties are comprised within a devise which appears *prima facie* not to comprise them. A proper case for such an issue was that of *Newburgh v. Newburgh*, 5 Madd. 364.

DEVISE. This word meant originally to *divide* or distribute property, but it is now used exclusively to signify the giving of real estates by will, the testator being called the deviser, and the object of his bounty the devisee. The word "devise" is properly applicable to real estate only, while the word "bequeath" is properly applicable to personal estate only; and upon the strength of the word "devise" alone, an intention has been found to pass real property, which nothing else in the will seemed to indicate (*Coard v. Holderness*, 20 Beav. 147).

See title **SPECIFIC DEVISES**.

DICTION. Called also *obiter dictum*, or "remark by the way," is a remark more or less casual dropping from a judge regarding the law in matters like that at the time before him.

DIEI CONDUCTIO: See title **LEGIS ACTIONES**.

DIEM CLAUSIT EXTREMUM: see title **ESCHEATOR**.

DIES FASTI
DIES JURIDICI
DIES NEFASTI } See title **DIES NON JURIDICIUS**.

DIES NON JURIDICIUS. A day on which the Courts, for reasons of religion, do not sit; e.g., Good Friday, Sunday, and the like. In Roman Law it is called *dies nefastus*. The days on which the Courts may sit are called *dies juridici*, and in Roman Law were called *dies fasti*. Vacations are non-court days for a very different reason, namely, the health of the judges, counsel, and officers.

DIET. A legislative assembly; e.g., the Diet of Frankfurt.

DIEU ET MON DROIT ("God and my right"). This is the motto of the royal family, and is said to have been first used by Richard I. It signifies that the sovereignty is subject only to the divine, and not to any human, law. But it is no pretext either for absolutism on the one hand, or for the subjection of the State to the Church on the other.

DIFFERENCES, CONTRACTS FOR: See titles **STOCK-EXCHANGE**; **TIME-BARGAINS**.

DIGNITIES. These are titles of honour; and having been originally annexed to land, they are considered as real property (1 Cru. 55).

DILAPIDATIONS. This word denotes generally letting a house get into bad repair, and is applicable generally to all tenants who are under a covenant to repair (see title **WASTE**). But it is more peculiarly applicable to the bad repair of ecclesiastical residences, the Ecclesiastical Law enabling a succeeding rector to bring an action for dilapidations against the executor or administrator of his predecessor, or (if he should be still living) against the predecessor himself; and by the stat. 34 & 35 Vict. c. 43, ss. 36, 60 (Ecclesiastical Dilapidations Act, 1871), claims for dilapidations rank *pari passu* with debts due from the deceased incumbent in the administration of the assets of the latter.

See title **ADMINISTRATION OF ASSETS**; **REPAIRS**; **WASTE**.

DILATORY PLEAS: See title **ABATEMENT, PLEAS IN.**

DIRECT EVIDENCE. Is evidence directly proving any matter, as opposed to circumstantial evidence which is often called *indirect*. It is usually conclusive, but (like other evidence) it is fallible, and that on various accounts. It is not to be confounded with primary evidence as opposed to secondary, although in point of fact it usually is primary.

See titles **CIRCUMSTANTIAL EVIDENCE; EVIDENCE.**

DIRECTING THE JURY: See title **JURY.**

DIRECTOR OF PUBLIC PROSECUTIONS. Under the Prosecution of Offences Act, 1879 (42 & 43 Vict. c. 22), provision is made for the appointment of an officer to be called by the name of Director of Public Prosecutions, and whose duty it is to be, under the superintendence of the Attorney-General, to institute and prosecute criminal proceedings in any criminal Court, whether formal or summary, and to advise police officers and others relatively to criminal offences (s. 2). But the Act expressly preserves the rights of private persons to prosecute (s. 7); only the director may be substituted for the private prosecutor in any case, so as to release the latter from his obligation to prosecute.

DIRECTORS. The first directors of a company are the subscribers to the memorandum of association. These subscribers afterwards elect their successors in the directorate; but subsequently the directors are elected by the shareholders. The directors manage the business of the company pursuant to the articles of association, and so long as they act *intra vires* and the company has put no restrictions on their powers they bind the company. And not only are they agents for the company, but they are also trustees for the shareholders, and liable or not liable accordingly like ordinary trustees would be; but they are not trustees for the creditors of the company (*Poole's Case*, 26 W. R. 823). Directors being (as they usually are) shareholders in the company have as shareholders the same rights and privileges as shareholders generally, the capacity of director not affecting the capacity of shareholder, e.g., they may transfer their shares like other shareholders in all respects, unless it should be their necessary qualification shares where there is any qualification.

See titles **COMPANIES; FRAUD IN COMPANY LAW; JOINT STOCK COMPANIES.**

DISABILITY. This means any incapa-

DISABILITY—continued.

city either of acquiring or transmitting a right, or of resisting a wrong. Such disability may arise either from the act of the party, or from the act of his ancestor, or from the act of law, or from the act of God. (1.) From the act of the party,—as where, after having agreed upon the surrender of an old lease to grant a new one, he grants the reversion to another, whereby he incapacitates himself to grant the new lease; (2.) From the act of the ancestor,—as where he was attainted or convicted of treason or felony, whereby formerly he rendered his children incapable of inheriting; (3.) From the act of law,—as where (prior to 1870) he was an alien born, whereby, or in consequence thereof, the law struck him with a general incapacity to hold lands; and (4.) From the act of God, as where he is a lunatic or idiot, and incapable therefore generally of contracting.

DISABLING STATUTES. Are certain statutes relating to the alienation of church lands by ecclesiastical corporations aggregate and (in a lesser measure) by ecclesiastical corporations sole. They are 1 Eliz. c. 19; 13 Eliz. c. 10; 14 Eliz. c. 11; and 18 Eliz. c. 11; amended by 6 & 7 Will. 4, c. 20, and a considerable number of statutes passed in the present reign. Leases are by these statutes (speaking roughly) limited to the term of twenty-one years or three lives; but with the sanction of the Church Estates Commissioners building and mining leases of a much longer duration may be granted.

See title **ENABLING STATUTES.**

DISBAR. To deprive a barrister permanently of the privileges of his position. It is analogous to striking an attorney off the rolls. Being an extreme measure it is more common to suspend than to disbar.

DISCHARGE. The discharge of an obligation arises by payment of what is due under it, or by satisfaction otherwise. A bankrupt is discharged by an order of discharge, and a liquidating debtor by a certificate of discharge.

See titles **ACCORD AND SATISFACTION; CERTIFICATE OF DISCHARGE; CONTRACTS; ORDER OF DISCHARGE.**

DISCHARGE, CERTIFICATE OF. In liquidation, is granted by the registrar in bankruptcy, when the creditors have by special resolution agreed to give their debtor his discharge.

See title **DISCHARGE, ORDER OF.**

DISCHARGE OF CONTRACT. This may be by performance; also, failing per-

DISCHARGE OF CONTRACT—contd.

formance according to the tenor, it may be discharged (1.) before breach by the like instrument whereby it was contracted (*e.g.*, specialty by release, and simple contract by the mere oral or written consent of the parties); and (2.) after breach, by release in all cases, or (but only when the amount due on the contract is uncertain) by accord of the parties and satisfaction. The discharge also sometimes arises through operation of law, *e.g.*, where the debtor becomes the executor of his creditor; also, where the creditor's own conduct renders performance of the contract impossible.

DISCHARGE, ORDER OF. In bankruptcy, is granted by the Court either when the debtor has paid 10s. in the pound, or having paid less his creditors have resolved for sufficient reasons to allow him to be discharged.

See title DISCHARGE, CERTIFICATE OF.

DISCLAIMER: *See title CONVEYANCES, sub-title DISCLAIMER.*

DISCONTINUANCE. As applied to the cessation of an estate, a discontinuance is said to arise when he who hath an estate tail maketh a larger estate of the land than by law he is entitled to do, in which case the estate is good, but so far only as his estate extends who made it, *e.g.*, if tenant in tail makes a feoffment in fee simple, or for the life of the feoffee, or in tail—all which are unless he have first barred the estate tail beyond his power to make—and if the feoffee having entered (as lawfully he may) during the life of the feoffor, retains the possession after the death of the latter, the injury which he does by such retention is a discontinuance of the legal estate of the heir in tail.

As applied to the cessation of an action, it means the withdrawal of same out of Court. When a plaintiff has become aware of any defendant's defence, he may, at any time before replying thereto, wholly discontinue his action by delivering a notice in writing to that effect. And he may, with the leave of the Court or of a judge, do the like at any subsequent stage of the action, but only upon terms, and leave to discontinue is not granted as a matter of course (*Stahlschmidt v. Walford*, 4 Q. B. D. 217). The discontinuance does not prejudice any subsequent action for the same cause, unless one of the terms was such (Order xxiii., 1); and the plaintiff almost invariably pays the defendant his costs, for which costs the defendant may sign judgment (Order xxiii., 2), and may also assess damages upon any undertaking as to damages (*Newcomen v. Coulson*, 7 Ch. Div. 764).

DISCONTINUANCE OF ACTION**DISCONTINUANCE OF ESTATE**

See title DISCONTINUANCE.

DISCOUNT. Is interest *in reverse*; that is to say, where money is payable on a certain day, and it is paid after that day, or (as it is said) the payment is *in mora*, then interest is demandable as a general rule; but when conversely or reversely, the money in such a case is paid before the day, then a deduction in the nature of interest is made on account of the accelerated payment, and the deduction is called discount. Banker's discount is literally the same as ordinary discount.

See title INTEREST OF MONEY.

DISCOVERY. By the Common Law, neither party to an action was required to make discovery to the other of any documents or circumstances which might be useful in evidence; and an application required to be made to the Court of Chancery, which would in certain cases upon a BILL OF DISCOVERY being filed, decree that the defendant thereto should make a particular discovery to the plaintiff. But, in more recent times, bills of discovery became unnecessary; for, in the Court of Chancery, discovery of documents might be obtained under the Jurisdiction Act, 1852, by summons at chambers; and, under the stats. 14 & 15 Vict. c. 99, and 17 & 18 Vict. c. 125, discovery might also be had at law. And under the present practice, the varieties of and modes of obtaining discovery are the same in all the Courts, and are briefly the following:—

I. *Interrogatories and Answers thereto.*—Either party may deliver to the other or others, interrogatories in writing for his examination (Order xxxi.), such interrogatories being reasonable and not vexatious or irrelevant, or ill-timed; and the party interrogated answers by affidavit said interrogatories, doing so fully and not evasively, or else refuses to answer same or any of them, giving his reasons for refusing. A first insufficient answer may be ordered to be supplemented by a further answer, and so on; and the not complying with any order to answer or to further answer interrogatories is a contempt of Court (Order xxxi., 20).

II. *Affidavit of Documents.*—Either party may obtain against the other or others upon summons at chambers an order requiring him or them to make discovery on oath of all the documents relating to the action which are or which have been in his or their possession or power (Order xxxi., 12); and a form of affidavit of documents is prescribed, and that form

DISCOVERY—continued.

must be strictly observed (Appendix B, Judicature Act, No. 9).

III. *Inspection of Documents.*—Upon notice or (failing compliance therewith) upon order to produce for inspection, either party may inspect all the documents relating to the action which are referred to in any affidavit or pleading of the other party or parties; and a note of the result of such inspection may be made. Non-compliance with any order to permit inspection of documents is a contempt of Court (Order xxxi., 20).

N.B.—In addition to these modes of discovery, properly so called, either party may also obtain upon summons [or motion] an order to inspect the property of the other party or parties (*see* title *INSPECTION OF PROPERTY*). And while discovery is in aid of evidence, the effect of admissions (whether of documents or of the allegations in pleadings) is to supersede the necessity of evidence.

See titles *ADMISSION; ADMISSION OF DOCUMENTS; ADMISSIONS IN PLEADINGS.*

DISCREDITING WITNESS. Is often the object of the cross-examination of a witness. And upon any examination in chief of a witness who proves *adverse*, the party may attempt to discredit even his own witness.

See titles *ADVERSE WITNESS; EXAMINATION OF WITNESSES.*

DISCRETION. Is sometimes opposed to *duty*, *e.g.*, in determining the liability of trustees for making an investment that has proved a loss to the trust estates.

DISCRETIONS AND DUTIES: *See* title *DUTIES AND DISCRETIONS.*

DISENTAILING ASSURANCE. By the stat. 3 & 4 Will. 4, c. 74, which abolished the ancient Fines and Recoveries, whereby formerly (amongst other things) an estate tail might be barred, there was substituted a new assurance, called a disentailing assurance, which was calculated to produce the same effect. By this assurance, which is in the form of a simple indenture, but which requires to be enrolled within six months of its execution in the Court of Chancery, the tenant in tail (with or without the consent of the protector when there is any such) conveys the lands to a middle man (or man of straw), to the use of himself, the tenant in tail, his heirs and assigns, by which means, and under the Statute of Uses, he instantly (upon enrolment) emerges a legal tenant in fee simple. It is usual (but not apparently necessary) to add, that the object of the assurance is to dock and bar the entail and all remainders, &c. Where there is a protector, and

DISENTAILING ASSURANCE—contd.

he refuses to concur, the disentailing deed has the effect of a *fine* only, but otherwise or if there is no protector it has the effect of a *common recovery*, or such other effect as the party disentailing chooses to effect. For example, the entail may be barred for 500 years and so forth.

See titles *FINE; RECOVERY.*

DISENTAILING DEED: *See* title *DISENTAILING ASSURANCE.*

DISFRANCHISE. To deprive of certain privileges, freedoms, or franchises.

See title *ENFRANCHISE.*

DISGRACE, QUESTIONS TENDING TO.

Questions which tend to disgrace a witness may be put by counsel in cross-examination, or in order to discredit an adverse witness, subject only to the control of the Court, and subject apparently to this, that the evidence is not excluded as being contrary to public decency (*e.g.*, sexual disclosures).

See title *PRIVILEGE OF WITNESS.*

DISHONOUR, NOTICE OF. Where the acceptor of a bill fails to pay at maturity on the bill being presented to him, in other words, dishonours the bill, the billholder (although he may sue the acceptor) commonly prefers looking either to the drawer or some or one of the indorsers; and to ensure his remedy against the latter, he must without delay give them notice of the acceptor's refusal to pay, *i.e.*, must give notice of dishonour. Even the drawer is entitled to such notice, unless in the one case of the bill being accepted for his accommodation only (*Bickerdike v. Bollman*, 1 T. R. 405). The failure to give prompt notice of dishonour has the effect of discharging all the parties other than the acceptor.

See title *BILL OF EXCHANGE.*

DISMISSAL OF ACTION. May be either before the trial or at the trial. (1.) Before the trial, either for want of prosecution, or for the plaintiff's default in delivery of statement of claim or in complying with an order for discovery, or in giving notice of trial; (2.) At the trial, for plaintiff's default to appear, or from his case breaking down either through insufficiency of evidence or upon any legal ground. Such dismissal is almost invariably with costs.

DISPAUPER. When a poor person has been admitted to sue *in forma pauperis*, and through the subsequent acquisition of property or any other sufficient cause it is proper that he should be deprived of the privilege of suing in that quality, then he is deprived of the privilege accordingly; in other words, he is *dispaupered*.

DISPENSING POWER. The early English sovereigns, in imitation of the Popes of Rome, had assumed to dispense with the laws by issuing proclamations and making grants "*non obstante* any particular law to the contrary." This assumption was odious to the Common Law. Thus, in the reign of Henry III. in a suit between the Bishop of Carlisle and a certain baron, the king having resorted to his dispensing power in favour of the bishop, and afterwards in favour of the baron, the chief justiciary complained of the introduction of ecclesiastical maxims into the Civil Courts; and in the same reign, the king having referred to the practice of the popes in vindication of his use of the clause *non obstante*, the Master of the Hospitallers exclaimed, "God forbid that your Majesty should utter such a graceless speech."

The practice, notwithstanding, continued to be exercised, and in some reigns more extensively than in others. In particular the exercise of the power by Richard II. is said to have been such as to set aside the very principles of the statutes dispensed from; but the more usual practice was to dispense in particular cases only of an exceptional character. It was the opinion of Lord Coke (Case of *Non obstante*, 12 Rep. 80) that no Act of Parliament could bind the king from any prerogative that was inseparable from his person, so as that he might not dispense with the statute by *non obstante*. But the true nature and limits of the king's right of dispensing with statutes was not fully understood until the case of *Thomas v. Sorrell*, decided in 1666. and reported in Vaughan. The plaintiff in that case was a common informer, who brought his *qui tam* action against the defendant (a vintner) to recover his share of a penalty under the stat. 7 Edw. 6, c. 5, incurred by the defendant in selling wine by retail without a licence, in the county of Middlesex. It was found, on special verdict, that James I., who incorporated the Company of Vintners in the City of London, had given them licence in the letters patent of their incorporation to sell wine by retail or in gross within the city and its suburbs, "*non obstante* the statute of Edw. VI." The judgment given was to the effect that the king was able to dispense in some cases and not in others, and that the distinction between the two classes of cases did not depend (as had at one time been said) upon whether the act prohibited by the statute was *malum in se* or *malum prohibitum* only, but that it depended upon whether the king himself was the only person affected by it or whether his subjects also were affected by it. He could dispense with his own privileges, but not with his subjects' rights; and this

DISPENSING POWER—continued.

distinction has been substantially adopted by the legislature, the statute 38 & 39 Vict. c. 80, recognising it, and in fact expressly enabling the Crown to dispense with the penalty (so far as it accrues to the informer) upon conviction of an offence against the Sunday Observance Act, 21 Geo. 3, c. 49. (See title *QUI TAM ACTIONS*.) Clearly, therefore, the practice or privilege of dispensing was considered as being not in itself wrong, but only wrong in the abuse of it. Such abuse was again illustrated in 1685, in the case of *Godden v. Hales*, James II. having in that case dispensed with the Test Act in favour of the defendant upon his appointment to a military office, and in express fraud, not only of the Test Act itself, but also of successive resolutions of Parliament confirmatory of the Act. In the Bill of Rights (1 W. & M. sess. 2, c. 2), it is accordingly declared, with reference evidently to James II., that the dispensing power as of late exercised was illegal, thus indicating at once the legitimate use and the illegal abuse of that prerogative. In the recent Case of *Eton College*, 1815, it was held that a dispensation of Elizabeth granted to the fellows of Eton College to hold ecclesiastical preferment together with their fellowships, notwithstanding a statute of Henry VI. to the contrary, was a legitimate exercise of the dispensing power.

DISPOSSESSION: See title *OUSTER*.

DISSEISIN. When one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands, this is termed a disseisin, being a deprivation of that actual seisin or corporal possession of the freehold which the tenant before enjoyed. In other words, a disseisin is said to be when one enters intending to usurp the possession, and to oust another from the freehold. To constitute an entry a disseisin, there must be an ouster of the freehold, either, first, by taking the profits; or, secondly, by claiming the inheritance (1 Cruise, 60). He who so enters and puts a party out of possession of the freehold is termed the disseisor, and the party ousted is called the disseisee.

See title *OUSTER*.

DISSENTERS. The stat. 1 Will. & M. sess. 1, c. 18 (Toleration Act), s. 4, exempted persons taking the oaths and subscribing the declaration therein mentioned from all prosecutions in the Ecclesiastical Courts for nonconformity; and it was held in *Barnes v. Shore* (8 Q. B. 640), that this provision extended not only to lay persons, but to clergymen who, after being ordained, dissented from the Church. For disturb-

DISSENTERS—continued.

ing a Dissenting congregation each offender is liable to a penalty of £20. A Jewish synagogue is not at the present day an illegal establishment (*Israel v. Simmons*, 2 Stark. 256).

Dissenters, in respect of their religious worship have as full a right as Churchmen to the protection of the Courts (*Rez v. Wroughton*, 3 Burr. 1683): and a mandamus will lie to register and certify a Dissenting meeting-house (*Rez v. Derby (Justices)*, 4 Burr. 1991); also to compel the trustees of a meeting-house to admit a Dissenting teacher (*Rez v. Barker*, 3 Burr. 1265).

See title NONCONFORMISTS.

DIS-SERVING EVIDENCE: See titles EVIDENCE, sub-title ADMISSIONS; SELF-REGARDING EVIDENCE.

DISSOLUTION: See titles DIVORCE; MARRIAGE; PARTNERSHIP.

DISSOLUTION OF PARLIAMENT. The Crown may dissolve Parliament either in person or by proclamation; the dissolution is usually by proclamation, after a prorogation. No Parliament may last for a longer period than seven years (Septennial Act, 1 Geo. 1, c. 38). Under the 6 Anne c. 37, upon a demise of the Crown Parliament became *ipso facto* dissolved six months afterwards, but under the Reform Act, 1867, its continuance is now nowise affected by such demise (May's Parl. Pract. 6th ed. p. 48).

DISTANCE. Is to be measured in a straight line as the crow flies (*Lake v. Butler*, 5 El. & Bl. 92), in the absence of an expressed contrary intention. And where the trustees of a turnpike road were prohibited by a local Act of Parliament from erecting any toll-gate within three miles of Bargate in the town of Southampton, it was held that the distance was to be measured by a straight line and not by the road (*Jewell v. Stead*, 6 El. & Bl. 350; *Duignan v. Walker*, 1 Johna. 446).

DISTINCT CONTRACTS: See title DOUBLE PROOF.

DISTRESS. A power of distress may belong to a landlord either in virtue of express words conferring it (*Daniel v. Stepney*, L. R. 7 Ex. 327; 9 Ex. (Ex. Ch.) 185), or in virtue of the general law. In the latter case, the following are the requisites to the power of distress:—

- (1.) There must be an actual lease, and not a mere agreement for one;
- (2.) The rent must be certain;
- (3.) The rent must be in arrear, but in the case of rents payable in advance, these are held to be in

DISTRESS—continued.

arrear instantly upon the commencement of the period for which they are payable (*Buckley v. Taylor*, 2 T. R. 600); and

- (4.) The distrainer must have the reversion in him, either an actual reversion or (at the least) a reversion by estoppel (*Morton v. Woods*, L. R. 3 Q. B. 658).

With reference to the things that are liable to be distrained, generally speaking, all moveable chattels (whether the property of the tenant or of a stranger) which are upon the demised premises at the time when the distress is made are liable. (2 W. & M., sess. 1, c. 5, s. 3), subject

With reference to the things that are not liable to be distrained, the following classes of things are not liable:

- (1.) Fixtures, *sed quære*;
- (2.) Title deeds;
- (3.) Things delivered to a person exercising a public trade to be managed in the way of his trade;
- (4.) Animals *feræ naturæ*;
- (5.) Things in actual use;
- (6.) Perishable goods;
- (7.) Goods in the custody of the law;
- (8.) Crops of produce sold by sheriff, subject to an agreement to consume same on land;
- (9.) Frames, looms, &c., entrusted to workmen;
- (10.) Goods of an ambassador; and
- (11.) Effects of a company being wound up, unless by leave.

And the following classes of things are conditionally privileged from being taken in distress:—

- (1.) Implements of trade not in actual use; and
- (2.) Cattle and sheep.

The distress must be made, as a general rule, on the premises demised, subject, however, to the following exceptions:—

- (1.) Cattle or stock of the tenant feeding or being on a common appendant or appurtenant or otherwise belonging to the demised premises;
- (2.) Cattle seen driven off the demised premises on purpose to defeat the distress; and
- (3.) Goods fraudulently removed from the demised premises.

See title EXECUTION.

DISTRESS INFINITE. In the case of a distress for fealty or suit of Court, no distress can be unreasonable, immoderate or too large; for this is the only remedy to which the party aggrieved is entitled, and therefore it ought to be such as is sufficiently compulsory; and let it be of what value it may, there is no harm done, espe-

DISTRESS INFINITE—*continued.*

cially as it cannot be sold or made away with, but must be restored immediately on satisfaction made. A distress of this nature, that has no bounds with regard to its quantity, and which may be repeated from time to time, until the stubbornness of the party is conquered, is called a *distress infinite*. For some other purposes, as in summoning jurors and the like, a distress infinite used also to be allowed; and so likewise under the C. L. P. Act, 1854, to compel the delivery up of the specific chattel ordered by the Court to be delivered up.

DISTRIBUTION OF INTESTATE'S ESTATE: See titles CAPITA, DISTRIBUTION PER; NEXT OF KIN; STIRPES.

DISTRICT CHAPELS OR CHURCHES: See title PROPRIETARY CHAPELS.

DISTRICT REGISTRIES. Under the 60th section of the Judicature Act, 1873 (36 & 37 Vict. c. 66) power was given to the sovereign to establish district registries; and by Order in Council dated the 12th of August, 1875, such registries have been established, and district registrars appointed over them, for the issue of writs of summons, and for the taking of other proceedings in an action in the High Court of Justice.

See title DISTRICT REGISTRIES, PROCEEDINGS IN.

DISTRICT REGISTRIES, PROCEEDINGS IN. Generally all proceedings may be taken in the district registry, which may be taken in the chambers of the judge in London. When an action is proceeding in the District Registry (through the writ of summons having been issued thereout, and appearance to such writ having been entered therein), then in the district may be taken all proceedings down to and including final judgment for default of appearance, or interlocutory judgment, for account or otherwise, for default of appearance, or of pleading together with final judgment thereon, when damages have been assessed, and in other cases down to and including entry for trial of the action (Snell's Equity by Brown, 5th ed. pp. 729-731).

DISTRINGAS, INJUNCTION IN NATURE OF. Under the 4th section of the stat. 5 Vict. c. 5, an injunction in the nature of, but much more efficacious than, a writ of distringas, may be obtained summarily in the Chancery Division against, not only the Bank of England, but any public company whatsoever, to restrain the transfer of (or the payment of dividends upon) not only any stock, but also any shares, in the books of such bank or company.

See title DISTRINGAS, WRIT OF.

DISTRINGAS JURATORES. A writ directed to the sheriff peremptorily commanding him to compel the appearance of jurors in Court on a certain day therein appointed. This writ was abolished by the C. L. P. Act, 1852 (1 Arch. Prac. 365).

DISTRINGAS, WRIT OF. Formerly, a writ bearing this name used to be directed to the sheriff, commanding him to distrain upon the goods and chattels of a defendant, in order to compel his appearance to a writ of summons. It was only granted when the person requiring the same had shewn by affidavit to the satisfaction of the Court out of which the writ of summons issued, that the defendant had not been personally served with the writ of summons, and had not, according to the exigency thereof, appeared to the action, and could not be compelled so to do without some more efficacious process (1 Arch. Prac. 202). The writ in this use of it was abolished by the C. L. P. Act, 1852. Another writ bearing this name had for its object to stay the payment away of stock in the Bank of England. This latter writ is still in use, and issues out of the London Office, out of which writs of summons are issued (Order XLVI. 2). Any person may issue it who claims to be interested in any stock transferable at the Bank of England standing in the name of any other person (Order XLVI., 2). The writ issues upon filing an affidavit swearing to the interest of the applicant, and identifying the stock (Morgan's Chanc. Acts, 5th ed. p. 586; 5 Vict. c. 5).

See title DISTRINGAS, INJUNCTION IN NATURE OF.

DISTURBANCE. A species of injury to real property, commonly consisting of a wrong done to some incorporeal hereditament by hindering or disquieting the owners in their regular and lawful enjoyment of it. There were five principal varieties of this injury, viz.: (1.) Disturbance of franchise; (2.) Disturbance of common; (3.) Disturbance of ways; (4.) Disturbance of tenure; and (5.) Disturbance of patronage (Finch, 187).

DITCHES: See title FENCES AND DITCHES.

DIVINATIO NON INTERPRETATIO. Conjecture is not construction,—a maxim overlooked by the Court in *Travers v. Blundell*, 6 Ch. D. 436.

DIVISIONAL COURTS. Are any courts composed of the Judges of the High Court, and comprising not fewer than two of such judges at the least. They correspond very much to the old sittings of the Common Law Courts in Banc. These Courts are never made up in the Chancery Division (from paucity of judges); but the Divisional

DIVISIONAL COURTS—continued.

Courts at Westminster entertain all Chancery applications which require to go before a divisional Court.

See title **DIVISIONAL COURTS, MATTERS FOR.**

DIVISIONAL COURTS, MATTERS FOR.

The various business for these courts may be classified as under:—

- (1.) All appeals from Petty or Quarter Sessions, from a County Court, or from any other Inferior Court, which, before the Judicature Acts, 1873-5, lay to the Superior Courts of Law or Equity (Order LVII a., 1);
- (2.) Cases or points in cases, reserved at trials for the consideration of the Divisional Court, and cases or points in cases directed at trials to be argued before the Divisional Court.
- (3.) Application for new trials, from a trial before a judge *with* a jury (Orders XXXIX. 1; LVII a., 1., Dec. 1876).
- (4.) Applications for orders, charging stock, or shares (Order XLIV. 1); and
- (5.) The following civil (besides certain election and criminal) proceedings, viz.:—
 - (a.) Proceedings directed by Act of Parliament to be taken before the Court, when the Court's decision is final;
 - (b.) Cases stated by the Railway Commissioners;
 - (c.) Special cases, by agreement of all parties; and
 - (d.) Appeals from the Common Law Chambers to the Court (Order LVII a., 1);

See title **BANC OR BANCO, SITTING IN.**

DIVISIONS OF HIGH COURT. Are the Chancery Division (comprising the Master of the Rolls, the three Vice-Chancellors, and the Additional Judge) and the three Common Law Divisions, and the Probate Division and Admiralty Division.

DIVORCE. The legal separation of husband and wife. There were two kinds of divorce, the one total, the other partial; the one *à vinculo matrimonii*, the other merely *à mensâ et thoro*. The total divorce, *à vinculo matrimonii*, used to be only for some canonical cause of impediment existing before the marriage, e.g., consanguinity, and not for any impediment that was supervenient. In these cases of a total divorce, the marriage used to be declared null, as having been absolutely unlawful *ab initio*; and the parties were therefore separated *pro salute animarum*; for which

DIVORCE—continued.

reason no such divorce could be obtained but during the life of the parties. In these divorces the wife, it was said, should receive all again that she brought with her, because the nullity of the marriage arose through some impediment, and the goods of the wife were given for her advancement in marriage which was now found never to have existed. (Dyer, 62). But at the present day a divorce *à vinculo matrimonii* may be obtained for a cause that is supervenient; thus, a husband may obtain it on account of his wife's adultery, and a wife may obtain it on account of her husband's adultery, coupled with cruelty or desertion on his part; and such divorces are not unfrequently granted under the provisions of the Act 21 & 22 Vict. c. 77, without the necessity (which for some time existed) of obtaining a special statute for the purpose. This divorce enables the parties to marry again, and to do all other acts as if they had never been married. Divorce *à mensâ et thoro* used to be granted when the marriage was just and lawful *ab initio*, and therefore the law was tender of dissolving it, but for some supervenient cause it might become improper or impossible for the parties to live together, e.g., in case of intolerable ill-temper, or adultery in either of the parties. But at the present day there is no divorce *à mensâ et thoro*, but either a total divorce *à vinculo matrimonii* for the causes mentioned above, or else a judicial separation for causes that are insufficient to justify a total divorce, e.g., cruelty or incompatibility of temper, being extreme. Parties separated in this manner cannot afterwards marry again, until, at any rate, the one party is dead, when the other may lawfully marry again.

See title **ALIMONY.**

DIVORCE, COURT OF: See title **MATRIMONIAL CAUSES.**

DIVORCE, DAMAGES UPON. A husband may obtain damages against the adulterer co-respondent; and he may even obtain such damages without proceeding for a divorce (20 & 21 Vict. c. 85, s. 33). The damages are estimated by the value of the wife, not (strictly) by the wealth or position of the adulterer. The damages may be paid to the husband, but appear to be usually settled by way of alimony on the wife during chastity and the children.

See titles **ALIMONY; DIVORCE.**

DOCKS: See title **HARBOUR.**

DOCK-WARRANTS: See titles **BILL OF LADING; STOPPAGE IN TRANSITU.**

DOCKET, STRIKING A. A phrase formerly used in bankruptcy. It referred to the entry of certain papers at the bank-

[illegible]

NOBIS CUNCTIV FOR PURGATUR.

BOOK or BOOK This is literally a
book. It is the Book of Here-
in. The word occurs,—“So help
me at the day of judgment,” meaning at the
day of judgment.

BOOK-BOOK. A book of judgments
was compiled during the time of Alfred
the Great, and is said to have been extant
so late as the reign of Edward IV., after
which it was lost. It is generally assumed
to have contained the principal rules of the
Common Law (so far as these rules were
then developed), together with the then
penalties for misdemeanours, and the then
forms of judicial proceedings.

DOMESDAY-BAY. The book thus called was compiled in the reign and by the direction of William I., commonly called the Conqueror, and is one of the many works of permanent utility of that sovereign. It was in two volumes, and contained the details of a great survey of the kingdom, throughout all its counties, five men in each county (called justices) having been assigned in 1081 for the purpose of collecting the necessary statistics, and having completed their statement thereof in 1086, when the whole returns were thrown together and formed the two volumes of Domesday Book.

This work is an authority upon certain points of real property law; e.g., upon the question whether lands of copyhold tenure are or are not of that peculiar species of copyhold which is called *Ancient Demesne*.
See title **ANCIENT DEMESNE**.

DOMICILE. Is the place at which a person has his principal residence, and that is generally construed to be the place

RECEIVED

The first of these is the fact that the
 Government has been unable to secure the
 necessary funds to carry out its policy.
 The second is the fact that the Government
 has been unable to secure the necessary
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DIVIDE This word is derived from the Latin *dividere*, and denotes a part or portion of a number which is divided; and the word *divide* retains the meaning of dividing. To divide is to divide or separate.

DOMICILE—continued.

at which he usually keeps his wife and family (or household gods, *ubi lar et penates*). In the case of infants and married women, their domicile is that of their parents or husband. A domicile may be either original or acquired. The original domicile (*domicilium originis*) is that at which the parents of the person are domiciled at the time of his birth, and usually agrees (under English Law) with his nationality. To acquire another domicile, the rule of law is that both the *animus* (or intention to acquire it) and the *factum* (or actual acquisition of it) must combine. Now the acquisition of a new domicile is only complete when the former domicile is definitively abandoned, and an actual removal is made to the place of the acquired domicile. But for the re-acquisition of the original domicile, the definitive abandonment of the acquired domicile when followed up, or rather when evidenced, by one step towards a return to the original domicile, is sufficient.

The law of a man's domicile for the time being (whether original or acquired) determines all his personal capacities and incapacities; and to that extent it often controls the operation of the *Lex loci situs*, although not also the operation of the *Lex loci rei sitæ*. Further, the *Lex Domicilii* also regulates the distribution of his personal estate in case of his death intestate. See Story on Conflict of Laws; Westlake's Private International Law; Foote's Private International Jurisprudence.

DOMICILII LEX: See title DOMICILE.

DOMINANT TENEMENT. In the law of easements, the tenement whose owner as such enjoys an easement over an adjoining tenement is called by this name.

See title EASEMENTS.

DOMINIUM. Was ownership in Roman Law, and was one of two kinds, viz.:—(1.) Quiritary Dominion,—or ownership in the fullest sense of the strict civil law; and (2.) Bonitary Dominion,—or ownership in *bonis*, i.e., according to the Prætorian Law complete, but according to the strict Civil Law incomplete. When a *res Mancipi* was transferred by *mancipatio*, it was at once acquired in the Quiritary ownership; but if it was transferred by *traditio* merely, then it was acquired in Bonitary ownership only, until *usucapio* matured it into Quiritary ownership. On the other hand, when a *res nec Mancipi* was transferred by *traditio*, it was at once acquired in full Quiritary ownership, assuming that it had been purchased or otherwise acquired from the true owner; and if it had been so acquired *bonæ fide* from one

DOMINIUM—continued.

that was not the owner, then it required *usucapio* to mature the Bonitary ownership so acquired into full Quiritary ownership.

See titles TRADITIO; USUCAPIO.

DONATION. In French Law, every donation in order to be complete must be assented to by the donee, and if a married woman with the consent of her husband. Immediately upon such assent being given, the gift is complete (just as in Roman Law) without any *traditio*; for a necessity is laid on the donor or his heirs to make *traditio*. In this respect, the English Law differs from both, holding that not only is assent on the part of the donee necessary, but also delivery of the thing given. In French Law such gifts are irrevocable, excepting for one of three causes,—(1.) The non-performance of conditions when there are any such; (2.) The ingratitude of the donee; or (3.) The subsequent birth of offspring; but in English Law, a gift when once completely made is not revocable for any cause whatever, unless there is an express condition or clause of revocation contained in it.

DONATIO MORTIS CAUSÆ. Is a gift made in contemplation of death, and taking absolute effect upon the death. The great essential to it is a DELIVERY actual or constructive of the thing given; and provided that requisite is observed, there is nothing which may not be the subject of such a gift, excepting a cheque (inasmuch as the authority to pay that is revoked upon the death), and excepting apparently railway stock (*Moore v. Moore*, L. R. 18 Eq. 474), and excepting perhaps real property (inasmuch as the law prescribes particular formalities for the conveyance of such). There may, however, be a *donatio mortis causæ* of a mortgage debt charged on real property, and such gift is made by a delivery of the mortgage deed; also, of a deposit note (*Amis v. Witt*, 33 Beav. 619).

DONATIO PROPTER NUPTIAS. Was the property contributed by the husband in respect of the marriage, and was opposed to the *dos*. It might be given or increased either before or after the marriage.

See title Dos.

DONATIVE ADVOWSON: See title ADVOWSON.

DONEE.

DONOR.

DONUM.

Phrases denoting respectively the grantee of an estate tail, the grantor of such an estate, and the estate tail itself.

See title CONVEYANCES, sub-title GIFT.

DORMANT PARTNER. A sleeping partner.

See title PARTNERS, VARIETIES OF.

DOS. Is the property contributed by the wife or her relations upon or in respect of the marriage, and is opposed to the *Donatio propter nuptias* of the husband. It was called *profectitia* when made by the wife's father or other male ascendant; *adventitia* when made by the wife or wife's mother or other female ascendant; and *receptitia* when made by a stranger. The husband had the management and enjoyment of it during the coverture, but (in the later law) could neither sell nor mortgage it, and had to restore it upon the determination of the coverture to the source from which it came.

See title DONATIO PROPTER NUPTIAS.

NOTE ASSIGNANDÂ. The writ thus described lay for a widow whose husband held of the king in chief, and who was thence called a king's widow, to recover her dower, she first taking an oath not to marry without the king's leave.

NOTE UNDE NIHIL HABET. The writ thus described lay for a widow against a purchaser of the lands from her husband.

DOUBLE COSTS. Under the stat. 5 & 6 Vict. c. 97, all previous Acts of Parliament (whether public or private) which awarded double or treble costs were repealed, and party and party costs only, or reasonable costs upon taxation only, were to be given, when given at all; and that is now the law.

See title COSTS.

DOUBLE PLEA. Was a plea faulty on the ground of duplicity. Duplicity in pleading is a fault which may arise either in the declaration or in any subsequent pleading, and signifies the allegation of several distinct matters in support of, or in answer to, a single demand, any one of which matters would be sufficient of itself to support the demand, or to answer it. Leave to plead several pleas might, however, be obtained under the C. L. P. Act, 1852, s. 81. The fault of duplicity used formerly to be taken advantage of by special demurrer; but after the C. L. P. Act, 1852, it was met by application in a summary way under s. 52 of that Act, to amend or strike out the faulty pleading; and a motion to strike out or amend the pleading as embarrassing would be the course to adopt under the present practice.

DOUBLE PORTIONS: See title SATISFACTION IN EQUITY.

DOUBLE POSSIBILITY: See titles CONTINGENCY, DOUBLE; POSSIBILITY.

DOUBLE PROOF. As a general rule, the creditor of a partnership (to whom the partners are bound jointly and severally) is not allowed in bankruptcy to rank as a creditor both against the joint estate of the partnership and against the separate estate of any partner when both estates are bankrupt; but he must elect to prove either against the joint estate or against the separate estate. But to this general rule against double proof, there is an exception made in the case of distinct contracts, entered into with regard to distinct estates, in which latter case (both estates being in bankruptcy) double proof is allowed by the Common Law, and by the 37th section of the Bankruptcy Act, 1869.

See title PROOF OF DEBTS IN BANKRUPTCY.

DOUBLE RENT: See title DOUBLE VALUE.

DOUBLE RETURN: See title RETURN.

DOUBLE VALUE. A tenant wilfully holding over after the determination of his term, and after demand of possession made and notice in writing properly given, pays at the rate of double the yearly value of the lands (4 Geo. 2, c. 28). Similarly if the tenant holds over after giving notice of his intention to quit (2 Geo. 2, c. 19).

DOWAGER. A widow who is endowed, or who has a jointure in lieu of dower, is thus described; but in common practice the word is confined to the widows of princes, dukes, and other like persons only.

DOWER. Is the right of a widow during the residue of her life to one-third part of the freehold lands late of her deceased husband.

(1.) In the case of widows who were married on or before the 1st of January, 1834, the right to dower attached to all freehold lands of which the husband was solely seised for an estate of inheritance, and, having once attached, the right was not capable of being barred or defeated excepting by a *fine* or deed acknowledged in which the wife joined. In the absence of a *fine*, it attached upon the lands even when in the hands of a purchaser. It was not necessary that she should have any issue actually born. To exclude her dower from attaching at all was therefore the great object of every purchaser of land; and two methods were in common use, called respectively the old method and the modern method of barring dower. Under the old method, the lands were conveyed to the grantee and his heirs, to the use of the grantee and a trustee and the heirs of the grantee, with a declaration that the estate of the trustee was in trust only for the grantee and his heirs. Under the

DOWER—*continued.*

modern method, a general power of appointment was in the first place given to the grantee, and subject thereto the land was given to the grantee for his life, with remainder to a trustee and his heirs during the purchaser's life with an ultimate remainder to the heirs and assigns of the purchaser for ever.

(2.) In the case of widows who have been married since the 1st of January, 1834, the right of dower attaches to all lands of which the husband is solely seised, or even equitably possessed, for an estate of inheritance; but although it may have once attached, the right is of the most fragile sort, being defeated by any declaration in the will of the husband, or by his devise of the lands, or by his alienation of them during his life, and even, *pro tanto*, by his debts. And it is not infrequent to exclude it from attaching even from the first, by inserting a declaration to that effect in the deed of grant, which is also now effectual to defeat the widow's right.

See title FREE BENCH.

DOWRY. This is the proper name for the property which the wife brings to her husband upon her marriage with him, and, like the *dos* of Roman Law is distinguished from the dower (or jointure in lieu thereof), which corresponds to the *donatio propter nuptias* of Roman Law. The wife's dowry is often called her *maritagium* in the old statutes.

DRAINAGE CHARGES. These (and other general improvement) charges are created in virtue of the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), as to lands in settlement, and in virtue of the Limited Owners Residences Act, 1870 (33 & 34 Vict. c. 56), and the Amendment Act, 1871 (34 & 35 Vict. c. 84), as to mansion houses, and in virtue of the stat. 40 & 41 Vict. c. 31, as to reservoirs for water, and are made a charge upon the land in the hands of its successive owners, and are repayable (principal and interest) by not more than twenty-five yearly instalments.

See title MINISTERIAL POWERS.

DRAMA, COPYRIGHT IN. Dramatic compositions, when printed and published, are books within the meaning of the general Copyright Acts, and when still in manuscript, they are within the Copyright Act, 5 & 6 Vict. c. 45. (See title COPYRIGHT). Moreover, musical compositions intended for the stage come under the head of dramatic compositions. The stat. 3 & 4 Will. 4, c. 15, gave to the author, or his assignee, of any printed and unpublished tragedy, comedy, play, opera, farce, or other dramatic piece or entertainment,

DRAMA, COPYRIGHT IN—*continued.*

the sole right of having it represented in any part of the British dominions, for a period of twenty-eight years, and, if the author were living at the end of that time, for the remainder of the author's life; and if any person should represent, or cause to be represented, *without the consent in writing of the author or other proprietor*, at any place of dramatic entertainment, any such production, or any part thereof, every such offender was made liable in damages for the infringement as also to double the costs of the action for infringement; but such double costs have been taken away by the stat. 5 & 6 Vict. c. 97. And it has been provided by the stat. 5 & 6 Vict. c. 45, s. 20, that the copyright in any dramatic piece or musical composition shall endure and be the property of the author thereof and his assigns for the term in that Act provided for the duration of copyright in books, i.e., for the natural life of the author and seven years, or for forty-two years, whichever period is the longer; and the first public representation or performance of any dramatic piece or musical composition is equivalent to the first publication of a book. The copyright and all assignments thereof must be registered before any action will lie for infringement thereof; and if the assignment of the copyright is to pass the sole right of representation, then the assignment and the registration thereof must so express (s. 22), in order to obviate such a result as that which occurred in *Cumberland v. Planché* (1 Ad. & El. 580).

See title MUSIC, COPYRIGHT IN.

DRAWEE AND DRAWER. Are the parties to a bill of exchange upon whom and by whom respectively the bill is drawn.

See title BILL OF EXCHANGE.

DROIT. This word signifies *right*. *Droit-droit* signifies, therefore, a right upon a right, or a double right, and was used to denote the title of one in whom the right of possession and the right of property were combined. The phrase *droitural* was used of actions which were brought upon a writ of right, as distinguished from those actions called *possessory*, which were brought upon the fact of, or right to, the possession merely.

DROIT-DROIT: See title DROIT.

DROITS CIVILS. In French Law, denote private rights, and the exercise of which is independent of the status (*qualité*) of citizen. Foreigners enjoy them, and the extent of that enjoyment is determined by the principle of reciprocity. Conversely, foreigners, although not resident in France, may be sued on contracts made by them

DROITS CIVILS—*continued.*

in France, and (unless possessed of sufficient real property in France) are obliged to give security. This provision meets such a case, *semble*, as that of *Leroux v. Brown*, 12 C. B. 801.

DRUNKENNESS. Where total, is a qualified incapacity for contracting; and where the drunkenness, being partial, is caused by the other contracting party to the fraud of the intoxicated person, then it is also a ground for avoiding the contract. And with reference to crime, habitual drunkards are placed under police supervision; and persons committing any crime while in a state of temporary drunkenness are not excused thereby, but the circumstance at the very most goes only in extenuation of the offence (1 Hawk. c. 1, s. 6; Arch. Crim. Pl. 18).

See title HABITUAL DRUNKARDS.

DUCES TECUM. When a person, who is *not* a party to an action or suit, has in his possession any written instrument which is capable of being used as evidence at the trial or hearing, he is brought before the Court upon a *subpoena duces tecum*, which is a writ commanding him to appear at the trial and *bring* the instrument *with him*. And, notwithstanding he may have some good reason for not producing it, still he must obey the writ in the first instance, not himself judging, but leaving the Court to judge, of the sufficiency of his reason for the non-production.

See title BANKERS' BOOKS EVIDENCE.

DUCHY COURT OF LANCASTER: See title CHANCELLOR.

DUELLING. Where it results in death is murder (24 & 25 Vict. c. 100, s. 14); and otherwise it is a misdemeanour, as constituting an affray.

See title AFFRAY.

DUM FUIT INFRA ÆTATEM. This was a writ which lay for the recovery of lands which a man had alienated while under age. The writ lay also for the heir of the infant alienor.

DUM FUIT IN PRISONÂ. This was a writ which lay for the recovery of lands which a man had alienated while in prison or under duress.

DUM FUIT NON COMPOS MENTIS. This was a writ which lay for the recovery of lands which a man had alienated while insane.

DUNNAGE. Is loose wood or other like material placed against the sides and bottom of the hold of a vessel, above the ballast, to protect the cargo laden in hold, *semble*, from *dun*, meaning to *mitigate* the

DUNNAGE—*continued.*

bad effects of contact with ballast &c. The shipowner is liable for damage to cargo from want of sufficient dunnage. *Kay's Shipmasters*, 268.

DUPLICATE. Any copy or transcript of a deed or writing is called a duplicate.

See title COUNTERPART.

DUPLICITY IN PLEADING: See title DOUBLE PLEA.

DURATION OF LIFE. The presumption in favour of the continuance of life is in English Law very slight, and may be readily rebutted. After seven years' absence, if a person has not been heard of, and it was *prima facie* reasonable to hear from him, he is presumed to be dead (*Doe d. Knight v. Nepean*, 5 B. & Ad. 86; 2 M. & W. 894), but the exact time of the death is not fixed by that presumption (*Re Phené*, L. R. 5 Ch. App. 139). When two persons perish in one and the same calamity, there is no presumption from age, sex, or other differential circumstance whatsoever, which of them was the survivor, but that is a matter to be proved by the party alleging the survivorship of either (*Underwood v. Wing*, 19 Beav. 459; 4 De G. M. & G. 633; 8 H. L. Ca. 183).

DURESS. Is of two kinds, being either (1.) To the *person*; or (2.), To the *goods*. The object of placing either the person or the goods under duress being to extort money in excess of what (if anything) is rightfully owing, the law holds that the excess so obtained may be recovered back as money had and received; also, that duress (like fraud) vitiates all contracts made under its influence.

DUTIES: See titles CUSTOMS; EXCISE.

DUTIES AND DISCRETIONS. A trustee is liable for breach of trust; and such breach may consist either in his neglect of a duty, or in his abuse or misuse of a discretion. Thus a trustee is under a *duty* to invest in certain investments that are prescribed by the Court for trust moneys, when the will or trust-deed is silent upon the matter; and a trustee's neglect to do so, or his placing out the trust funds upon any security other than one of the prescribed investments, will render him liable, however laudable his object or careful his conduct. On the other hand, if the instrument of trust expressly enumerates a series of investments (good, bad, and indifferent), and authorizes the trustee to invest at his discretion in any of them he chooses, then and in such a case the trustee must exercise a prudent discretion, selecting such of them as he considers safest and best (all things considered), and in fact such of

DUTIES AND DISCRETIONS—contd.

them only as he would have no hesitation in placing out his own proper moneys upon; and if he have shewn that measure or amount of discretion, then he will be safe from liability, even in case of some loss or calamity befalling the investment.

See titles BREACH OF TRUST; INVESTMENTS; TRUSTEE.

DWELLING HOUSE. Is included under the older word *messuage*, and is usually opposed to *outhouse* in the language of conveyancers. A dwelling house, if unfit for habitation, may be pulled down by the sanitary authorities (38 & 39 Vict. c. 55, and (for London) 18 & 19 Vict. c. 121).

DYING DECLARATIONS. In criminal law, the dying declarations of the injured person, being an adult, are admissible, but being an infant of very tender years are not admissible in evidence, the reason for the exclusion of the latter being that the child's mind is not affected by the prospect of death, as the adult's is supposed to be.

See title DECLARATIONS, DYING.

DYING WITHOUT ISSUE. Formerly, if lands were given to A., and if he died without issue, then to B. in fee simple, A. took an estate tail by implication, and B. an estate in fee simple in remainder, which, however, A. could defeat. But now, under 1 Vict. c. 26, under the same words, A. would take an estate in fee simple defeasible in case he left no issue when he died, and B. would take an estate in fee simple that was executory upon the same event, namely, A.'s leaving no issue at the time of his, A.'s, death (s. 29).

See title WILLS.

E.

EALDERMAN. A title of office in Anglo-Saxon times, in the same position of eminency as the title of Earl held during the Danish period of occupancy.

The *alderman* of the present day, meaning thereby the civic functionary so described, is clearly a derivation etymologically from the Anglo-Saxon Ealderman, but with the changes in society which have intervened between the Anglo-Saxon and the present times, the eminency of the office has been comparatively depreciated, although the aldermanic gown is still a distinction to be aspired at; and the office carries with it certain minor judicial functions.

See titles CORPORATIONS, MUNICIPAL; LONDON, CITY OF.

EAR-MARK. Personal property is said to be ear-marked when it can be identified,

EAR-MARK—continued.

that is, distinguished from other personal property of the same nature. As a general rule, money has no such distinguishing feature, or ear-mark.

EARNEST. In Roman Law called *arrha*, is something given as evidence of the contract in Roman Law, and for the purpose (in certain cases) of binding the bargain in English Law. As the name denotes, it is given to shew that the purchaser is in earnest, and not either trifling or intending a deception. For this purpose it is not infrequently exacted by tradesmen from unknown customers giving them orders to make goods; it is originally no part of the price of the goods, and therefore is forfeited on the customer's default; but if he duly accepts and pays for the goods when made, then the earnest counts as part of the price. The giving of an earnest is one of the three alternatives prescribed by the Statute of Frauds (29 Car. 2, c. 3), s. 17, for the validity of a contract for the sale of goods of £10 or upwards.

See titles ARRAHA; FRAUDS, STATUTE OF.

EARNINGS OF MARRIED WOMEN.

Are made separate property by the Married Woman's Property Act, 1870; and, apart from that Act, the wife may also obtain protection for same by order of the police court or of a justice of the peace.

See titles HUSBAND AND WIFE; PROTECTION ORDER; SEPARATE ESTATE.

EASEMENTS. An easement is a privilege, without profit, which one neighbour hath of another (*Termes de la Ley*, 284); or which the owner of one tenement as such has over an adjoining tenement or the owner thereof as such, the former tenement being for this purpose called the dominant tenement, and the latter the servient tenement (Gale; Goddard).

Easements are in derogation of natural rights, being rights in respect of *private* or individual ownership, and not rights in respect of *public* or common occupation. Thus, a private owner, subject only to the maxim *sic utere tuo ut alienum ne laedas*, has, in virtue purely of his ownership, an absolute power of using, or right to use, his property in whatever way he pleases, to the full extent that his interest therein extends, that is to say, to the full extent of his life-estate if he is a tenant for life, and to an unlimited extent if he is a tenant in fee simple or in fee tail absolute; and an easement in or over that estate or interest is, to the extent that the easement extends, a restriction upon that absolute right or power of user.

Easements consist in *patiendo* or in *non*

EASEMENTS—continued.

faciendo, and not in *faciendo*; in other words, easements extend thus far in their general effect, namely, that they oblige the private owner of the servient tenement, not in his personal capacity, but in virtue of that of his connection with the servient tenement, to *permit*, or in no active sense *impede*, the owner or occupier of the dominant tenement as such in the enjoyment of his easement over the servient tenement, to the extent that such easement may extend; but they oblige no further, *e.g.*, they do not oblige the owner of the servient tenement as such in any active sense to augment the measure of the easement, or even to facilitate the enjoyment of it, as, for example, by widening or clearing out a dam or watercourse, scouring a sewer, and such like (*Pomfret v. Ricroft*, 1 Wms. Saund. 557).

Easements are of various kinds, being either.

- (1.) Easements of necessity; or,
- (2.) Easements of convenience.

An easement of *necessity* is one without which one's neighbour or the owner of the property adjoining could not pursue his trade or enjoy his property at all, and not merely with less readiness or comfort; and with reference to easements of that kind, the law implies or assumes a grant of them, and dispenses with the production of the grant. An easement of *convenience* is one by which one's neighbour, or the owner of the property adjoining, pursues his trade or enjoys his property in a readier or more comfortable way, but which he might also do without, although not so well.

An easement which under certain circumstances is merely one of convenience may, under certain other circumstances, be one of necessity, or almost of necessity. Thus, given the natural state of land, the only easement of necessity is a road or right of access to it of the simplest character over the adjoining land when it is surrounded by such latter land and there is no public highway running to it; and under such a state of circumstances all other easements, whether in the shape of ways, or in other shape or shapes, are easements of convenience merely. But given an artificial state of land, *e.g.*, land which has been and is applied to manufacturing processes, the easement of necessity in the shape of a right of access to it under the like circumstances as above continues to exist; but that easement, instead of being now a way of the simplest character, is enlarged into a wider way, for numerous purposes other than the mere right of personal access, and although to the extent of such enlargements of it, it would be an easement of convenience and not of necessity in the

EASEMENTS—continued.

case of the natural state of land, yet in the assumed artificial state of the land, the easement is to its full extent an easement of necessity, or almost of necessity, and not of convenience merely. And similarly, rights of consuming water, rights of fouling water, rights of fouling air, may under given circumstances be easements of necessity, although in the natural state of land they would be easements of convenience merely. And such being the wavering character of the distinction between easements of necessity and easements of convenience, it is useless to make that distinction, although a true one, the cardinal division in an enumeration of the varieties of easements, which are much more usefully referred to the natural rights of user, upon which they are restrictions; and upon that principle they may be enumerated generally as follows:—

I. With reference to *Air*. Every private owner having a *natural* right, recognised by the Common Law of England, to *PURITY OF AIR*, the *easement* relative to that natural right is the following one, namely:—

(1.) A right to pollute the air (*Flight v. Thomas*, 10 A. & E. 590) to an extent justified by the customary business of the locality (*Walter v. Selfe*, 4 De G. & Sm. 315), but not further (*St. Helen's Smelting Co. v. Tipping*, 11 H. L. C. 650); and it makes no difference whether the party complaining of the pollution comes to the nuisance or not (*Bliss v. Hall*, 4 Bing. N. C. 183); at any rate, where material injury, as distinguished from mere personal discomfort, is the result of it. *St. Helen's Smelting Co. v. Tipping*, *supra*).

Again, no private owner having a *natural* right recognised by the Common Law of England to the *FREE PASSAGE OF AIR*, the easements relative to the absence of such natural right are the following two, namely:—

(2.) A right to the free passage of air (*Trahern's Case*, Godb. 233); but such a right seems now to be discouraged by the law (*Webb v. Bird*, 10 C. B. (N.S.) 268; *Bryant v. Lefever*, 4 C. P. Div. 172).

(3.) A right to send noise through the air (*Roskell v. Whitworth*, 19 W. R. 804), *i.e.*, to vibrate the air, and structures within the circle of the vibration.

II. With reference to *Light*. No private owner having a *natural* right recognised by the Common Law of England to the *FREE PASSAGE OF LIGHT*, the *easement* relative to the absence of such natural right is the following one, namely:—

(4.) A right to the free passage of light (*Aldred's Case*, 6 Rep. 54), which right, if it arise in virtue of the Prescription Act, is an absolute and indefeasible right as well

EASEMENTS—continued.

for the present as for all possible future purposes (*Yates v. Jack*, L. R. 1 Ch. App. 295); but if it arise from express grant, the right is limited to the amount of light accustomed to pass at the time of the grant (*Yates v. Jack, supra*); and if it arise from implied grant, as where a person sells a house with windows overlooking land which he retains, the right is limited in like manner as upon an express grant. If, however, the easement is exceeded, that does not entitle the servient owner to obstruct the free passage of the accustomed light, although he is unable without doing so to obstruct the passage of the excess (*Tapling v. Jones*, 11 H. L. C. 290); and the dominant owner, in case the accustomed light is obstructed, may have either damages alone, in a few rare cases (*Heath v. Bucknall*, L. R. 8 Eq. 17); or an injunction and damages both (*Straight v. Burn*, L. R. 5 Ch. App. 166; *Aynsley v. Glover*, L. R. 18 Eq. 544; *N. P. P. Insurance Co. v. P. Assurance Co.*, 6 Ch. Div. 757).

III. With reference to *Water*. Every private owner, being a riparian owner, having certain *natural* rights recognised by the Common Law of England in respect of natural streams, whether constant or intermittent, of a known and definite course, and not being artificial or underground, that is to say, the three following *natural* rights, namely:—

- (a.) A right to the NATURAL FLOW of the water;
- (b.) A right to the NATURAL PURITY of the water; and
- (c.) A right to take the water for NATURAL USE, and whether for the entire or partial consumption of the water taken,—

The *easements* relative to those respective *natural* rights are the following three, namely:—

(5.) A right to divert the water (*Bealey v. Shaw*, 6 East, 209), including the right to a watercourse; and also a right to pen back the water (*Wright v. Howard*, 1 Sim. & S. 190); including the right to flood another's land in penning back the water.

(6.) A right to pollute the water (*Hall v. Lund*, 1 H. & C. 676), not exceeding the measure of pollution which the easement authorizes (*Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R. Ch. App. 349; *Crossley v. Lightowler*, L. R. 2 Ch. App. 476).

(7.) A right to take the water for extraordinary uses and purposes (*Earl of Sandwich v. Great Northern Ry. Co.*, 10 Ch. Div. 707).

IV. With reference to *Support*. Every private owner having certain *natural* rights

EASEMENTS—continued.

recognised by the Common Law of England in respect of the contiguous land, whether adjacent or subjacent, that is to say, the two following *natural* rights, namely:—

- (a.) A right to ADJACENT SUPPORT, and
- (b.) A right to SUBJACENT SUPPORT

sufficient while his land is in its natural state,—

The *easements* which are relative to these respective *natural* rights are the following three, namely:—

(8.) A right of support from underground water (*Popplewell v. Hodgkinson*, L. R. 4 Ex. 248);

(9.) A right of support for land built upon, or for buildings (*Humphries v. Brogden*, 12 Q. B. 749), or otherwise rendered more liable to subside (*Harris v. Ryding*, 5 M. & W. 71); and conversely

(10.) A right to cause a subsidence of land (*Chadwick v. Trower*, 6 Bing. N. C. 1).

V. With reference to *Ways*. Every private owner having an exclusive *natural* RIGHT OF WAY recognised by the Common Law of England over and throughout his private property, the *easement* relative to that *natural* right is,—

(11.) A private right of way in an adjoining private owner; and

The easement consisting of a private right of way may be either limited or unlimited in extent, as being either a foot-path, a bridle-path, a carriage way, a drift way, or any other way.

See title HIGHWAYS.

Easements being considered odious in law, because they are restrictions upon the free use of property in others, no other easements than those above enumerated have been established, the following attempts to create new easements having failed,—

(1.) A right of prospect (*Aldred's Case*, 9 Rep. 58; *Att.-Gen. v. Doughty*, 2 Ves. 453);

(2.) A right of view to a shop-window (*Smith v. Owen*, 35 L. J. (Ch.) 317);

(3.) A right of undisturbed privacy, (*Turner v. Spooner*, 30 L. J. (Ch.) 803; *Re Penny and the South Eastern Ry. Co.*, 7 E. & B. 660); and

(4.) A right to the free passage of wind to a windmill (*Webb v. Bird*, 10 C. B. (N.S.) 268); *Bryant v. Lofever*, 4 C. P. D. 172).

The apparent easement in these four cases, and in all such like cases, where any such exists, is in the nature of a licence only, particular or general, which is personal to the licensor and not binding on his successors in the *quasi* servient tenement.

See title LICENCE.

Easements must be proved either by the production of the instrument which creates

EASEMENTS—continued.

them, or (in the case of its loss), by prescription, whether at the Common Law, or (but in certain cases only) under statute. And those two modes of proof are also the modes of the acquisition of easements. The most usual instrument whereby an easement is created is a deed of *grant*, which again may either in so many words expressly create the easement (in which case the easement exists by reason of the express grant, and the production of such grant is the proof of its existence), or only impliedly create the easement (in which case the easement exists by reason of the implied grant, and the proof of the existence of such grant lies in the production of an express grant *involving as a necessary incident to it the implied grant of the particular easement*, and the withholding of which easement would therefore be in derogation of the express grant). Also, the instrument of the creation of the easement may be a will, an Act of Parliament, or a custom even; but such modes are not usefully distinguished from a grant by deed.

Again, the easement may arise by prescription, and that, either—

(1.) At the Common Law, that is to say, upon proof of uninterrupted user, for twenty years (*Mounsey v. Ismay*, 3 H. & C. 486), which is considered as implying a grant, in the absence of contrary evidence; or

(2.) Under the Prescription Act (2 & 3 Will. 4, c. 71), which, however, relates to only a limited number of easements, that is to say, the following:—

(a.) Any way or other easement *ejusdem generis* (*Webb v. Bird*, 12 C. B. (N.S.) 268; 13 C. B. (N.S.) 841);

(b.) Any watercourse;

(c.) The use of any water;

(d.) Access of light (*N. P. P. Insurance Co. v. P. Assurance Co.*, 6 Ch. Div. 757); and

(e.) Use of light.

The statute has provided that for the acquisition of any sort of way, or of any watercourse, or of the use of any water, there shall be actual enjoyment thereof without interruption for the full period of twenty years, and if proof of such enjoyment is produced, any adverse proof purporting to shew merely that the easement had its origin in respect of time on this side of the reign of Richard I., although beyond the period of twenty years, shall be excluded, but any adverse proof of a different effect is admissible, unless in cases where proof of the actual enjoyment of the easement without interruption for the full period of forty years is produced, in which latter class of cases the only adverse proof

EASEMENTS—continued.

admissible is that of some consent or agreement in writing (under hand and seal, or under hand only), expressly granting the right of enjoyment (s. 2); and for the acquisition of any access of light, or of any use of light, there shall be actual enjoyment thereof without interruption for the full period of twenty years, and if proof of such enjoyment is produced, the only adverse proof admissible is that of some consent or agreement in writing (under hand and seal, or under hand only), expressly granting the right of enjoyment (s. 3.)

By the decision in *Flight v. Thomas* (11 A. & E. 688; 8 Cl. & F. 231), taken in connection with the 4th section of the Prescription Act, the actual enjoyment for twenty years in the case of light is practically reduced to nineteen years; and the actual enjoyment for twenty years, or for forty years, in the case of any sort of way, or watercourse, or water, is also practically reduced to nineteen years or thirty-nine years, as the case may be. Moreover, the periods of twenty years and forty years respectively are to be reckoned backwards from suit or action bringing the easements into dispute (s. 4); and it has been determined that the actual enjoyment must therefore have continued to within one year at the very longest from the commencement of the suit or action (*Parker v. Mitchell*, 6 Ex. 825). Where actual user before and after a period of intermission is proved, the user is taken to have been uninterrupted or continuous (*Carr v. Foster*, 3 Q. B. 581). The 7th and 8th sections of the Act provide for the case of persons under the disabilities therein specified of disputing the easement during the period of its adverse acquisition. In all other respects the acquisition of an easement under the Prescription Act is regulated by the same principles as the acquisition of an easement by prescription at Common Law.

The varieties of adverse proof (when admissible) to the claim of an easement by prescription are the following:—

- (1.) Proof of the legal impossibility of the grant which is implied;
- (2.) Proof of the extinguishment of the easement by unity of seisin or otherwise;
- (3.) Proof of the improbability of the grant; and
- (4.) Proof of the inability of the servient owner to resist the user.

Thus, where the grant would have been void by reason of some Act of Parliament (*Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287), or where the servient owner was legally incapable to make the grant (*Winship v. Hudspeth*, 10 Exch. 5), or was

EASEMENTS—continued.

ignorant of the user (*Daniel v. North*, 11 East, 370), e.g., in the case of an alleged right to support from buildings (*Solomon v. Vintners' Co.* 12 Q. B. 739), there is no easement.

In case the owner of the dominant tenement is hindered in his enjoyment of the easement, in other words, in the case of a disturbance of his easement, he has the following remedies:—

(1.) An action on the case at Law or in Equity for the disturbance, bringing damages for the disturbances that are past, but not for such as have been committed since the commencement of the action, or are yet to come, it being a rule that the damages must not be for cause of action subsequent to the action in which they are recovered (2 Saund. 174, a, b). But an injunction against further disturbance may be obtained in the action (*Wood v. Sutcliffe*, 21 L. J. (Ch.) 255; *Soames v. Edge*, Johns. 669).

And every continuing trespass is a fresh trespass.

(2.) The remedy by abatement of the disturbance as a nuisance is also available to the person entitled to the easement (*Rex v. Roswell*, 2 Salk. 459); but the abatement generally evolves a trespass *quare clausum fregit* (*Arnold v. Jefferson*, Holt, 498); and is for other reasons also to be discouraged (*Hyne v. Graham*, 1 H. & C. 598).

For the maintenance of an action for the disturbance of an easement, as also for interference with a natural right, it is essential that actual damage should have been sustained (*Bonomi v. Backhouse*, 9 H. L. O. 503), unless where the disturbance amounts to or involves a trespass, in which latter case the law presumes the damage (*Smith v. Thackerah*, L. R. 1 C. P. 564). And where the disturbance may be regarded as an injury to the right itself, and the repetition of which injury would tend to destroy or prejudice the right, that tendency is a sufficient damage (*Harrop v. Hirst*, L. R. 4 Ex. 43). But a mere possibility of damage at some future period, unaccompanied with any present damage, is insufficient to sustain the action (*Jackson v. Newcastle (Duke)*, 33 L. J. (Ch.) 698).

The right of action sometimes varies according as the disturbance affects the dominant occupier only, or the dominant reversioner as well, it being sufficient in the case of the latter, that there should be a reasonable probability of damage to his reversion arising from the fact of the denial of the right of easement generally (*Metropolitan Industrial Dwellings Association v. Petoh*, 5 C. B. (N.S.) 504). For example,

EASEMENTS—continued.

an action for the pollution of air can in general only be maintained by the person in present occupation, and not by the reversioner (*Simpson v. Savage*, 1 C. B. (N.S.) 347), that injury being necessarily of a temporary nature. At the same time, if the injury is likely in any case to be of a permanent character, the reversioner may take proceedings for its suppression (*Wilson v. Townend*, 1 Dr. & Sm. 324), e.g., for the locking of a gate (*Kidgill v. Moor*, 9 C. B. 364).

A defendant to an action for disturbance may plead in justification that the plaintiff was exceeding the rightful enjoyment of his easement, and that he the defendant, merely obstructed the plaintiff's encroachment; and this plea is good, even although the defendant's obstruction of plaintiff's encroachment has obstructed also the plaintiff's lawful enjoyment (*Cawthwell v. Russell*, 26 L. J. (Ex.) 34), with the single exception of light, as to which the plea would be bad (*Tapling v. Jones*, 11 H. L. C. 290). And it seems that when an easement of light has been acquired under the Prescription Act, there can be no encroachment, inasmuch as the user is for all purposes, future as well as present (*Yates v. Jack*, L. R. 1 Ch. Ap. 295), although where the easement exists under an express grant the user is measured by the words of the grant.

Lastly, easements although once validly existing may have become extinguished or suspended. Thus, in the event of the dominant and servient tenement becoming united in one owner who is legally seized thereof, the easement as such is necessarily either extinguished or suspended, upon the maxim *nulli res sua servit* (*Sury v. Pigott*, Pop. 166). But in such event, if the easement is of the quality styled apparent and continuous, that is to say, if the existence of the easement is apparent to the eye, and those appearances continue after the unity of ownership, then it may be concluded from the cases of *Suffield v. Brown* (33 L. J. (Ch.) 349); *Crossley v. Lightowler* (L. R. 2 Ch. Ap. 486; and *Wheeldon v. Burrows*, 12 Ch. Div. 31), that if the once-dominant tenement is sold, the easement revives without any fresh creation by grant or otherwise, and is taken to have been suspended merely, but that if the once servient tenement is sold, the easement (unless, *sembla*, it be an easement of necessity) does not revive without some fresh creation by reservation or otherwise, and is taken to have been extinguished; and the like rule applies in the case of those rights or quasi-easements, being apparent and continuous, which the common owner has exercised over one portion of his land for the benefit

EASEMENTS—continued.

of the other portion of it, where the two portions, being respectively the *quasi* servient and *quasi*-dominant lands, was not prior to the unity of ownership, the properties of several owners.

Where an easement (like a natural right) is suspended merely, it revives (like a natural right) upon the removal of the cause of the suspension (*Bower v. Hill*, 2 Bing. (N.C.) 339); on the other hand, where an easement (unlike a natural right) is extinguished altogether, it does not revive merely upon the removal of the cause of the extinguishment, but requires in addition for its revival, or rather re-establishment, a re-grant thereof (*Bower v. Hill*, *supra*).

EASEMENTS-QUASI. Some rights very like easements have grown up and attached by customary enjoyment to the inhabitants of definitive districts, *e.g.*, the right of free-men and citizens of a town to have horse-races on some individual's land on a particular day or days of the year (*Mounsey v. Iremay*, 1 H. & C. 729; 3 H. & C. 486); the right of victuallers of a manor to erect booths on the waste during fair-days (*Tyson v. Smith*, 9 A. & E. 406); the right of the inhabitants of a village to dance or have other games on a particular close at certain seasons (*Abbot v. Weekly*, 1 Lev. 176; *Warrick v. Queen's College*, L. R. 10 Eq. 129). No such rights belong to the public at large (*Coventry (Earl) v. Willes*, 9 L. T. (N.S.) 384).

EAT INDE SINE DIE. When judgment is given for the defendant, and the cause is at an end, *he may go thence without a day, i.e.*, without any further adjournment and continuance of the cause; in effect, therefore, these words are a judgment that the king's writ commanding the defendant's attendance has now been fully satisfied, and that he is free to go.

See title **SINE DIE**.

ECCLESIA FUNGITUR VICE MINORIS. The church is like an infant, in that it can make its condition better but not worse (Co. Litt. 341); and the Crown is therefore its guardian (11 Co. Rep. 49).

ECCLESIASTICAL COMMISSIONERS. These are a body of men constituted under the stats. 6 & 7 Will. 4, c. 77, 3 & 4 Vict. c. 86, and 29 & 30 Vict. c. 18, for the general management and supervision of the estates of the Church, being either episcopal or capitular, and for the proper application of the revenues or produce thereof in support and extension of the Church.

ECCLESIASTICAL CORPORATION. May be either sole (*e.g.*, bishop) or aggregate

ECCLESIASTICAL CORPORATION — continued.

(*e.g.*, dean and chapter of cathedral). Ecclesiastical corporations aggregate are subject to the law regarding corporations generally (see title **CORPORATION**); but both they and ecclesiastical corporations sole are subject to many statutes regulating their administration of their respective church estates,—such statutes being some of them called enabling statutes, and others of them disabling statutes.

See titles **DISABLING STATUTES**; **ENABLING STATUTES**.

ECCLESIASTICAL COURTS: See titles **COURTS ECCLESIASTICAL**; **COURTS OF JUSTICE**.

ECCLESIASTICAL LAW. Is the law which relates to the ordering of public worship, the ordination of clergymen, and their conduct as well in their personal as in their professional capacities. This law does not extend to the freehold interests of ecclesiastics, or to matters of a personal character arising adversely to them,—their freehold rights and all matters affecting adversely their person or their person or reputation being within the exclusive jurisdiction of the Common Law and Equity tribunals. The exact definition between the limits of the ecclesiastical jurisdiction and the limits of the secular or Common Law jurisdiction was the subject of very acrimonious dispute in early times, but was practically settled by Henry II. in the Constitutions of Clarendon, 1164 A.D.

See titles **ADVOWSON**; **ARTICLES OF RELIGION**, **THIRTY-NINE**; **CLERGY**, **BENEFIT OF**; **CLERGYMEN**; **COURTS**, **ECCLESIASTICAL**; &c.

EDICT. Was the name descriptive of the law promulgated by certain magistrates (*e.g.*, praetors, aediles, &c.), and which held good during their period of office only. That portion of it which was re-enacted by their successors was called the *edictum tralatitium*, from *transfere*, to transfer or carry forward. In Hadrian's reign, the existing edict was fixed for continuous use without the need of yearly promulgation, and for that reason it was called the *edictum perpetuum*, or "continuous," receiving sometimes the additional name of *Salvianum* from Julius Salvius, its compiler. Latterly the emperor propounded further edicts (see title **CONSTITUTIONES**). An edict of the emperor is like a proclamation of the Queen.

See title **PROCLAMATION**, **ROYAL**.

EDUCATION: See title **SCHOOLS**.

EFFLUXION OF TIME. When this phrase is used in leases, conveyances, and other like deeds, or in agreements expressed

EFFLUXION OF TIME—*continued.*

in simple writing, it indicates the conclusion or *expiration* of an agreed term of years specified in the deed or writing, such conclusion or expiration arising in the *natural* course of events, in contradistinction to the *determination* of the term by the act of the parties or by some unexpected or unusual incident or other sudden event.

See title DETERMINATION.

EIGNÉ. This word is a corruption of the French word *ainé* or *ainé*, meaning eldest. The phrase is usually found in connection with bastard, and a *bastard eigné* is commonly used to describe a son born before the intermarriage of his parents, in contradistinction to a *mulier puina*, who is the second or other son born of the same parents subsequently to their intermarriage. By the laws of England, and in particular by a clause in the Statute of Merton (20 Hen. 3, c. 9), a *bastard eigné* remains a bastard even after the intermarriage of his parents, and as such is incapable of inheriting from or through either of his parents; and neither is he their, or either of their, next of kin. By the laws of some other countries (*e.g.*, of Scotland) he becomes legitimate upon the intermarriage of his parents; and even by the laws of England, he has, *semble*, a modified right of inheriting to his parents or either of them in this way, namely, that if he enters upon the lands of his parent upon the parent's death, and afterwards dies seised thereof, his issue succeeding him in the possession of the lands may hold and enjoy the same as against the *mulier puina* and his heirs.

EIRE, or EYRE. This word is a French corruption of the Latin word *iter*, and means a *way*. The word usually occurs only in the phrase *justices in eyre*, called also *justices itinerant*, a body of judges who were instituted for the first time in 1176 by an Act of the Parliament held at Northampton in that year. Under that Act the kingdom was divided into six circuits, and these newly created judges were commissioned to travel through the various counties comprised in the several circuits, and therein to administer justice upon writs so-called of *assize* (see title ASSIZE). It is from this early institution that the present justices of *assize* and *nisi prius* are historically derived.

See title COURTS OF JUSTICE.

EJECTIONE CUSTODIÆ. This phrase, which is the Latin equivalent for the French *ejectment de garde*, was the title of a writ which lay for a guardian when turned out of any land of his ward during the minority of the latter.

EJECTMENT. This is an action for the recovery of land. The action originated as far back as the reign of Edward III., and was then a species of personal action brought to recover damages only for the ouster. But towards the end of the 15th century the possession, it was decided, might be recovered by it. From that time until the C. L. P. Act, 1852, the action was encumbered to a very large extent with fictions, being in the form of *Doe d. Thomas v. Richard d. Roe*, the first-mentioned person, viz., Doe, being the nominal plaintiff only; the second-mentioned person, viz., Thomas, the real plaintiff, and who was commonly called the lessor of the plaintiff; the third-mentioned person, viz., Richard, being the tenant in possession; and the fourth-mentioned person, viz., Roe, being the imaginary ejector, and who was commonly called the casual ejector. The declaration was the first step in the action, and was framed in trespass and ejectment between *Doe v. Roe*; it was served upon the tenant in possession, who or his landlord thereupon obtained a "consent rule" of the Court to appear and defend the action, admitting the fictitious lease, entry, and ouster, and consenting to defend the action upon the strength of his *title* and nothing else. Thereafter the question came on to be tried upon its merits, and was in substance the following:—Whether the lessor of the plaintiff, on the day when he was alleged to have made the lease to John Doe, and from thence until the service of the declaration, was entitled to the property in question; if the verdict was in the affirmative, the plaintiff recovered; and if in the negative, then the defendant remained in possession, and also recovered his costs of the action from the lessor of the plaintiff.

Latterly, under the C. L. P. Act, 1852, ss. 168, 221, the mode of proceeding in ejectment was as follows:—

(1.) In cases other than between landlord and tenant,—A writ of summons was issued precisely as in a personal action, and was directed to the persons in possession, and to all persons entitled to defend the possession; and it described with a reasonable certainty the property claimed. The writ also stated the names of all persons in whom the title was alleged to be, and commanded the persons to whom it was directed to appear within sixteen days after service thereof to defend the possession, and gave notice that in default of appearance they would be turned out of possession. The writ remained in force for three months, and was to be served personally if possible. Immediately upon service the tenant in possession was forthwith to give notice thereof to his landlord,

EJECTMENT—continued.

who might by leave of the Court or a judge appear and defend. An appearance having been entered, an issue might be made up without any pleadings, by the plaintiff merely setting forth the writ, and stating the fact and date of appearance; and the sheriff was directed to summon a jury. The issue was then delivered by the plaintiff to the opposite party, and the action came on for trial in the usual way. The question for trial was, in substance, whether the statement in the writ of the plaintiff's title was true or false, and if true, then which of the plaintiffs, if more than one, was entitled, and whether to the whole or to what part; and then, according to the verdict, the plaintiff recovered or not. But in a proper case a special verdict might be found, and either party might tender a bill of exceptions. The damages for the interim detention of the property were in general recovered in an action of trespass for meane profits.

The plaintiff if successful then obtained a writ of execution, called a writ of *habere facias possessionem*, the writ being directed to the sheriff as in the usual case.

In case the judgment was afterwards reversed in error or on appeal, a writ of *restitution* must be awarded.

Under the present practice, the action of ejectment (now called an action for the recovery of land) is like any other action, and is commenced with a writ of summons indorsed with a claim to recover the land specified, and served on the tenant in possession or (in the case of vacant premises) posted up in a conspicuous place upon them; and of which writ the tenant immediately gives notice to his landlord, and the landlord by leave defends the action either as to the entire land claimed or as to such part thereof as he specifies in his memorandum of appearance to the writ or in a notice delivered by him to the plaintiff within four days after appearance. The modern action has the usual pleadings, and is in all other respects tried, and the verdict therein and judgment thereon obtained and enforced, as in an ordinary action, the writ *habere facias possessionem* being now called simply a *writ of possession*.

(2.) In cases between landlord and tenant.—Putting aside the provisions made by statute for the recovery of small tenements for causes sufficient to support an ejectment, the mode of ejectment between landlord and tenant is as follows:—

(a.) If there be a sufficient distress on the premises to answer the amount of rent due.—The proceeding in this case must be by the Common Law, and not under the C. L. P. Act, 1852, and

EJECTMENT—continued.

is as follows:—Before commencing the action, a demand must be made for the rent, and usually by the landlord in person, upon the land, on the last day limited for payment to save a forfeiture, and at sunset of that day. If the tenant fails to pay, then the proceedings in ejectment are to be taken as in an ejectment between strangers explained above.

(b.) If there be no sufficient distress on the premises to answer the amount of rent due, and one-half year's rent is due.—The proceeding in this case is under the C. L. P. Act, 1852, s. 210, and is as follows:—The landlord or his agent must make a search over the land to prove the insufficiency of the property thereon to answer the distress, and must furnish himself with proof thereof for the satisfaction of the Court. Thereafter the writ is the same as in the ordinary case of ejectment as between persons who are strangers to each other, as explained above. See *Smith's Action at Law*, 398–429.

EJUSDEM GENERIS CONSTRUCTION.

It is a rule of legal construction that general words following an enumeration of particulars are to have their generality limited by reference to the preceding particular enumeration, and to be construed as including only all other articles of the like nature and quality. See an example of this construction in *Elliott v. Bishop*, 10 Ex. Ch. 4, 96; 11 Ex. Ch. 113.

ELDER TITLE. A title older in point of existence coming simultaneously into operation with a title of younger origin, is called the elder title, and prevails.

See title **FIRMIOR OPERATIO LEGIS**.

ELECTION. Is the name of a head of Equity jurisprudence, which directs as follows:—Where, by one and the same instrument, property belonging to A. is given away to B. without the consent of A., and other property of the testator's or settlor's own is at the same time given to A., without any *express* condition that A. is to take the latter property only if he consents to give up his own property to B., then there is an *implied* condition to that effect: nevertheless if A. will keep his own property, he is only bound to give up to B. an equivalent for it out of the property of the testator or settlor which is given to himself, and he may thereafter

ELECTION—continued.

keep the difference and also his own property, *compensation* and not *forfeiture* being the rule in all cases of election.

The question of election is sometimes encumbered by part of the property given being the subject of a special power of appointment among children or other limited class of objects; but the rule in these cases, although somewhat more encumbered in its details, is in substance the same, viz.:—

(1.) When the intended appointees of the property are also the persons entitled in default, then in every such case:—

(a.) If the testator gives them some property of his own, and gives away either the whole or part of the appointment property to other persons who are not objects of the power at all, the intended appointees are put to their election (*Whistler v. Webster*, 2 Ves. Jun. 367); but

(b.) If the testator gives them no property of his own, under the like circumstances, they are not put to their election (*Bristolow v. Warde*, 2 Ves. Jun. 336).

(2.) Where the intended appointees are not also entitled in default, but some other person or persons are entitled in default of appointment, inasmuch as in this case, clearly, the donee of the power has the intended appointees, and (although to a less extent) the person or persons entitled in default, under his entire control, to give or not to give the property to them:—

(a.) The intended appointees cannot complain whatever the donee of the power should do, and must simply be thankful for what they get; but

(b.) The person or persons entitled in default have a right to say that, an improper appointment being no appointment at all, they are entitled to all that part of the property which is improperly appointed; and if the appointor wants to shut them up from complaining of and defeating his improper appointment, he must give them some property of his own, "as a sop to pacify them;" for otherwise they will not be put to their election. But if he does give them some property of his own, they will be put to their election, according to the general rule.

ELECTION COMMITTEE. This was a committee of the House of Commons appointed to inquire into the validity of the

ELECTION COMMITTEE—continued.

election of its own members. Its mode of proceeding was regulated by the Act 4 & 5 Vict. c. 58, which prescribed a remedy by petition in favour of the party aggrieved, whether he were a candidate for election or an elector, and to which petition the member actually returned was made respondent. The petition was, in the first instance, delivered by either party to the general elections committee appointed by the House at the commencement of the session, and was then referred by that committee to the Select Committee, which consisted of a chairman and six other members. This select committee, being sworn duly to try the matter, were empowered for that purpose to examine witnesses on oath; and by the majority of their voices they determined the validity or invalidity of the past return, together with consequential findings. These election committees have been superseded by the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), which has provided in effect as follows:—

A petition complaining of an undue return is to be presented in the Court of Common Pleas by any one who either voted or had a right to vote at the election, or by the defeated candidate; and such election petition (as it is called) is to be tried before a puisne judge of the superior Courts, three such judges (to be called the election judges), being chosen for this purpose from among the judges of those Courts respectively. The trial is to take place, in the case of a borough election, in the borough, and in the case of a county election, in the county, excepting in exceptional cases; and at the conclusion of the trial the judge is to declare the validity or invalidity of the return, and who is duly elected, or whether the election is wholly void, and is to certify his determination to the Speaker of the House of Commons, and the determination so certified is final to all intents and purposes.

ELECTION JUDGES: See title ELECTION COMMITTEE.

ELECTIONS, COMMONS' RIGHTS IN.

At the election for Bucks, in 1604, Sir Francis Goodwin was chosen in preference to Sir John Fortescue. Now Goodwin was an outlaw, and the King, by proclamation of the previous year, had forbidden the return of such persons as members; accordingly, the return made by the sheriff into Chancery was sent back to the sheriff, and a second election was directed to be made, upon which latter election, Sir John Fortescue was returned.

With this interference in election matters on the part of the King, the Com-

ELECTIONS, COMMONS' RIGHTS IN— —continued.

mons were greatly annoyed, and they resolved that the election of Goodwin was lawful. The Lords thereupon requested the Commons to explain the matter; but the Commons answered, that it was not consistent with the dignity or the practice of their House to account for their proceedings. The King thereupon directed a conference between the Lords and Commons upon the matter, and afterwards a second conference between the Commons and the judges; but the Commons refused to obey either direction, whereupon the King commanded the same as an absolute monarch. Upon this, the Commons yielded, and the conference between them and the judges came off and ended in both members being set aside and a writ issued for a new election, the King directing that all the proceedings in the matter should be erased from the journals.

Subsequently, in the year following (1604-5), the Commons delivered to the King a declaration of their rights, and which declaration (entitled "A Form of Apology and Satisfaction") was to the following effect:—

"(1.) That the privileges and liberties of the Commons are their right and their inheritance no less than their very lands and goods, and that the same privileges and liberties are not given up by the customary request made by the Commons at the commencement of parliaments, that they may enjoy their privileges and liberties as in times past, for that such request is a mere act of courtesy on their part;

"(2.) That their House is a Court of Record, and that there is no Court in the kingdom which can compare with the High Court of Parliament;

"(3.) That the House of Commons is the sole proper judge of election matters; and

"(4.) That the power of the High Court of Parliament being above the Law is not founded on the Common Law, but that Court has rights and privileges peculiar to itself."

These rights of the Commons in election matters were asserted with great vehemence and pertinacity in the case of *Ashby v. White* in the years 1700-1703. That case was an action by the plaintiff (a qualified elector) against the defendant (the returning officer for the borough of Aylesbury), the ground of complaint being the defendant's refusal to accept the plaintiff's vote for a certain candidate, who was, however, elected member, so that there was no damage, other than such damage as was implied by law from the denial of plaintiff's right. The plaintiff eventually recovered judgment in the House of Lords, and that

ELECTIONS, COMMONS' RIGHTS IN— continued.

was the occasion of the Commons passing a succession of resolutions re-affirming in stronger terms their own exclusive jurisdiction in election matters and in other matters incident thereto.

See title ELECTION COMMITTEE.

ELECTIONS, CROWN'S INFLUENCE IN. By the stat. 28 Edw. 1, st. 3, c. 8, the power to elect the sheriffs had been given to the people, but that power was transferred to the king by the stat. 9 Edw. 2, st. 2, and the election of sheriffs was rendered annual and the old sheriffs made re-eligible by the stat. 14 Edw. 3, st. 1, c. 7, Now—

(1.) The first mode in which the Crown endeavoured to influence elections was furnished by this attitude of the sheriffs to the Crown; for the sheriff being the nominee of the Crown and being anxious to retain a lucrative and influential position, it was a matter of policy on his part to return members who should support the Crown, and to omit altogether (as he was well able in those times to do), the return of members from boroughs not well disposed towards the Crown.

In later times, other modes were adopted by the Crown to influence elections, namely, the following,—

(2.) The creation of new boroughs. *e.g.*, Edward VI. created 22, Mary 14; Elizabeth over 50, and James I. about as many;

(3.) The dispatch of circular letters to the nobility and influential gentry in the provinces. *e.g.*, in the reigns notably of Edward VI. and James II.;

(4.) The securing a favourable party in the Commons, *e.g.*, by means of the *undertakers* of James I., being five in number (Neville, Yelverton, Hyde, Crow, and Digges); who *undertook* to keep up a favourable majority for the king;

(5.) The re-modelling or purging of corporations, *e.g.*, by James II., by means of his Regulators of Corporations; and

(6.) The distribution of places and pensions by the sovereign and his ministers,—a mode of influence which was originated and carried to excess in the reign of George III., and which has, more or less, continued almost until the present day.

ELECTIONS, MUNICIPAL. Under the stat. 5 & 6 Will. 4, c. 76, as amended by the stat. 32 & 33 Vict. c. 55, one year's occupation entitles a person to exercise the municipal franchise, and that whether male or female, assuming that he or she is not otherwise disqualified. And in the case of the compound householder (see title COMPOUND HOUSEHOLDER), the franchise extends to each separate one of the joint

ELECTIONS, MUNICIPAL—continued.

occupiers. Personation at these elections is checked by 35 & 36 Vict. c. 33, and corrupt practices, the giving of refreshments to voters included (*Hargreaves v. Simpson*, 4 Q. B. Div. 403) are severely punished under 35 & 36 Vict. c. 60, and under the last-mentioned statute the election may be questioned on petition. The voting is by ballot under 35 & 36 Vict. c. 33 (Ballot Act, 1872), and the poll at a contested election is conducted in the same way (*mutatis mutandis*) as in the case of a contested parliamentary election.

ELECTIONS, PARLIAMENTARY. The writ for a parliamentary election issues upon a general election out of Chancery (Petty Bag Office) by advice of the Privy Council; and upon a vacancy (by death or otherwise), the writ issues from the office of the Clerk of the Crown in Chancery under the Speaker's warrant, and (if Parliament is in session) by order of the House itself. The writ is directed to the returning officer (usually the sheriff, but occasionally the mayor), who thereupon proceeds to act upon it according to its tenor, and gives all such notices and makes all such arrangements as are necessary for holding the election. Under the Ballot Act, 1872 (35 & 36 Vict. c. 33), the candidate for election is nominated in writing, and the nomination is subscribed by two registered electors as his proposer and seconder, and by eight other registered electors as persons assenting to the nomination; such nomination is delivered to the returning officer. If at the time fixed for the election, or one hour thereafter, there are no more candidates nominated than vacancies to fill up, the returning officer at once declares the nominated candidates elected; but if there are more candidates than vacancies, the returning officer adjourns the election, and takes a poll. The votes at the poll are given by ballot, and the result is ascertained by counting the votes; in case of an equality, the returning officer has a casting vote. Personation at these elections is made a felony punishable with imprisonment and hard labour. (See for the latest practice in these matters, *Bushby's Election Manual*, by Hardcastle, 1874.)

ELECTORAL FRANCHISE. This phrase denotes most commonly the qualifications of the persons entitled to elect members of parliament, whether in counties or in boroughs; although it may also apply to the qualifications (now entirely repealed) of persons entitled to become candidates for election. A brief history of the electoral franchise at different periods is as follows:

I. In the case of Counties: It appears

ELECTORAL FRANCHISE—continued.

that originally all the freeholders of the county, whether resident or not, elected the members for the county (7 Hen. 4, c. 15); that afterwards by the stat. 1 Hen. 5, c. 1, residence was made a necessary qualification; that the number of electors occasioning turbulence, the forty shillings' freehold qualification was imposed by 8 Hen. 6, c. 7; that the stat. 14 Geo. 3, c. 58, dispensed with the qualification of residence. More recently, by the Reform Act, 1832, the electors for counties were increased by the addition of copyholders and leaseholders for terms of years and of tenants at will, paying a rent of £50 a year.

II. In the case of Boroughs: It appears that originally the right of election in these was very various, the chief varieties of qualification being the following:—

(1) All inhabitant householders resident within the borough;

(2.) All inhabitants paying "scot and lot";

(3.) All "potwallers," i.e., persons (whether householders or lodgers) furnishing their own diet;

(4.) All persons holding burgage lands; and

(5.) All persons enjoying corporate rights. And in some boroughs two or more of these qualifications might be combined.

After many fruitless endeavours, extending through the reigns of George III. and George IV., the Reform Act, 1832, regulated the representation as follows: A £10 household franchise was uniformly established in all boroughs, saving only the rights of corporate towns. Ultimately, by the Act 30 & 31 Vict. c. 102 (the Representation of the People Act, 1867), which extends as well to counties as to boroughs, the rights of election have been regulated as follows:—

I. In the case of Counties: Every person duly registered as a voter, and who is of full age and capacity, and who is the owner of lands or tenements of freehold, copyhold, or any other tenure whatever, for his own life or *pur autre vie*, or for any larger estate of the clear yearly value of not less than £5, or who is entitled either as a lessee or assignee to the unexpired residue of a term of years which was originally for a period of not less than sixty years, determinable or not on a life or lives, of the like clear yearly value (s. 5); or who has occupied for twelve months lands or tenements within the county of the rateable value of £10, and has been rated for the same for the relief of the poor, and has paid such rate, (s. 6).

II. In the case of Boroughs: Every person duly registered as a voter, and who is of full age and capacity, and who has

ELECTORAL FRANCHISE—*continued.*

for twelve months preceding been an inhabitant occupier, whether as owner or tenant, of any dwelling-house within the borough, and who has been rated for the same for the relief of the poor, and has paid such rates; or who as a lodger has occupied in the borough separately and as sole tenant for twelve months preceding the same lodgings in a house of the clear yearly value of £10 at the least, and has also resided for that period in such lodgings (s. 5).

See title REPRESENTATION IN PARLIAMENT.

ELEEMOSYNARY CORPORATION. Is a Charity.

See title CHARITIES.

ELEGIT. This is a writ of execution, and is so called because the plaintiff *has chosen* this particular writ in preference to others. The writ was first given by the statute of Westminster the Second (13 Edw. 1), c. 18, and has received a more extensive operation from the statute 1 & 2 Vict. c. 110. The writ is available for the recovery of either a debt or damages due upon a judgment or upon the forfeiture of a recognizance taken in the King's Court. By the Common Law (apart from statute), a judgment creditor could come upon the goods and chattels and the presently accruing profits of the lands and hereditaments of his debtor (the writ of execution for that purpose being either a *fi. fa.* or a *levari facias*), but he could not come upon the lands or hereditaments themselves so as to have the possession of them; by the statutes before mentioned, he has been enabled, by means of the writ of *elegit*, to appraise (instead of selling) the goods and chattels of his debtor and to obtain a delivery of the same to himself at such appraisement in part satisfaction of his judgment debt; and in case his judgment is not fully satisfied thereby, then the moiety (under 13 Edw. 1, c. 18) or the entirety (under 1 & 2 Vict. c. 110) of the lands themselves may be taken possession of under the *elegit*. During such time as the judgment creditor so holds the lands under his *elegit*, he is called a *tenant by elegit*, and his estate in the lands is a *tenancy by elegit*.

See title EXECUTION, WRIT OF.

ELEMENTARY SCHOOLS: See title SCHOOLS.

ELISORS. If the sheriff who returns the jury in an action is himself an interested party in the action, upon his array being quashed, the jury is to be summoned by the coroner; and if the coroner's array is also challenged and quashed, then the jury is to be summoned by two clerks of

ELISORS—*continued.*

the Court, who for that matter are called *elisors*, and to whose array no challenge is allowed. The word *elisors* is by many supposed to mean *electors*, from the French *élire*, to elect.

ELOIGNMENT. When a defendant has recovered judgment in an action of replevin, he obtains a writ of execution *de retorno habendo*, for the return of the things distrained; and in case the sheriff in executing this writ finds that the goods have been conveyed to places unknown to him, so that he cannot execute the writ, he makes a return to the writ, that the goods are eloigned, i.e., taken to a distance out of his jurisdiction or to some place unknown to him. This return of the sheriff is called a return of *eloignment* or *elongata*. The defendant is thereupon entitled to sue out a writ of *capias in withernam*. Failing satisfaction by that writ, the defendant may then sue out a *scire facias* against the plaintiff's pledges, to shew cause why the price of the eloigned distress should not be made good out of the lands and goods of the pledges; and if no cause be shewn, then the plaintiff has execution against the lands and goods of the pledges; and in case the registrar of the county court who granted the replevin has not taken pledges, the defendant has an action on the case against him for his omission, and the damages arising therefrom.

EMANCIPATIO: See title MANUMISSION.

EMANCIPATION. In French Law, a father or mother (being a widow) may by a simple declaration emancipate a child at the age of fifteen years; and the marriage of a child, at whatever age, operates an emancipation. An orphan of the age of eighteen years may be emancipated by a decision of the *conseil de famille*. The effects of emancipation are to render the child competent to act generally on his own account in all matters of a purely administrative character; but he remains subject to all former disabilities in respect of the alienation of capital, of real estate (*immeubles*), of loan transactions, and the like. If a trader his capacity is unlimited. Code Nap. 1, 10, 3.

EMBARGO. Is the hindering or detention by any government of ships of commerce in its ports. If the embargo is laid upon ships belonging to citizens of the state imposing it, it is called a *civil embargo*, an example of which occurred in 1807 in the conduct of the United States; on the other hand if (as more commonly happens) the embargo is laid upon ships belonging to the enemy, it is called a *hostile embargo*. The effect of this latter

EMBARGO—continued.

embargo is that the vessels detained are restored to the rightful owners if no war follows, but are forfeited to the embargoing government if war does follow, the declaration of war being held to relate back to the original seizure and detention. See *Wheaton*, pp. 372-373.

EMBARRASSING PLEADING: See title PLEADING.

EMBEZZLEMENT. May be roughly defined as stealing, by clerks, servants, or agents. It is not larceny,—that offence involving a taking without the will of the owner, which a clerk, servant, or agent who is entrusted to take cannot be said to do. But the offender *intercepts* and misapplies money or such like things; and this constitutes the offence of embezzlement under the stat. 24 & 25 Vict. c. 96, ss. 68-72. The offence is a felony, and is punishable precisely as larceny is. In case a larceny is proved upon an indictment for embezzlement, the defendant may be convicted of the former offence, and *vice versa*. Any number of distinct embezzlements not exceeding three, committed within a period of six months, may be joined in the same indictment.

See title LARCENY.

EMBLEMENTS. These are the green crops, in other words, the crop which is upon the ground and unreaped when the tenant goes away, his lease having determined; and the right to emblements is the right of the tenant in certain cases to take away these crops when ripe, and for that purpose to come upon the land, and do all other necessary things thereon. The instances in which the right to emblements exist are the following:—

- (1.) A tenant for life sowing the lands and dying before harvest, his executors will have the right;
- (2.) An under-tenant, whose tenancy is suddenly and without his own act determined before harvest, *e.g.*, by his landlord's estate determining (whether by the death or re-marriage of the latter), has the right (*Kingsbury v. Collins*, 4 Bing. 207);
- (3.) A tenant at will, who is ousted by his landlord for no cause of forfeiture (Co. Litt. 66 a); or who or whose landlord suddenly dies (Co. Litt. 55 b);
- (4.) A tenant by the curtesy (2 Bl. 122) or in dower (20 Hen. 3, c. 2),—upon their deaths; and
- (5.) A tenant *pur autre vie* (Co. Litt. 55 b) and a parson (28 Hen. 8, c. 11), upon the determination of

EMBLEMENTS—continued.

their estates otherwise than by their own act or default.

But the following persons have no right to emblements, notwithstanding the sudden determination of their tenancy:—

- (1.) A tenant for life who determines the tenancy by his or her own act, *e.g.*, a widow who re-marries, being only entitled during her widowhood;
- (2.) A tenant at will or for years who commits a forfeiture or otherwise wilfully determines his own tenancy;
- (3.) A tenant at sufferance (7 M. & W. 235);
- (4.) Tenants at a rack rent since 1851, in virtue of the 14 & 15 Vict. c. 25, s. 1, whose tenancy, but for that act, would have suddenly determined by the death or cesser of the estate of their landlord, these tenants now holding on until the expiration of the then current year of their tenancy, and apportioning their rent between the executors of the deceased landlord and the estate of the succeeding landlord (see title APPORTIONMENT OF RENT);
- (5.) Mortgagors, although to some extent they are tenants at will;
- (6.) A tenant in dower becoming unchaste;
- (7.) A parson who resigns his living. (*Bulwer v. Bulwer*, 2 Barn. & Ald. 470).

See title AWAY-GOING CROP.

EMBRACERY. This offence consists in the attempt to influence a jury corruptly to one side or the other, by promises, persuasions, entreaties, entertainments, douceurs, and the like. The person guilty of it is called an *embracer*, and is punishable under 19 Hen. 7, c. 13; and see stat. 6 Geo. 4, c. 50.

EMINENT DOMAIN. Is the ownership or *dominium* (domain) of an independent sovereign over the territories of his sovereignty, by virtue of which no other sovereign can exercise any jurisdiction therein. The eminent domain is to be distinguished from the *paramount* domain, which latter term is only applicable to the sovereign as against the so-called ownerships of his own subjects.

See titles FEUDAL SYSTEM; ESTATE; OWNERSHIP.

EMPHYTEUSIS. Is a term of Roman Law, and which finds a near equivalent in the phrase *fee farm* of English Law, being the letting of lands or houses to a lessee

EMPHYTEUSIS—*continued.*

for ever, subject to the payment of a perpetual rent, usually of small amount. The interest of the holder (who is called the *emphyteuticarius*) is assignable, *i.e.*, alienable; and the landlord may not eject him unless for non-payment of the rent agreed. In case the entire subject-matter of the lease is destroyed, the loss falls upon the landlord; but a particular loss falls upon the tenant.

See titles CONDOMINIA; FEE FARM.

EMPLOYERS AND EMPLOYÉES: See titles MASTER AND SERVANT; SERVICE, CONTRACTS OF.

EMPTIO BONORUM. In Roman Law was the assignment of the estate and effects of an insolvent debtor, whether during his life or after his death, to a trustee for his creditors. Justinian deprived it of all its cumbrous formalities, but retained its effect, which is simply or very nearly that of an assignment upon bankruptcy in English Law.

EMPTIO VENDITIO. Was the contract of sale in Roman Law. In some respects it agrees with, and in other respects it differs from, sale in English Law.

See title SALE.

ENABLING STATUTES. Are certain statutes relating to the alienation of church lands by ecclesiastical corporations sole and (in a lesser measure) by ecclesiastical corporations aggregate. They are 32 Hen. 8, c. 28; 5 Geo. 3, c. 17; 5 & 6 Vict. cc. 27, 108; and 21 & 22 Vict. c. 57. Leases are by these statutes (speaking roughly) enabled to be made not exceeding twenty-one years or three lives; but with the various consents in the Acts specified and subject to the conditions therein prescribed, building leases not exceeding ninety-nine years and mining leases not exceeding sixty years may be granted.

See title DISABLING STATUTES.

ENCLOSURE: See title INCLOSURE.

ENCROACHMENT: See titles APPROVE-MENT; COMMON, RIGHT OF.

ENDOWED CHAPELS: See title CHAPELS.

ENDOWED SCHOOLS: See title SCHOOLS.

ENDOWMENT. This term is commonly applied to any provision for the officiating minister of a church, the provision usually consisting in the setting apart of a portion of lands for his maintenance. Thus, in ancient times, the lord of a manor, when he built a church on his demesne lands, usually endowed it with a piece of land called the *glebe* (see title ADVOWSONS). But at the present day, many endowments exist and for many very diverse objects, and may

ENDOWMENT—*continued.*

consist either in land or in money or consols simply, which private individuals have given to trustees in trust for the charity (see title CHARITIES). Endowments of charities are under the regulation of the Charity Commissioners and the Court of Chancery; and church endowments are under the Ecclesiastical Commissioners.

ENEMY SHIPS, ENEMY GOODS: See title VISIT AND SEARCH.

ENFEOFF. This means to vest in another by means of a *feoffment* the legal estate in lands.

See title FEOFFMENT.

ENFRANCHISEMENT. This term is usually applied to copyhold lands, and as so applied denotes the conversion of the copyholds into freeholds. The mode of enfranchisement is chiefly regulated at the present day by the stat. 4 & 5 Vict. c. 35, and the Copyhold Acts, 1852 and 1858, under which Acts great facilities are afforded for the commutation of the lord's customary rights; moreover, enfranchisement is rendered compulsory at the wish either of the lord or of the copyhold tenant, with this difference in the two cases, namely, that if the compulsory enfranchisement is made at the wish of the tenant, the commutation of the lord's rights consists in a gross sum of money, either paid at the time of the completion of the enfranchisement, or secured by a mortgage on the lands; whereas, when the compulsory enfranchisement is made at the wish of the lord, the commutation of his rights consists in an annual rent-charge issuing out of the lands enfranchised. When both the lord and the tenant are competent in themselves to effect an enfranchisement,—*e.g.*, each being entitled for a fee simple estate in his own lands,—and they agree to enfranchise, they may do so without reference to the statutes, and upon such terms as they please. The effect of enfranchisement is, to discharge the lands of all customary incidents, *e.g.*, the custom of descent to the customary heir, and to annex to them all the incidents of freehold lands; but there is this distinction to be observed that upon any enfranchisement at Common Law the mines and minerals, if intended to remain the lord's property, must be expressly excepted; while upon an enfranchisement under the statutes, no such express exception is required, but the exception is implied.

ENGLISHRY, LAW OF. A law enacted by William the Conqueror to repress the increasing practice of assassination of Normans by discontented and turbulent English. Under the law, the hundred in

ENGLISHRY, LAW OF—*continued.*

which the assassinated person was found was made liable to a heavy amercement; and every assassinated person was to be presumed to be a Norman, unless proofs of his "Englishry" were made by his four nearest relatives. *Taswell - Langmead*, 67-68.

ENGRAVINGS, COPYRIGHT IN. The first statute which gave copyright in engravings was 8 Geo. 2, c. 13, and the duration was fixed at fourteen years, but that Act extended only to engravers who were also designers. The mere engraver was protected by the later stat. 7 Geo. 3, c. 38, and the term was fixed at twenty-eight years. These two Acts imposed penalties and gave only a *qui tam* action; but under the stat. 17 Geo. 3, c. 57, the proprietor was enabled to bring an action for damages. This copyright need not be registered as a condition precedent to bringing the action; it is enough, if the date of publication and the name of the publisher are contained in the engraving (*Harrison v. Hogg*, 2 Ves. 323). These three Acts were extended to Ireland by 6 & 7 Will. 4, c. 59. Under the stat. 15 & 16 Vict. c. 12, s. 14, lithographing of engravings is a piracy unless authorized; and this statute would extend to photographs (*Gambart v. Ball*, 14 C. B. (N.S.) 306).

See title COPYRIGHT.

ENLARGE. This term is commonly used in connection with *rules* calling upon either party to an action or suit to do a certain thing by a specified day; the judges in such a case will, on sufficient grounds being shewn for so doing, enlarge the time originally specified for doing the act, in which case the rule is said to be *enlarged*, meaning that the time specified in it has been enlarged, i.e., extended. Similarly, an arbitrator often enlarges the time for making his award; and the Court of Chancery may, and often does, enlarge the time for taking some step in an action, where the Court is satisfied upon affidavit that there is good reason for so doing.

See title EXTENSION OF TIME.

ENQUIRY, WRIT OF: See title INQUIRY, WRIT OF.

ENROLMENT: See title ENROLMENT.

ENTAIL: See title ESTATE-TAIL.

ENTERING APPEARANCE: See title APPEARANCE TO WRIT.

ENTERING JUDGMENTS. The formal entry of the judgment on the rolls of the Court, which is necessary before bringing an appeal or an action of debt on the judgment. Under the C. L. P. Act, 1852,

ENTERING JUDGMENTS—*continued.*

s. 206, and r. 70, H. T. 1853, it was not necessary, before issuing execution, to enter the proceedings on any roll, but an *incipitur* thereof might be made upon paper, shortly describing the nature of the judgment, and judgment might thereupon be signed, costs taxed, and execution issued; but it was provided that the proceedings might be entered on the roll as theretofore, whenever the same might become necessary for the purpose of evidence, or of bringing error, or the like. But under the present practice, it seems that as a general rule, only to be dispensed with by special leave of the Court (Order XLII., 15), before execution may now issue the judgment or order must be entered, because (Order XLII., 9) no execution is to issue without production of the judgment or an office copy thereof *showing the date of entry*. The judgment as entered is usually dated as of the day on which it is pronounced (Order XLI., 2). The entry is usually in the London office; and if the action is one proceeding in the District Registry an office-copy of the judgment is transmitted to the Registry. But all orders made by the District Registrar himself and all judgments in the District Registry which are signed by consent or for default of appearance to writ or for default of pleading are entered in the District Registry (Order xxxv., 2). This entry of the judgment may, it seems, be made after any lapse of time (*Barrow v. Croft*, 4 B. & C. 388).

ENTICK v. CARRINGTON. A celebrated decision of Lord Camden's in 1765, whereby general search warrants were declared illegal.

See title SEARCH WARRANTS.

ENTIRETY. A tenancy by entirety or (in the case of husband and wife) *entireties*, is a tenancy in which the entire or sole possession is in one person, as distinguished from a joint or several possession by two or more persons; in other words, tenants by entireties are seised *per tout*, and not also *per my*, whereas joint tenants are seised *et per my et per tout*. Consequently, upon the death of either of the tenants by entireties, the other takes the whole under the old original grant, and not (as is the case in joint tenancy) by the new or independent title of survivorship. The effects of such a tenancy are, that neither tenant can convey the whole of his estate without the other, and neither can sever without the other; and this curious result follows from the unity of the two persons of husband and wife, that a gift to them and a third person of lands or of goods in words which purport to make the three parties joint tenants, or even tenants

ENTIRETY—*continued.*

in common, carries one moiety or equal half part only to the husband and wife, and leaves the other moiety to the third person (*Atcheson v. Atcheson*, 11 Beav. 485; *In re Wylde's Estate*, 2 De G. M. & G. 724).

ENTRY. The actual taking possession of lands or tenements by entering upon the same. This is a remedy which the law affords to an injured party ousted of his lands by another person who has taken possession thereof without right. This remedy (which must in all cases be pursued peaceably) takes place in three only out of the five species of ouster, viz., abatement, intrusion, and disseisin; for as in these three cases, the original entry of the wrongdoer is unlawful, so the wrong may be remedied by the mere entry of the former possessor. But it is otherwise upon a *discontinuance*, or *deforcement*, for in these latter two cases, the former possessor cannot remedy the wrong by entry, but must do so by action, inasmuch as the original entry being in these cases lawful, and therefore conferring an apparent right of possession, the law will not suffer such apparent right to be overthrown by the mere act or entry of the claimant. And by the Act 3 & 4 Will. 4, c. 27, s. 10, no person shall be deemed to have been in possession of any land within the meaning of that Act, merely by reason of his having made an entry thereon; and by the same Act, s. 11, no continual or other claim upon or near any land shall preserve any right of making an entry.

ENTRY, WRIT OF. A writ anciently made use of in a possessory action and which was directed to the sheriff, requiring him to command the tenant of the land that he render the same to the demandant, because that the tenant had not entry into the land in question, but by or after a disseisin, intrusion, or the like, made within the time, limited by law for conferring title by adverse possession; or that in case of his refusal so to render the land, he should appear in Court to shew the reason of his refusal. It was usual to specify in the writ the *degree* or *degrees* within which the same was brought, in this manner; (1.) If the writ was brought against the party himself who did the wrong, then it only charged the tenant himself with the injury,—*non habuit ingressum nisi per intrusionem quam ipse fecit.* (2.) If the writ was brought against an alienee of the wrongdoer, or against the heir of the wrongdoer, then it was said to be in the first degree, and charged the tenant in this manner: that he the tenant had not entry but by, *i.e.*, *through*, *per*, the

ENTRY, WRIT OF—*continued.*

original wrongdoer who alienated the land or from whom it descended to him,—*non habuit ingressum nisi PER Gulielmum, qui se in illud intrusit, et illud tenenti dimisit.* (3.) If the writ was brought against a tenant holding under a second alienation or descent, then it was said to be in the second degree, and charged the tenant in this manner: that he the tenant had not entry but by, *i.e.*, *through*, *per*, a prior alienee, *to whom, cui*, the original wrongdoer demised the same,—*non habuit ingressum nisi PER Ricardum CUI Gulielmus illud dimisit, qui se in illud intrusit.* If the writ was brought against a tenant holding under more than two alienations or descents, *i.e.*, after two degrees were past, it was framed upon the Statute of Marlbridge (52 Hen. 3), c. 30, which first gave the writ in this case; and as that statute provided that when the number of alienations or descents exceeded the usual degrees, *i.e.*, two degrees, the writs should not mention the degrees at all—the writ was called a writ of entry *sur disseisin* in the *post*, and charged the tenant in this manner: that he the tenant had not entry unless *after, post*, or subsequent to, the ouster or injury done by the original wrongdoer,—*non habuit ingressum nisi POST intrusionem quam Gulielmus in illud fecit.*

By the Act 3 & 4 Will. 4, c. 27, s. 36, and the C. L. P. Act, 1860, s. 26, all real actions have been abolished; and under the present procedure, all actions (including ejectment) are actions on the case simply.

See titles EJECTMENT; ENTRY.

ENTRY AD COMMUNEM LEGEM.

This was a writ of entry which lay for a reversioner after the alienation and death of the particular tenant for life, against him who was in possession of the land.

ENTRY AD TERMINUM QUI PRÆTERIIT.

This was a writ of entry which lay for a reversioner when the possession was withheld from him by the lessee or a stranger, after the determination of a lease for years.

ENTRY IN CASU PROVISO. This was a writ of entry provided by the Statute of Gloucester (6 Edw. 1), c. 7; it lay for a reversioner after the alienation by tenant in dower or tenant for life, and during the life of such tenant.

ENTRY IN CONSIMILI CASU: See title CASU CONSIMILI.

ENTRY OF JUDGMENT OR ORDER: See title JUDGMENT, ENTRY OF.

ENTRY ON THE ROLL. In former times, the parties to an action personally or by their counsel used to appear in open Court and make their mutual statements *virâ voce*, instead of as at the present day delivering their mutual pleadings, until they arrived at the issue or precise point in dispute between them. During the progress of this oral statement, a minute of the various proceedings was made on parchment by an officer of the Court appointed for that purpose; the parchment then became the record, in other words, the official history of the suit. Long after the practice of oral pleading had fallen into disuse, it continued necessary to enter the proceedings in like manner upon the parchment roll, and this was called *entry on the roll*, or making up the *issue roll*.

But by a rule of H. T. 4 Will. 4, the practice of making up the *issue roll* was abolished; and it was only necessary to make up the issue in the form prescribed for that purpose by a rule of H. T., 1853, and to deliver same to the Court and to the opposite party. The issue which was delivered to the Court was called the *nisi prius record*; and that was regarded as the official history of the suit, in like manner as the *issue roll* formerly was. Under the present practice, the *issue roll* or *nisi prius record* consists of the papers delivered to the Court, to facilitate the trial of the action,—these papers consisting of the pleadings simply, with the notice of trial.

ENTRY FOR TRIAL: See title TRIAL, ENTRY FOR.

ENURE. This word means to operate or take effect. Thus, a release in fee from a reversioner to his prior tenant *enures* by way of the enlargement of the particular tenancy into a fee simple; also, a grant by one joint tenant to another will *enure*, i.e., operate, as a release (*Chester v. Willan*, 2 Wms. Saund. 97 a); and a release may operate as a covenant to stand seised (*Roe v. Tranmarr*, Willes, 632).

EODEM MODO QUO COLLIGATUR. The maxim that an obligation should be discharged or released (*dissolvi debet*) in the same way that it is contracted (*eodem modo quo colligatur*) holds good generally in the law of contracts, but it is subject to exceptions.

See title CONTRACTS.

EQUITABLE ASSETS. As opposed to legal assets were such assets as the executor was not chargeable with at law in an action brought there by a creditor of the deceased against him. These assets were exclusively available in a Court of Equity. All creditors (whether specialty or simple) were payable *pari passu* there-

EQUITABLE ASSETS—continued.

out. Equitable assets were so, either in their own nature (e.g., separate estate of married women) or by act of the party (e.g., estates charged with the payment of debts).

See title LEGAL ASSETS.

EQUITABLE ASSIGNMENT. Prior to the Judicature Acts, 1873-5, a legal assignment could only be effected by deed, and then only in those cases in which the property dealt with was in its own nature assignable; but when the property was not legally assignable, equity held that the purported assignment, if by deed, was complete, because it could not be made more complete at law. Further, every species of property was assignable in equity, and a mere appropriation was good as an equitable assignment. For example, an order (even by word of mouth) from a creditor to his debtor to pay over to a third person (to whom the creditor was indebted) money or any portion of money owing by the debtor to the creditor was considered as a good equitable assignment. But as regards land (whether freehold, leasehold, or copyhold), an equitable assignment could not be by word of mouth simply, but by reason of the Statute of Frauds required to be in writing, and the better opinion is that under the stat. 8 & 9 Vict. c. 106, this assignment must now be by deed even in equity. with this exception that an assignment without a deed, yet if for value, would be held good in equity. Under the Judicature Act, 1873, s. 25, sub-s. 6, assignments (being absolute and not by way of mortgage only) of legal choses in action may be effected by writing under hand merely, followed by written notice.

See title ASSIGNMENT OF PERSONAL PROPERTY.

EQUITABLE DEFENCE: See title EQUITABLE PLEAS.

EQUITABLE ESTATE. The origin and character of the equitable estate in lands will be found explained under the title USES. From land it appears to have been easily transferred to personal property, the beneficial owner of that being the *cestui que trust*, where the legal estate is in another or others as usually is the case. By reason of the operation of the maxim "Equity follows the Law," the interests in equitable estates, and the liabilities attaching to them and rules regulating or restricting their creation are almost identical with the like interests in legal estates, nevertheless with certain differences, e.g., in equitable estates there is no distinction taken between a contract and an actual

EQUITABLE ESTATE—continued.

conveyance, although that distinction is an essential one in the transfer of legal estates.

EQUITABLE JURISDICTION: See title EQUITY.

EQUITABLE MORTGAGE. May be either by conveyance or by deposit of title deeds accompanied or not accompanied with a written memorandum. Where the mortgagor at the time of making the mortgage is not himself possessed of the legal estate and merely conveys what he has to the mortgagee, the mortgage is of necessity equitable only as passing only an equitable estate. Tacking does not apply as between equitable mortgages, but consolidation does (see titles CONSOLIDATION OF MORTGAGES; TACKING). Again, where the mortgagor merely deposits all (or some or one of the principal) title deeds relating to an estate in the hands of the mortgagee, or deposits the land certificate in the case of lands registered under the Land Transfer Act, 1875, and either by word of mouth or by memorandum in writing it is agreed between the mortgagor and the mortgagee that the deposit shall continue so long as the money lent or to be lent is owing, that is an equitable mortgage by deposit of title deeds, and it is (or may be made) as efficacious as any other equitable mortgage.

See title MORTGAGE.

EQUITABLE PLEAS. Under the C. L. P. Act, 1854 (17 & 18 Vict. c. 126), it was permitted to plead equitable defences at Law, beginning the plea with the words, "For defence on equitable grounds." Such plea required to be such as would have entitled the defendant who pleaded it to an unconditional injunction upon a bill filed in Equity. Equitable pleas used to make the replications and all subsequent pleadings equitable also (*Savin v. Hoylake Ry. Co.*, L. R. 1 Ex. 9). Under the present practice, the rules of pleading in the Common Law and the Chancery Divisions are the same, and no words of introduction to an equitable plea are now required.

EQUITABLE WASTE: See title WASTE.

EQUITIES EQUAL, LAW PREVAILS.

It is a maxim of Equity that where the defendant has as much claim to the protection of the Court in his possession as the plaintiff has to its assistance, then the defendant's possession or legal estate prevails.

See titles NOTICE; PURCHASER FOR VALUE.

EQUITY. Is the phrase commonly used to designate that portion of the law which

EQUITY—continued.

is administered by the Courts of Chancery in Lincoln's Inn and at the Rolls. Equity, in this sense, is wider than Law, and narrower than Natural Justice or Natural Equity, in the extent of the matters which are the subjects of its jurisdiction. Equity cannot be defined in its content, otherwise than by an enumeration of its various subject-matters, being trusts, mortgages, administrations, &c., &c.

There are, or used to be, three jurisdictions in Equity, namely, the exclusive, the concurrent, and the auxiliary jurisdictions, the *exclusive* jurisdiction being that in which Equity had jurisdiction and Law had not; the *concurrent* that in which Equity and Law had jurisdiction equally; and the *auxiliary* that in which Law had exclusive jurisdiction, and Equity was only the handmaid of Law therein.

EQUITY DRAFTSMAN. Pleaders in Equity are so called.

EQUITY FOLLOWS THE LAW. This maxim, which is expressed in Latin by the phrase, *Aequitas sequitur legem*, signifies that the Courts of Chancery follow the same principles in construing documents and in determining rights as the Courts of Common Law, but the rule is subject to a few inconsiderable exceptions which the Courts of Chancery have, for reasons of their own, thought fit to make in their application of it.

The following are some illustrations of the general rule:—

(1.) In construing the words of limitation of estates, the same words which at Law confer a life estate do so in Equity also; and the phrase "heirs of the body" gives an estate tail in Equity equally as at Law; and the phrase "heirs and assigns" in like manner gives a fee simple in Equity as at Law.

(2.) In applying the rules of descent, Equity adopts the entire nine canons of descent which regulate the descent of real estate at Law; e.g., primogeniture, coparcenary, &c.

(3.) In applying the statutes for the limitation of actions and suits, Equity never exceeds the limits which the Law prescribes, although, for reasons of its own, it often stops short of the outside limit, but only within its strictly equitable jurisdiction, and not also in its concurrent jurisdiction.

The following are examples of the exceptions which Equity has made in its application of the general rule:—

(1.) In the construction of executory trusts, i.e., of trusts incompletely set out in the instrument creating them, if the instrument is either marriage articles or a

EQUITY FOLLOWS THE LAW—*contd.*

will containing a reference to marriage, Equity refuses to follow blindfold the rule of Law commonly designated as the *Rule in Shelley's Case*, whereby the words "heirs of the body" following upon a freehold estate of the ancestor, confer upon the ancestor an estate tail, but chooses rather to mould these words into the form of a strict settlement, giving to the ancestor a life estate, and securing to the issue of the contemplated marriage a succession of estates, and to the intended wife a jointure or widowhood estate, over which estates the intended husband shall have no power either to defeat or to diminish them (*Trevor v. Trevor*, 1 P. Wms. 622; *Papillon v. Voice*, 2 P. Wms. 571); and

(2.) In the construction of the beneficial or equitable estates of joint tenants, with reference to whom, if they are mortgagees, whether for equal or unequal amounts, and if they are purchasers, for unequal amounts (but not also for equal amounts), Equity refuses to allow survivorship of the equitable estate, and decrees the survivor a trustee for the deceased as to the share of the deceased (*Lake v. Gibson*, 1 Wh. & T. L. C. 160).

EQUITY OF REDEMPTION. Where A. being the owner in fee simple of lands, mortgages them to B., A. is said to retain the equity of redemption in the lands. This equity was originally a mere right in A. to redeem and recover back his lands by paying off the mortgage debt and interest and costs of B.; but this equity is now held to be an estate, viz., an equitable estate (*Casborne v. Scarfe*, 1 Atk. 603). And if A. after mortgaging to B. should mortgage the same lands to C., still A. would have an equity of redemption; and so if A. mortgaged to D. and to E., and so forth, the equity of redemption always and in every case resulting to the mortgagor. And this holds good as well for personal estate as for lands.

See title MORTGAGE.

EQUITY TO A SETTLEMENT. *Prima facie*, the wife's property, whether at Law or in Equity, becomes the husband's, but the interference of Equity has derogated in certain cases from the husband's legal rights, and has compelled him to make a settlement on his wife, and her right to such settlement is called her equity to a settlement. Her equity to a settlement arises from the maxim, "He who seeks equity must do equity;" the Court of Equity imposes conditions on the husband coming as plaintiff, to recover the wife's property, and has even extended the principle to the husband's general assignees coming as plaintiffs, and also to the hus-

EQUITY TO A SETTLEMENT—*contd.*

band's particular assignees for value coming as plaintiffs; and, last of all, the wife herself has been permitted to assert her right as plaintiff. The general principle upon which the Court acts in decreeing or not to married women a settlement, appears to be this,—there being, first of all, a possibility of the husband getting hold of and keeping (by virtue of the right which the law gives to him as husband) the property in question of the wife, the Court next inquires whether the wife, if she survived her husband, would or would not take the entirety of the property by virtue of her right of survivorship; and if (but only if) there is a possibility of the husband getting and keeping the property wholly, and the wife would not be entitled to the entirety thereof by survivorship, then there being this danger to the wife, and such danger being also reasonably imminent, the Court assumes a jurisdiction to inquire into the question of the wife's equity to a settlement out of the property that is so in danger: and, upon this inquiry, the Court inquires principally, whether the property in question is or not legal, or is or not equitable; and then generally the Court answers—

(1.) If the property is *equitable*, that the wife is entitled to an equity out of it (there being no other sufficient reasons for denying her the equity); and (2.) If the property is *legal*, that the wife is *not* entitled to any equity out of it (there being no other sufficient reasons for decreeing to her the equity). Accordingly, it has been held that the wife is entitled to an equity to a settlement out of leaseholds being equitable, but not out of leaseholds being legal (*Hanson v. Keating*, 4 Ha. 1; *Hill v. Edmonds*, 5 De G. & Sm. 603); also out of pure personal property (the absolute interest therein) being equitable, but not out of such absolute interest being legal (*Scott v. Spashett*, 3 Mac. & G. 603); and, as regards the life interest in pure personal property, the wife has an equity thereout (being equitable) as against the husband ceasing to maintain her, and against his general assignees (i.e., trustee) in bankruptcy or liquidation (*Elliott v. Cordell*, 5 Mad. 149), but not as against the husband's particular assignee for value without notice (*Tidd v. Lister*, 3 De G. M. & G. 869). Similarly, out of life-estates in realty being equitable (*Sturgis v. Champneys*, 5 My. & Cr. 97), but not if they are legal (*Wortham v. Pemberton*, 1 De G. & Sm. 644). As regards the wife's realty of inheritance, whether fee simple or fee tail estates, the husband cannot possibly take these from the wife, consequently she has no equity thereout whether they are equitable or legal, because, of course, she has the whole

EQUITY TO A SETTLEMENT—*contd.*

(*Life Association of Scotland v. Siddal*, 3 De G. F. & J. 271); and when an equity is awarded her by the Court in any of the cases above mentioned, in which she is entitled to an equity, the settlement usually extends to one-half only of the property, and very rarely indeed (unless under extraordinary or exceptional circumstances) extends to the whole. Again, the wife has no equity out of reversionary choses in action, because she has something better under her right of survivorship.

See title SURVIVORSHIP, WIFE'S RIGHT OF.

EQUITY OF A STATUTE. When the statute 35 Edw. 1, stat. 2, commonly called the statute *Ne rector prosternat arbores*, which prohibited persons from cutting down trees in churchyards, was extended by judicial decision (*Rutland v. Greene*, 1 Keble, 557) to restraining them from working minerals in new mines not previously opened, the extension was said to be made upon the equity of the statute, meaning, that the same reason existed in the case of minerals as in the case of timber trees. This *extensive* interpretation of a statute was opposed to the *restrictive* interpretation by which the statute was held to be inapplicable when the reason for it ceased to exist.

See title INTERPRETATION.

ERASURES. Erasures or interlineations in a deed are presumed to be made before or at the time of execution (*Doe d. Tatum v. Catomore*, 16 Q. B. 745), but if material and in a suspicious place they require explanation. Material erasures or interlineations *after* execution vitiate the deed (See title ALTERATIONS IN WRITTEN INSTRUMENTS). In wills, the erasures and interlineations are subject to the reverse rule, being presumed to be made *after* executions and being (unless attested) wholly disregarded (*Cooper v. Bockett*, 4 Moo. P. C. 419; 1 Vict. c. 26, s. 21).

ERROR, WRIT OF. After final judgment had been signed in an action, the unsuccessful party, if desirous of disputing the matter afresh, might bring a writ of error, being a writ which was sued out of the Chancery, and which was addressed to the judges of the Court in which the judgment had been given, commanding them in some cases to examine the record themselves, and in others to send it to another Court of appellate jurisdiction. The error might consist either (1) in a matter of *fact*, or (2) in a matter of *law*. (1.) The matter of *fact* must not have been an issue found by a jury (for which

ERROR, WRIT OF—*continued.*

the only mode of reconsidering the same was by *motion for a new trial*), but it might have been such a fact as that the plaintiff was a minor, and appeared by an attorney instead of by his guardian, or the fact that the plaintiff, being a married woman, appeared without her husband; and in these and the like cases, the fact going to the validity or regularity of the proceedings, a writ of error *coram nobis* (or *vobis*) was available, that is to say, a writ of error to be tried before the same judges, because the reversal of such an error was not the reversal of the judgment of these judges, but the correction of something wrong not previously brought under their notice. (2.) The error was an error of *law*, when, upon the face of the record, the judges were seen to have committed a mistake of law; and in that case the remedy was by writ of error generally (and not by writ of error *coram nobis* or *vobis*), the writ commanding the record or a transcript thereof to be sent to the Court of appellate jurisdiction, *i.e.*, to the Court of Exchequer Chamber, or House of Lords. To support this writ, the error must have been one of substance, inasmuch as errors of mere form were cured by the Statutes of Amendments and Jeofails. But the writ of error, in both its varieties, was abolished by the C. L. P. Act, 1852, and error was made a step in the cause, and the Court had the same jurisdiction as upon a writ of error; and the limit of six years from the date of signing judgment and entering the same of record was fixed, an allowance for disability being made. Before bringing error, a bill of exceptions must have been tendered to the judge before verdict, and must also have been certified by his seal being affixed thereto. But, under the Judicature Acts, 1873-5, bills of exceptions and proceedings in error have been abolished, and where error would formerly have lain for error of law, an appeal now lies, and (in lieu of a Bill of Exceptions) where it is intended to move for a new trial an exception (*i.e.* objection) as to the judge's ruling or direction is to be taken at the trial and entered upon or annexed to the record (if any).

See titles BILL OF EXCEPTIONS; EXCEPTION TO JUDGE'S DIRECTION.

ESCAPE. In civil cases, this was defined to be, in general, where any person under lawful arrest either violently or privily evaded such arrest, or was suffered to go at large before he was delivered from custody in due course of law. If the arrest was unlawful, as where the judgment or the writ of execution was absolutely void, then there was no escape.

ESCAPE—continued.

Such an escape might have been either negligent or voluntary:—

(1.) If the escape was *negligent*, i.e., without the knowledge or consent of the sheriff or his officer, then the escaped person might be pursued and retaken anywhere, and even on a Sunday; and in such a case, if the sheriff or his officer retook the prisoner before any action was brought for the escape, he was excused.

(2.) If the escape was *voluntary*, i.e., with the knowledge or consent of the sheriff or his officer, then the escaped person could never be retaken, but the sheriff was liable for the escape, and also (if it should so happen) for the re-taking.

For an escape, the remedy against the sheriff was either in debt for the full amount of the judgment or on the case for damages; and after the Act 5 & 6 Vict. c. 98, s. 31, the remedy was on the case only, and not in debt. It must be remembered that, by the Act 32 & 33 Vict. c. 62 (the Debtors Act, 1869), imprisonment for debt either on a *ca. sa.* or on *mesne process* has been abolished, with the trifling exceptions in the Act specified; and that in criminal cases there was no escape; and now by the Prison Act, 1877 (40 & 41 Vict. c. 21), s. 31, as from the 1st April, 1878, the sheriff of any sheriffdom is not to be liable for the escape of any prisoner.

ESCAPE-WARRANT. This was a warrant granted to re-take a prisoner committed for debt to the custody of the Queen's Prison who had escaped therefrom. It was obtained on affidavit from a judge of the Court in which the action had been brought, and was directed to all the sheriffs throughout England, commanding them to re-take the prisoner and to commit him to gaol when and where taken, there to remain until the debt was satisfied.

ESCHEAT. This word is derived from the French *échoir*, to fall, and denotes that incident of feudal tenure by which the land reverts back to the lord upon the failure of a tenant to do the services. Escheat used to arise from two causes:— Either

- (1.) *Propter defectum sanguinis*, i.e., on account of the failure of blood, i.e., heirs, of the grantee; or
- (2.) *Propter delictum tenentis*, i.e., on account of the felony or attainder of the tenant.

But by the Act 33 & 34 Vict. c. 23, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* is to cause any attainder or corruption of blood, or any forfeiture or escheat. So that, at the present day, escheat, it appears, can only arise from the

ESCHEAT—continued.

failure of heirs of the grantee. Upon an escheat, the lord used to have a *writ of escheat*, against the person who was in possession of the lands after the death of his tenant without heirs: and now he has an action of ejectment against him to recover the lands.

See titles FORFEITURE; YEAR, DAY, AND WASTE.

ESCHEAT, WRIT OF: See title ESCHER.

ESCHEATOR. The name of an officer who was appointed by the lord treasurer in every county to look after the escheats which fell due to the king in that particular county, and to certify the same into the exchequer. An escheator could continue in office for one year only, and was not re-eligible until the third year from the expiration of his former year of office. This officer continues to exist at the present day; he holds his inquest or inquisition under a writ called *diem clausit extremum*, which means simply that *so and so having died*, and (it is reported) without heirs, an inquest to ascertain the fact must be had.

See titles INQUEST; INQUISITION OF OFFICE.

ESCROW. Where a deed is delivered conditionally and not absolutely, e.g., where it is delivered not to the grantee personally (or his agent), but to some third person pending the doing of some act which is required of the grantee to be done, such deed is said to be delivered as an *escrow*, i.e., a mere *scroll*, or writing, which becomes a good deed upon the accomplishment of the condition, and failing such accomplishment never becomes a deed at all.

ESCUAGE. This word is from the French *écu*, meaning a shield or buckler, and denotes bucklerage, or rather a pecuniary satisfaction paid in lieu thereof. It was a composition offered by knight-tenants to their lord, and accepted by him in lieu of their personal attendance on him in the wars. From being occasional, this composition became general, and ultimately was levied by regular assessments.

See title TAXATION, HISTORY OF.

ESQUIRE. Is a description to which certain persons are entitled, e.g., foreign nobility, descendants of the English peerage and not being (excepting by courtesy) themselves peers, the sons of baronets, the eldest sons of knights, barristers-at-law, justices of the peace, and colonial attorneys who are also barristers. The description is not a dignity within 1 Edw. 4, c. 7, s. 3.

ESQUIRE—*continued.*

but is merely a name of worship, just as gentleman is.

See titles GENTLEMAN; YEOMAN.

ESSOIN. This was an excuse (whether on the ground of illness, *de infirmitate*, or on other ground), for not appearing in Court in pursuance of the summons contained in a writ. The first day of term was called the *essoin day*, or day for hearing excuses. But since 1 Will. 4, c. 70, the *essoin day* has been done away with altogether, the practice of alleging such excuses, *i.e.*, of *casting the essoin*, having been discontinued even previously to that Act.

See title SUBPOENA.

ESTATE. Absolute ownership is an idea quite unknown to the English Law of Real Property; the so-called owner of lands can, at the most, hold only an estate in them. The estate which he holds may, at the present day, be of a very various kind; originally, however, an estate for the man's own life was both the largest and the smallest estate in lands, being in fact the only estate properly so called.

The estate for life was originally the *largest* estate in lands, for the simple reason that the lord would not grant a larger one, the condition of the tenure being, that the tenant should be personally competent to discharge the feudal services annexed to it; and it was originally the *smallest* estate in lands, for the simple reason that the vassal might in all cases hold for life, conditionally upon his continuing competent to discharge the feudal services. Whence a gift of lands to A. B. was originally a gift to him so long as he personally could hold them, and not longer; in other words, it was an estate for his own life. And to the present day the effect of such a gift when it is made by deed is still the same, conferring an estate for life only, according to the maxim *Verba dant feudo tenorem*; the effect of such a gift even when made by will was equally the same until the year 1838, but as from that year it was enacted by the New Wills Act (7 Will. 4 & 1 Vict. c. 26, s. 28), that such latter gift should, in the absence of a contrary intention appearing on the will, pass a fee-simple estate if the testator had that quantity of estate to pass.

If it was intended that the descendants of the tenant should, at his decease, succeed him in the tenancy, as son to sire, then that intention required to be expressed by additional words of grant, the gift being in that case expressed to be to the tenant *and his heirs*. This extended form of grant, however, did not originally give the ancestor more than a life estate; he and his

ESTATE—*continued.*

heirs, *i.e.*, descendants, were equally nominees in the original grant, and took as a succession of usufructuaries, each of them during his life, and for that period only, enjoying the benefit of the grant. Such was the construction which this form of grant received as far down as the reign of Henry II.; but from causes which were vigorously at work, that construction was abandoned by the reign of Henry III., and a construction adopted in its stead which is very nearly the construction of the present day, namely, that the ancestor is the alone nominee in the grant and takes a fee simple to himself, with power by subinfeudation or otherwise to defeat or prejudice his issue. The power of complete alienation, the facility of which is the chief characteristic of the modern fee simple, was not long to follow after, being complete as early as the 18 Edw. 1, c. 1, commonly called the statute *Quia Emplores*.

ESTATE AT WILL: See title WILL, ESTATE AT.

ESTATE BY SUFFERANCE: See title SUFFERANCE.

ESTATE FOR LIFE: See titles ESTATE; ESTATE PUR AUTRE VIE.

ESTATE FOR YEARS: See title TENANCIES.

ESTATE PUR AUTRE VIE. The estate for life was originally *inalienable*, unless where the lord consented to the alienation, or, in other words, to the substitution of a different vassal for the first grantee; but the estate for life gradually became freely alienable without the lord's consent. When an estate for life was aliened in this latter way, the alienee took an estate *pur autre vie*, *i.e.*, during the first grantee's life and not during the life of the alienee himself. Accordingly, the first grantee was in such a case described as the *cestui que vie*, and the alienee was described as the *tenant pur autre vie*. If the estate for life was granted to the tenant *pur autre vie* and his heirs, he took a *fee simple estate quasi*; and if to him and the heirs of his body, he took an *estate-tail quasi*.

The estate *pur autre vie* was attended with peculiar incidents. It was subject, like the ordinary estate for life, to the feudal maxim, *Verba dant feudo tenorem*, and therefore when the grant was made to C. D. simply without more, C. D. took a tenancy *pur autre vie* for his own life only. Consequently, C. D.'s estate was doubly liable to determine, depending for its continuance upon the joint existence both of A. B., the first grantee, and of C. D., the alienee,

ESTATE PUR AUTRE VIE—continued.

and determining upon the death of either. If it was intended that the grant to C. D. should extend beyond the life of C. D. and throughout the life of A. B., then that intention required, according to the maxim already quoted, to be expressed by additional words of grant, the gift being in that case expressed to be to C. D. and his heirs. Now, if the grant were made to C. D. simply without more, and C. D. died leaving A. B. him surviving, the land was left without an owner so long as A. B. lived, the law not suffering A. B. to re-enter after having parted with his life estate. Neither could the lord apparently re-enter. No person having, therefore, a right to the estate, anybody might enter on it; and he that first entered became entitled forthwith to hold the land so long as A. B. lived, and was called the general occupant with reference to the manner in which he had acquired the land. On the other hand, if the grant were made to C. D. and his heirs, and C. D. died leaving A. B. him surviving, the land was not left without an owner so long as A. B. lived; but the heir of C. D. might enter and hold possession so long as A. B. lived, and was called the special occupant with reference to the manner in which he had acquired the land. General occupancy has been abolished, but special occupancy has been preserved, by the Statute of Frauds (29 Car. 2, c. 3, s. 12), and also by the New Wills Act (7 Will. 4 & 1 Vict. c. 26, ss. 3, 6), which have enacted in effect that the owner of an estate *pur autre vie* (apparently whether granted to him simply without more or to him and his heirs) may dispose thereof by will, and failing such disposition the heir as special occupant shall become entitled to it, and to the extent thereof be chargeable with the debts of his ancestor: and in case there shall be no special occupant, then the executor or administrator of the deceased testator or intestate is to take possession of the land and to the extent thereof to be chargeable with the payment of the debts of the deceased. By the Act 14 Geo. 2, c. 20, the surplus (if any) of an estate *pur autre vie* as to which the owner died intestate was made distributable, and by the New Wills Act the same is now distributable, among the next of kin of the deceased; and by the Act 6 Anne, c. 18, in a case of *prima facie* concealment of the decease of the *cestui que vie*, with the determination of whose life the estate *pur autre vie*, as already stated, necessarily determines, the person next entitled to the land may upon affidavit of his reasonable belief of such decease obtain an order from the Lord Chancellor for the production of the *cestui que vie* alive, and

ESTATE PUR AUTRE VIE—continued.

failing or until such production, the applicant may enter upon and hold the land.

ESTATE TAIL. This is an estate given to a man and the *heirs of his body*.

Growth of the Estate-Tail. The following stages in the growth of the estate-tail may be indicated:—

(1.) Permission was granted to the heirs of the tenant to succeed on the decease of their ancestor;

(2.) The word *heirs* having acquired about the time of Henry II. a breadth of meaning sufficient to admit *collaterals* to succeed as heirs;

(3.) It became necessary in order to exclude collaterals to limit the estate expressly to a man and the *heirs of his body*;

(4.) This limitation to a man and the heirs of his body came to be construed in the Courts as a conditional gift, the condition being that the man should have issue, and so soon as that condition was fulfilled, the estate became an absolute estate in fee-simple; whence

(5.) The statute *De Donis Conditionalibus*, 13 Edward 1 (Statute of Westminster the Second), c. 1, was passed, enacting that the will of the donor, according to the form of the deed of gift manifestly expressed should be from thenceforth observed, or, that the estate should descend according to the formdon (*secundum formam doni*), so as that the ancestor should not alien it from his issue nor the donor be defeated of his reversion. This Act created the estate-tail as it at present exists. The further history of that estate is a history of the—

Decline of the Estate-Tail. The estate-tail was felt to be inconvenient in many ways, which were probably more sentimental than real, but the opposition of the nobility to the repeal of the statute succeeded in maintaining it intact for about 200 years, when,—

(1.) By the decision in *Taltarum's Case* (Year Book, 12 Edw. 4, 19), by means of a quiet decision, or rather an *obiter dictum*, of the judges, the incident of alienation from the issue, and so as to defeat remaindermen and the reversioner, was annexed to the estate-tail. It was there pointed out, or admitted, that the destruction of the entail might be accomplished by means of judicial proceedings collusively taken against the tenant in tail for the recovery of the lands entailed. The nature and effect of these proceedings will be found stated and explained under the title COMMON RECOVERY, that being the name by which the proceedings in question were characterised.

(2.) Another mode by which the estate-tail might be barred, but as against the

ESTATE-TAIL—continued.

issue only, was the *Fine*, for the history, nature, and effects of which, see title **FINE**.

(3.) These processes of barring the entail, namely, Common Recovery and *Fine*, grew to be thought cumbrous and inconvenient; they were also dilatory and expensive; and accordingly by the statute 3 & 4 Will. 4, c. 74, a statute passed (it will be observed) at the time of the Reform Bill, 1832, fines and recoveries were abolished, and a simpler mode of assurance, called a disentailing assurance, was substituted for them.

See titles **CONVEYANCES**; **DISENTAILING ASSURANCE**; **TAIL**.

ESTATE TAIL IN COPYHOLD LANDS :

See title **TAIL**.

ESTATE TAIL FEMALE

ESTATE TAIL GENERAL

ESTATE TAIL MALE

ESTATE TAIL SPECIAL

} See title
TAIL.

ESTATE-TAIL JOINT. Where lands are given to A. and B. and the heirs of their two bodies to be begotten as joint tenants, they have an estate-tail joint. If they can intermarry, it is a tail special, that is, descendible only to the issue of A. on the body of B. to be begotten; and it will fail, and the lands will revert, if there should be no such issue upon the decease of both A. and B. But if they are brothers or sisters or other persons who cannot possibly intermarry, then upon the deaths of A. and B., the joint tail becomes a several tail, and is descendible to their respective several issues,—upon the maxim *Lex neminem cogit ad impossibilia*.

See title **SEVERAL TAIL**.

ESTATE TAIL, PERPETUAL. There is a popular impression abroad that the entail is perpetual. This is a fallacy, the explanation of which is to be found in the modern practice of conveyancers, whereby the entail is perpetuated. That practice is carried out in the following way:—

Suppose that A. is tenant for life, and B. his son (as commonly happens) is tenant in tail in remainder expectant on his father's decease, so soon as ever B. attains the age of twenty-one years,—an age at which, or shortly after attaining which, it is probable that B. will marry,—the father and son being on friendly terms with each other, and the father more especially dreading that the inheritance may be dissipated through the son's folly, it is agreed between them to execute a disentailing deed of the estates, and to re-settle them to the following uses, that is to say,—

(1.) The father, who is already tenant for life, is to be created tenant for life again;

ESTATE-TAIL, PERPETUAL—contd.

(2.) The son who, before executing the disentailing assurance, was tenant in tail, is to be created tenant for life only, in remainder expectant on his father's decease;

(3.) The first grandson (i.e., the first son of the son) being a person not yet in existence, but who may reasonably be expected to come into existence in due course of time, is to be created first tenant in tail of the estates in remainder expectant upon the decease or respective deceases of his father and grandfather, and so on with the second, third, fourth, &c., grandsons.

In this way the entail is pushed off into the next generation; for the first grandson is the first tenant in tail, and he cannot alienate his estate until he is of the age of twenty-one years at the least; and he is not (as already stated) yet in existence. Then when the grandfather of this grandson is dead, and the grandson's father is in possession of the estates, it is clear that the original condition of matters is restored, B. who is now the father being tenant for life, and the grandson who is now the son being tenant in tail. So soon therefore, again, as the son has attained the age of twenty-one years, his father and he have only to repeat in their generation what was done in the generation before them; that is to say, execute a new disentailing assurance and re-settle the estates to analogous uses. And thus by means of disentailing assurances and deeds of re-settlement successively executed in each successive generation, the entail of freehold lands in England has come to be popularly regarded as being perpetual, and it is so in effect.

ESTATE-TAIL IN PERSONAL ESTATE.

There is no estate tail in personal estate, whether in chattels real or in chattels personal; but the words which seem to confer an estate tail in personalty confer in fact an absolute estate in fee simple. This construction of these words arises from two reasons, namely: (1.) The circumstance that the stat. *De Donis* (13 Edw. 1, c. 1) extended only to real estate, and (2.) The decision in *Leventhorpe v. Ashbie* (Tud. L. C. Conv. 763.) On the other hand, when a personal annuity (i.e., an annual sum not issuing out of land) is given to a man and the heirs of his body, that is a fee simple conditional, and becomes a fee simple absolute or absolute interest upon the birth of issue of the grantee-annuitant.

See title **TAIL**.

ESTATE-TAIL QUASI. This is an estate tail improper, and is derived out of an estate for life, when the tenant for life grants his estate to K., and the heirs of the

ESTATE-TAIL QUASI—continued.

body of K., these words of grant being apt and proper to create an estate tail; but inasmuch as the estate-tail of K. cannot (as the estate-tail proper may) possibly last for ever, but can last at the most for the life of the tenant for life (or grantor), therefore it is called an estate-tail improper or *quasi*. It further differs from the estate-tail proper in this respect, that it may be barred without the necessity of an enrolment of the deed of disentail in the Court of Chancery (Ferne's Conting. Remrs. 495). On the other hand, it agrees with the estate-tail proper in the course of descent, and also in this respect—that where there is an estate for life prior to the estate-tail *quasi*, then the tenant for life, as being *ex officio* protector, must consent in order to the bar being effective against the remaindermen and reversioners (*Allen v. Allen*, 2 D. & War. 307.);

See title **FREE SIMPLE ESTATE QUASI**.

ESTOPPEL. Is a term of law denoting that the person whom it affects is estopped, *i.e.*, stopped or hindered, from saying anything different to what has been already said, even although what he wishes to say is the truth, and the thing already said is an error. There are three kinds of estoppels, *viz.* :—

- (1.) Estoppels by record;
- (2.) Estoppels by specialty; and
- (3.) Estoppels by matters *in pais*.

The principle of, or justification for, the first of these three species of estoppel is, that no one shall aver against a record, *i.e.*, a judgment or verdict of the Court, so long as that judgment remains unreversed; and of the second, that a man shall not deny what he has already, with all the solemnity attaching to a deed, affirmed; and of the third, that a man shall not aver the contrary of that which by his previous conduct he deliberately led other persons to infer, and they have inferred accordingly, and would now be prejudiced pecuniarily if the contrary averment were admitted.

The operation of estoppels is *personal*, that is, against the party or parties who are principally affected thereby, their heirs, executors, and administrators; but in the case of an estoppel by record, where the record is a judgment *in rem*, the operation of the estoppel is universal, or (as it is said) against all the world. For particular instances of estoppel of all three varieties, see 2 Sm. L. C. 679.

ESTOVERS. This word, which is derived from the French *étoffer*, to furnish, *i.e.*, stuff, is used to denote certain rights enjoyed by persons who have merely a limited estate or interest in land, being rights necessary to the enjoyment of that estate or

ESTOVERS—continued.

interest. There are three kinds of estovers, namely.

- (1.) *Housebote*, being a sufficient quantity of wood for the fuel and repairs of the house;
- (2.) *Ploughbote*, being a sufficient quantity of wood for the making and repairing of agricultural implements; and
- (3.) *Haybote*, being a sufficient quantity of wood for the repair of fences.

It is a rule of law, that estovers must be reasonable; also, that they must be strictly applied to their respective purposes, and to none other. Any excess in the enjoyment or any misapplication of the just amount would be waste (*Simmons v. Norton*, 7 Bing. 640).

See title **WASTE**.

ESTRAYS. These are such animals of a tame and valuable character as are found wandering, *i.e.*, *straying*, in any manor or lordship, and are without any apparent owner. The law gives all such animals to the king, but allows him to make grants of them to other persons, and he has in very many cases granted them to the lords of manors, so that they are become incident thereto by special grant.

ESTREAT. This word, which is derived from the Latin *extractum*, denotes a copy or extract from the Book of Estreats, that is to say, the rolls of any Court in which are entered the amerciaments or fines, recognizances, &c., imposed or taken by that Court upon or from the person liable, or person accused, and which are to be levied by the bailiff or other proper officer of the Court. Recognizances are said to be *estreated* when they are forfeited by the failure of the person liable or person accused to comply with the condition of the recognizance, as by failure to appear or otherwise.

ESTREPIMENT, WRIT OF. This was a writ of waste, and lay in particular for the reversioner in fee simple or in tail against the tenant for life immediately before him, for wasteful acts of the latter.

ET HOC PARATUS EST VERIFICARE. The formal conclusion of any pleading which contained new affirmative matter. A pleading which concluded in that manner was technically said to "conclude with a verification," in contradistinction to a pleading which was a simple denial. Formal conclusions to pleadings were rendered unnecessary by the C. L. P. Act, 1852, s. 67.

See title **VERIFICATION**.

ETON COLLEGE, CASE OF: See title **DISPENSING POWER**.

EVASIVE PLEADING: See title **MAN-
NER AND FORM.**

EVICTIION. This is the same as dis-
possession or ouster of the possession (see
title **OUSTER**). It is usually applied to
ouster from real property only, but it is not
inapplicable to the dispossession from per-
sonal property also. The covenants for
seisin in fee simple and for good right to
convey usually inserted in deeds are in sub-
stance covenants against *eviction*, in this
respect differing from the covenant for
quiet enjoyment (*Child v. Stenning*, 11 Ch.
Div. 82). It is competent for a landlord
to evict his tenant for proper cause; but a
landlord may also be guilty of a wrongful
eviction of his tenant, as where without
proper cause he either actually, *i.e.*, physi-
cally, evicts him, or does any act of a
permanent character with the intention of
evicting the tenant, and which is incon-
sistent with the latter's returning into or
continuing in possession.

EVIDENCE. Is the proof of, or mode
of proving, some fact, event, or written
document. It is to be considered (1.) In
its *Nature*, and (2.) In its *Object*.

(A.) With regard to its *Nature*.—Evi-
dence is either primary, or secondary, or
presumptive, or hearsay. Admissions are
not themselves evidence, but narrow the
field which the evidence has to cover.

(1.) *Primary Evidence*.—This is the
highest kind of evidence which the nature
of the case admits of. Thus, where a will
of lands is to be proved, the primary evi-
dence of it is the will itself and not the
probate; for the Court of Probate has no
cognizance of real estate (B. N. P. 246).
And where any contract or agreement has
been reduced into writing, the primary
evidence of it is the writing (*Fenn v. Grif-
fiths*, 6 Bing. 633). But when the narra-
tive of a fact, which has arisen independ-
ently of writing, has been committed to
writing, the fact may of course be proved
by parol evidence, *e.g.*, a receipt for money
(*Rambert v. Cohen*, 4 Esp. 213), and the
writing is not the primary evidence in such
a case, and is not in fact admissible at all
unless it was made while the event was
recent. Also, parol admissions are good
as evidence against the party making
them, although they relate to the contents
of a written instrument (*Slatteris v. Pooley*,
6 M. & W. 664). The proper evidence of
all judicial proceedings is the proceedings
themselves, or an examined or office copy
of them (*Thelluson v. Sheddon*, 2 N. R. 228).

(2.) *Secondary Evidence*.—This is ad-
missible where primary, that is, better,
evidence cannot be had, *e.g.*, in the case of
a lost deed, upon proof of the loss (B. N. P.
254); and so also upon proof of an unsuc-

EVIDENCE—continued.

cessful application to the person who has
the legal custody of the deed (*R. v. Stoke
Golding*, 1 B. & A. 173). The wrongful re-
fusal of a third person (not being a solicitor)
on *subpoena duces tecum* to produce a
document in his possession, is, however, no
ground for admitting secondary evidence
(*Jesus College v. Gibbs*, 1 Y. & C. 156); but
it is otherwise in the case of a solicitor who
so refuses (*Hibbert v. Knight*, 2 Ex. 11). In
some cases, secondary evidence of oral testi-
mony is admitted, *e.g.*, where the testimony
of a witness on a former trial is admitted
on another trial without producing the
witness in person, as where a witness was
examined in a former action on the same
point between the same parties and he is
since dead (B. N. P. 242), or is kept away
by contrivance (*Green v. Gatewick*, B. N. P.
243).

It is commonly said, that *there are no
degrees of secondary evidence*. This means,
that when secondary evidence is admis-
sible at all, upon failure to produce the
original document, no restriction is put
upon the party producing the evidence as
to the kind of evidence he shall produce
for that purpose; but if it was apparent
that more satisfactory secondary evidence
might be produced than is produced, the
jury or a judge will be influenced by
that consideration (*Doe d. Gilbert v. Ross*,
7 M. & W. 102). And there is one excep-
tion to the rule, namely, where by statute
a special kind of secondary evidence is
substituted for the original, that only can
be produced, *e.g.*, a Queen's printers' copy
of a Private Statute.

See title **DOCUMENTS, PROOF OF.**

(3.) *Presumptive Evidence*.—This kind
of evidence is so called in contradistinction
to direct or positive proof whether oral or
written; it is not of the nature of second-
ary evidence, and does not therefore require
in order to its admissibility any preliminary
proof that positive or direct evidence can-
not be procured (*Doe d. Welsh v. Langfield*,
16 M. & W. 513). The commoner classes
of presumptions are the four following,
namely:—

(a.) Presumptions which admit of no con-
tradiction by contrary evidence,
and which are thence called *juris
et de jure*;

(b.) Presumptions which the Court or a
judge will direct the jury to pre-
sume, although no evidence thereof
has been given, and which are
thence called *juris only*;

(c.) Presumptions as to which the jury
are left entirely to themselves,
being cases in which direct proof
of one fact is given with the in-
tention that the jury may from it

EVIDENCE—continued.

presume another fact (*Fryer v. Gathercole*, 4 Ex. 262); and

- (d.) Presumptions that the testimony of a witness who might be, but is not, called, is unfavourable to the party who omits to call him.

For examples of these various kinds of presumptions, see 1 Tayl. Evidence, p. 85; Rosc. Evid. at N. P., p. 38.

(4.) *Hearsay*.—As a general rule, hearsay, i.e., the declarations of persons not made upon oath when repeated on oath by a witness who heard them, are not admissible as evidence. There are, however, some exceptions to this general rule; thus, hearsay is admissible in the following cases:—

- (a.) In questions of pedigree, in which questions the declaration (whether oral or written) of members of the family (being such either by blood or marriage) are admissible to prove, e.g., legitimacy, marriage, the date of marriage, the number of children, &c. Entries in a family bible fall under this head. Nor is it necessary that the declarations should be contemporaneous with the facts declared, or even that the declarant should have any personal knowledge of the fact, *provided he had it of a relation* (*Monkton v. Att.-Gen.*, 2 Russ. & My. 159). But the persons whose declarations are offered must be proved to be dead before they can be admitted in evidence (*Butler v. Viscount Mountgarret*, 7 H. L. O. 733); moreover, in proving RECENT events such as the death, place of birth, age, &c., of a person, where that fact is directly in issue, *strict* evidence thereof is required. And any declarations made *post litem motam* are inadmissible (*Berkeley Peerage*, 4 Camp. 401).

- (b.) In questions of public rights, being rights of a pecuniary nature; and the reasons for the admission are various, being either that the origin of such rights is generally ancient and obscure, and consequently incapable of direct proof, or that in local matters persons residing in the neighbourhood and interested in the rights are likely to be acquainted with them, or that such matters are likely to be the subject of frequent conversation. Such evidence is most commonly admitted for the following purposes:—

- (1.) To prove the extent of a manor.

EVIDENCE—continued.

- (2.) To prove the boundaries between parishes or manors.

- (3.) To prove the existence of a ferry, &c.

But to prove a prescriptive right which is strictly private no such hearsay is admissible. (*Morewood v. Wood*, 14 East, 327).

- (c.) As forming part of the transaction (*res gestæ*), and as being not evidentiary but explanatory thereof. Thus, the accompanying declarations may serve to shew the *animus* of the actor, when that is material (*Bateman v. Bailey*, 5 T. R. 512); also, generally, the feelings or sufferings of the party (*Thompson v. Trevanion*, Skin. 402); e.g., upon a prosecution for an alleged rape, the cries of the female as of a person in distress or the opposite would be a very material part of the *res gestæ*. The admissibility of the declarations in such cases depends not alone upon their accompanying an act, but on the light which they throw upon the act itself and its quality. (*Wright v. Doe d. Tatham*, 7 Ad. & E. 313).

- (d.) As being acts or assertions of ownership, but only when coupled with some other act or exercise of ownership.

- (e.) As being the declarations of persons since deceased, and who had no interest to misrepresent the truth. (*Sussex Peerage*, 11 Cl. & F. 85.)

- (f.) As being the declarations of persons since deceased, and who had an interest adverse to their own declarations (*Barker v. Ray*, 2 Russ. 67, n.; *Higham v. Ridgway*, 10 East, 109).

- (g.) As being entries, &c., made in the regular course of business by persons since deceased, e.g., a notice indorsed as served by a deceased clerk in an attorney's office is evidence of service (*Doe d. Patteshall v. Turford*, 3 B. & Ad. 890); and, again, contemporaneous entries by a deceased shopman in his master's books in the ordinary course of business, stating the delivery of goods, are evidence for his master of such delivery (*Price v. Lord Torrington*, 1 Salk. 285).

- (5.) *Admissions*.—These are as good as primary evidence of the fact or facts admitted, but they are not therefore conclusive (*Bulley v. Bulley*, L. R. 9 Ch. App. 739); and one letter may be used against the writer of it without producing the rest

EVIDENCE—continued.

of the correspondence (*Barrymore v. Taylor*, 1 Esp. 326). But, except in cases of estoppel, the party prejudiced by the admission may obviate it by shewing that it was made under a mistake or misapprehension of law or of fact (*Newton v. Liddiard*, 12 Q. B. 925). And, generally, letters marked "without prejudice," and the replies to such letters, although the replies should not be marked "without prejudice," cannot be used as admissions or as evidence (*Hoghton v. Hoghton*, 15 Beav. 278); and admissions made with a view to a compromise are not available against the person making them (B. N. P. 236). A compulsory admission, *e.g.*, in the answer to a bill in Chancery, is available against the person putting in the answer, even in another suit instituted by a different plaintiff, and, *à fortiori*, if instituted by the same plaintiff, or in the very suit in which the answer has been put in (*Fleet v. Perrins*, L. R. 1 Q. B. 536). A party's statement on the record is evidence against him, although it purports to be the statement of a written document, the contents of which are directly in issue in the cause (*Slatterie v. Pooley*, 6 M. & W. 664).

The uncontradicted statements of any one made in the presence and hearing of the party against whom they are offered are evidence of a matter reasonably within the party's knowledge, at any rate where it was within his power to contradict the statements and he did not do so, unless he explains satisfactorily his reason for not contradicting the statements; but no such consequence follows from the mere omission of a party to reply to a *letter*, unless the writer was entitled to an answer.

The acknowledgment in a deed of the receipt of money is conclusive evidence, both at Law and in Equity, as between the parties to it, of such receipt (*Baker v. Dewey*, 1 B. & C. 704), unless upon proof of fraud; but the acknowledgment indorsed on the deed is not conclusive (*Stratton v. Rastall*, 2 T. R. 366). A receipt not under seal is, on the other hand, not in general conclusive, and may be contradicted (*Graves v. Key*, 3 B. & Ad. 318). But a receipt may amount to an allowance of a sum or sums of money, and in that case is of value in itself, although no money has been paid (*Branston v. Robins*, 4 Bing. 11).

By the C. L. P. Act, 1852, s. 117, either party might call on the other by notice to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, the costs of proof had to be paid by the party neglecting or refusing, whatever was the result of the cause, unless the judge at the trial certified the refusal to be reasonable; and no costs of proof were

EVIDENCE—continued.

allowed unless such notice had been given, except where the omission to give such notice was, in the Master's opinion, a saving of expense. This was a simplification of the former practice (Rule of Practice, H. T. 4 Will. 4), under which a judge's order to admit was required. The provisions of the C. L. P. Act, 1852, were applicable to every document, whether in the custody or control of the party or not (*Rutter v. Chapman*, 8 M. & W. 388). And under the present practice, the rule regarding the admission of documents upon notice to admit same is unaltered (Order xxxii., 2).

(B.) With regard to its *Object*.—The *object* of evidence being to prove the point in issue between the parties, there are three general rules, *viz.* :—

- (1.) That the evidence be confined to the issue;
- (2.) That the substance only of the issue need be proved; and,
- (3.) That the burden of proof lies upon the party asserting the affirmative, in the absence of any presumption of law the other way.

In consequence of the first of these three general rules, evidence of collateral facts is excluded (*Holcombe v. Hewson*, 2 Camp. 391; *Blundell v. Howard*, 1 M. & S. 292); unless upon the general questions of skill, knowledge, or capacity (*Folkes v. Chadd*, 1 Phill. Ev. 276). So proof of a customary right in a particular manor or parish is, as a general rule, no evidence of the like customary right in an adjoining manor or parish (*Somerset (Duke) v. France*, 1 Str. 661); but if the manors or parishes are first proved to be held under the same tenure the case would be different (*Rowe v. Brenton*, 8 B. & C. 758). And evidence of *general damages*, although no part of the issue, is admissible; and evidence of character, as connected with the question of damage, is also in some cases admissible.

Where under R. G., H. T. 1853, r. 19, and the C. L. P. Act, 1852, s. 25, the plaintiff had delivered (or had indorsed on the writ of summons) particulars of his demand, he was precluded from giving any evidence of demands not contained therein (*Wade v. Beasley*, 4 Esp. 7; *Hedley v. Bainbridge*, 3 Q. B. 316); and this is the law under the new procedure.

In consequence of the second of the three before-mentioned general rules, variances, or apparent variances which are *immaterial* require no amendment: *e.g.*, on a count against a sheriff for a *voluntary* escape, it is enough to prove a *negligent* escape (*Banafous v. Walker*, 2 T. R. 126). And if a plea of justification is divisible, *e.g.*, in an action of trespass, it is enough

EVIDENCE—continued.

if so much of the plea is proved as is necessary to cover so much of the plaintiff's declaration as is proved, notwithstanding that the whole plea may have been put in issue by the replication (*Spilsbury v. Micklethwaite*, 1 Taunt. 146). And under the C. L. P. Act, 1852, c. 75, all pleadings capable of being construed distributively were to be so taken; and upon issue taken thereon, if so much thereof as was a sufficient answer to part of the causes of action proved was found true by the jury, a verdict passed for the defendant as to so much, and for the plaintiff as to the residue; and that would still be the law. With regard to the use of a *videlicet*, or *scilicet*, that may or may not dispense with proof of the precise particulars as stated, according as those particulars as stated are material or not.

See title **VARIANCES**.

With reference to the third of the three before-mentioned general rules, the burden of proof, see title **ONUS PROBANDI**.

See titles **EXTRINSIC EVIDENCE**; **INTERPRETATION**; and **WITNESSES**.

EVIDENCE BY AFFIDAVIT: See titles **AFFIDAVIT**; **AFFIDAVITS**, **EVIDENCE BY**.

EVIDENCE DE BENE ESSE: See title **DE BENE ESSE**.

EX ANTECEDENTIBUS ET CONSEQUENTIBUS. The maxim that the best interpretation is made (*optima fit interpretatio*) when regard is had to the matters which precede and follow (*ex antecedentibus et consequentibus*), means simply that the context is to be considered in interpreting any phrase or clause, and not the mere isolated phrase or clause.

See title **CONSTRUCTION, RULES OF**.

EXAMINATION OF WITNESSES. As to how much the plaintiff must prove in support of his case, and when and how far the burden of proof is on the defendant, see titles **EVIDENCE**; **ONUS PROBANDI**. As to the order of the examination in chief, the cross-examination, and the re-examination, and the object of each of these examinations, see title **WITNESSES**. As to who may be witnesses and who not, and how (in certain cases) the competency of witnesses may be ascertained before their examination, see titles **COMPETENCY OF WITNESSES**; **VOIR DIRE**. As to the manner of swearing witnesses, see title **OATHS**; and as to the cases where an oath may be dispensed with, see titles **AFFIRMATION**; **DECLARATIONS, STATUTORY**. As to what questions may be put, or may not be put, and when, see titles **PRIVILEGE OF WITNESSES**; **LEADING QUESTION**.

EXAMINER. An examiner in Chancery was an officer of the Court of Chancery appointed (1.) to take the depositions of unwilling witnesses when notice of motion for decree had been given, such examination being taken in the presence of all the parties, and the cross-examination and re-examination following there and then; (2.) to take the like depositions where issue was joined, *i.e.*, when replication had been filed in any cause, such examination being taken *ex parte*, and the cross-examination and re-examination afterwards coming on before the Court itself. There were two such examiners, but a special examiner was occasionally appointed. Under the present practice, the office of examiner is maintained, and the examination before him may be either of the two modes formerly in use, as above specified, according as the Court may have directed.

See title **DEPOSITION**.

EXCEPTIO PROBAT REGULAM. The exception proves the rule, is a maxim which denotes that apparent exceptions to the rule are in reality exemplifications of the rule modified or qualified by the absence or presence of some circumstance that is material to the application of the rule.

See title **SATISFACTION IN EQUITY**.

EXCEPTION. In conveyancing, means an exception of part of the thing granted, being a part which is less than and severable from the whole, and which is of such a nature that it may be held by itself. In the grant of a manor, the exception of the Court Baron would be void, that being an incident inseparable from the manor; and, again, in the like grant, an exception of the profits of the manor would be void, as being repugnant to the grant.

In the grant of land, on the other hand, an exception of all mines and minerals thereunder, would be a valid exception; and such an exception is also sometimes (although less accurately) called a *reservation* of the mines and minerals. A reservation, however, properly denotes the creation of some new hereditament, *e.g.*, a rent; whereas an exception is only a slice (so to speak) of the old hereditament.

EXCEPTION TO JUDGE'S DIRECTION. Upon motion for a new trial made to a Divisional Court in respect of a trial had before a judge and jury, upon the ground that the judge has not submitted the issues to the jury and directed the jury as to the law and the evidence applicable to the case (*Judicature Act, 1875, s. 22*), the motion is made upon an *exception* (*i.e.* objection) taken at the trial and entered upon or annexed to the record (if any), and when there is no record, then the ground

EXCEPTION TO JUDGE'S DIRECTION—*continued.*

of the motion must be brought to the knowledge of the Court by affidavit or otherwise.

See title **BILL OF EXCEPTIONS.**

EXCEPTIONES. In Roman Law, were pleas or objections taken or made in an action. An *exceptio cognitoria* was an objection taken to the sufficiency of the attorney who claimed to represent one of the parties; the *exceptio non numeratæ pecuniæ* was the objection that the money which was to have been given as the consideration for the bond sued on had never in fact been paid or given; the plea of *litis dividuæ* was the objection that the claim made in the action was the portion divided or split off from a certain other claim made in a former action during the same prætorship; and the plea of *rei residuæ* was the objection that the present action was one which might have been (but had not been) joined with a certain former action brought during the same prætorship.

See title **PRESCRIPTIONES.**

EXCEPTIONS TO ANSWER. Exceptions to an answer to a bill in Chancery were objections taken to it on the ground either of insufficiency or of scandal; or formerly (*i.e.*, prior to 1852) on the ground of impertinence. The objections were stated in the form of a written pleading. Under the Judicature Act, 1873, an answer is no longer one of the pleadings in the action (the statement of defence having taken its place), but is now an answer to certain questions called interrogatories; and for the insufficiency of such answer, the interrogating party would now move summarily for an order 'to make a further answer (Order xxxi., 9, 10).

EXCEPTIONS, BILL OF: See title **BILL OF EXCEPTIONS.**

EXCHANGE. A form of assurance of lands not now much in use (see title **CONVEYANCES**, sub-title **EXCHANGE**). Also, a form of contract equivalent to barter, and in Roman Law to *Permutatio* (see title **PERMUTATIO**). Also, a ratio of money equivalents between foreign countries.

See title **RE-EXCHANGE.**

EXCHANGE, BILL OF: See title **BILL OF EXCHANGE.**

EXCHEQUER BILLS AND BONDS. These are regulated by stats. 17 & 18 Vict. c. 23, and 29 & 30 Vict. c. 25.

See titles **FUNDED AND UNFUNDED DEBT; NATIONAL DEBT.**

EXCHEQUER, COURT OF. This Court was the first off-shoot from the *Aula Regis*, and was established by William I. for revenue purposes, and afterwards regulated

EXCHEQUER, COURT OF—continued.

by Edward I. The Court took its name from the table at which the judges sat, which Camden says, was covered with a *chequered* cloth resembling a chess-board and serving as a counter. Its jurisdiction continued to be principally matters in which the king's revenue was either really concerned or, in which by means of the fiction *quo minus*, it was fictitiously in question; but it acquired also some Equity jurisdiction. By the stat. 5 Vict. c. 5, its jurisdiction in Equity was taken away, and under the Uniformity of Process Act (2 Will. 4. c. 39), its jurisdiction was practically assimilated to that of the other co-ordinate Courts of Common Law. This Court is now the Exchequer Division of the High Court.

See title **COURTS OF JUSTICE.**

EXCHEQUER CHAMBER. At the time that the Court of Exchequer had an Equity jurisdiction, the Lord Chief Baron, when administering Equity, sat apart in a chamber called the Exchequer Chamber, and that was the original character of the Court so called as constituted by the stat. 31 Edw. 3, st. 1, c. 12. But after the Equity side of the Court of Exchequer was abolished by the stat. 5 Vict. c. 5, the name Exchequer Chamber was used, more especially since the Act 11 Geo. 4 & 1 Will. 4, c. 70, in revival, apparently, of a much earlier statute, 27 Eliz. c. 8, to designate the Court of Appeal which was next above the Courts of Queen's Bench, Common Pleas, and Exchequer, and intermediate between these Courts and the House of Lords. Its modern representative is that division of the Court of Appeal which commonly sits at Westminster.

See title **COURTS OF JUSTICE.**

EXCISE. The excise as a tax was first established in 1643 by the Long Parliament, and about the same time by the King's Oxford Parliament, ostensibly and professedly in each case only to meet the exigencies of the Civil War. It extended at first only to beer, ale, cider, and perry, but it was shortly afterwards imposed on wine, tobacco, sugar, and gradually on a great many other commodities. In 12 Car. II., the excise as a tax was in full operation, and a large portion of the revenue arising therefrom was given to that king as a commutation for the payments which were lost to him through the abolition in that year of the feudal tenures. The excise extends at the present day even to the inclusion of licences to exercise certain trades and professions, to keep dogs, to kill game, &c., and also to the inclusion of the duties payable in respect of stage-coaches, cabs, railway passengers, &c. Offences against the

EXCISE—continued.

excise are summarily triable before justices, with an appeal to quarter sessions.

See title CUSTOMS.

EXCLUSION, BILL OF. The Bill of 1679 for the exclusion of the Duke of York (afterward Jac. II.) from the throne was so called. It was the opinion of certain lawyers of the age (Sir Leoline Jenkins was one of them), that any such bill even although passed through both houses was in itself a nullity; but having regard to the general settlement of matters at the Revolution of 1688, that opinion, *semble*, cannot now be entertained.

See titles BILL OF RIGHTS; SUCCESSION TO CROWN, HISTORY OF.

EXCLUSIVE JURISDICTION. Was that jurisdiction of the Court of Chancery in which the Common Law had no share, as opposed to the concurrent jurisdiction in which law and equity equally shared. Since the Judicature Acts 1873-5, this exclusive jurisdiction as such has now theoretically ceased, the jurisdiction being now concurrent; but practically, the old exclusive jurisdiction continues exclusively in the Chancery Division. The jurisdiction comprised and comprises trusts, administration of assets, and such like.

EXCLUSIVE AND NON-EXCLUSIVE POWERS: See title POWER.

EXCOMMUNICATO CAPIENDO, WRIT OF. A writ which issued to the sheriff of the county commanding him to take an excommunicated person and imprison him in the county gaol, because within forty days after the sentence had been published in the church the offender would not submit to, and abide by, the sentence of the Spiritual Court. Upon being reconciled to the Church, and such reconciliation being certified by the bishop, another writ *de excommunicato liberando*, issued out of Chancery to deliver and release him. The ecclesiastical punishment of excommunication, or by means of other spiritual censures, appears to have become tacitly abolished in the case of lay persons—brawling and fornication, and such like offences, being now treated as misdemeanours, and upon conviction punishable accordingly.

EXCUSABLE HOMICIDE: See title HOMICIDE.

EXECUTE. As applied to deeds and other documents, this word denotes to sign, seal, and deliver same, or to sign same, as the case may be. As applied to *writs*, the word denotes the act of the sheriff in carrying out the command of the Court contained in the writ. Such a writ is called a *writ of execution*. As applied to

EXECUTE—continued.

criminals condemned to suffer death, the word denotes the act of the executioner in putting the criminal to death. But in each of these three applications, and in every other application, of the word, there is the same meaning; namely, that of completing or perfecting what the law either orders or validates.

EXECUTED AND EXECUTORY: See title EXECUTORY AND EXECUTED.

EXECUTION: See titles EXECUTE; EXECUTION, WRIT OF.

EXECUTION CREDITOR, RIGHTS OF. The creditor who has recovered final judgment in an action for debt or damages, may at once have execution upon entry of his judgment, and upon registering the execution may seize the entirety of the lands of his debtor, and obtain (if necessary), a sale thereof or of any part thereof, or take and receive the rents and profits thereof until his judgment is satisfied; and he may also seize the goods and chattels of his debtor and sell same in order to realise the amount of his debt.

See titles ELEGIT, WRIT OF; EXECUTION, WRIT OF; FI. FA., WRIT OF.

EXECUTION, WRIT OF. This is a judicial writ issuing out of the Court where the record or other judicial proceeding is on which it is grounded. It usually issues immediately after judgment is entered, but it may for good reason be either expedited or delayed; and it may issue within six years after the recovery of the judgment, without getting the judgment revived, as between the original parties; but after the period of six years, and before twenty years, or after any change in the original parties, the leave of the Court is necessary to issue the writ.

See title REVIVOR.

The principal varieties of writs of execution are as follows:—

- (1.) Fi. fa., writ of;
- (2.) Elegit, writ of;
- (3.) Possession, writ of;
- (4.) Delivery, writ of;
- (5.) Sequestration, writ of;
- (6.) Attachment, writ of;
- (7.) Capias, writ of; and
- (8.) Ca. sa., writ of.

There are also the following writs of execution that are assistant to the principal writ, viz., the following:—

- (9.) Venditioni exponas, writ of;
- (10.) Distringas nuper vicecomitem, writ of;
- (11.) Fi. fa., writ of, de bonis ecclesiasticis;
- (12.) Sequestrari facias de bonis ecclesiasticis; and
- (13.) Assistance, writ of.

EXECUTION, WRIT OF—continued.

And there are also the following exceptional writs, viz. :—

(14.) *Scire facias*, writ of; and

(15.) *Scire fieri*, writ of.

The judgment on which an execution issues may be either final or interlocutory, it being remembered that only some executions issue on some judgments.

The writ is usually addressed to the sheriff. An execution once issued remains in force for one year only, but may (before expiry), be renewed for one year more and so on (Order xvii., 16).

Where a writ of execution has been issued, it is good for a year; but may (if it still remains unexecuted) be by leave of the Court renewed for another year, and so on (Order xlii., 16). This renewal is effected either by sealing the writ of execution itself with a renewal seal (Order xlii., 16), or by sealing with such seal a written notice of renewal signed by the party or his solicitor, and delivering same as so sealed to the sheriff (Order xlii., 16).

See also titles *ELEGIT*; *FI. FA.*; &c., &c.

EXECUTOR. This word is commonly applied to wills, and as so applied it denotes the person who undertakes the execution of the will. An executor is of two kinds, being either :—

(1.) A lawful executor; or

(2.) An executor *de son tort*.

(1.) It is incumbent on a lawful executor to collect, get in, and realize all the personal estate of the testator, and if desirable for the more lucrative realisation thereof it is his duty to carry on or continue the trade or business of the testator, which he may do with safety under the direction of the Court of Chancery. For this latter purpose executors may carry out their testator's contracts, and, as a rule, should endeavour by all means to do so. But an executor is not bound to insure or to keep up an insurance against fire. Under the stat. 23 & 24 Vict. c. 145, s. 30, he has a right to compound debts. When the estate is realized, for which purpose he is allowed a year, thence called the executor's year,—his next duty is to divide or distribute the estate among the legatees, retaining and paying over the duty. But before making any such distribution, it is incumbent upon him to pay or provide for the funeral and testamentary expenses of the deceased, and all his just debts, otherwise he will be personally liable therefor as for a *devastavit*, assuming that there was originally a sufficiency of assets to pay them.

It is competent to an executor to renounce probate of the will, and in that case his right as executor wholly ceases. But, as-

EXECUTOR—continued.

suming that he has obtained a grant of probate, he and he only is entitled to act as executor until the grant is revoked.

With reference to the question in what cases an executor is entitled to sue, or is liable to be sued, *as executor*, or in his own personal capacity, there is a clear line of division, namely the death of the testator; and as to all contracts which had their commencement on the one side of that line, i.e., during the life of the testator, the executor is entitled and liable in his representative capacity only; but as to all contracts which had their commencement on the other side of that line, although these contracts are incidental to the contracts of the testator, the executor is entitled and is liable in his own personal capacity.

All the rules stated above regarding a lawful executor hold true, *mutatis mutandis*, for an administrator also.

(2.) A person becomes an executor *de son tort* from almost any intermeddling with the estate after the death of the testator; e.g., where A., the servant of B., sold the goods of C. the testator, as well after his death as before, though by the orders of C., and paid the money arising therefrom into the hands of B., the latter was held liable to be sued as executor *de son tort* (*Padget v. Priest*, 2 T. R. 97). So also living in the house and carrying on the trade of a deceased victualler was held to be a sufficient intermeddling to make an executor *de son tort* (*Hooper v. Summersett*, Wightw. 16). Where there is also a lawful executor, the act of an executor *de son tort* is good against him only when it is lawful, and such an act as the lawful executor was bound to perform in the due course of administration (*Buckley v. Barber*, 6 Ex. 164). But it is evident that an act of intermeddling may be sufficient to make a person liable as executor *de son tort*, although it should not bind the lawful executor (*Thompson v. Harding*, 2 El. & Bl. 630).

EXECUTOR ACCORDING TO THE TENOR. Where a will contains no appointment of executors, excepting such an appointment as may be vaguely implied or inferred from the general purview or tenor of the will, the Court appoints an executor to execute the will according to its tenor; and the person so appointed is called by this name (*Re Bell*, 4 Prob. Div. 85).

EXECUTOR DE SON TORT: See title *EXECUTOR*.

EXECUTORY CONTRACTS: See title *EXECUTORY AND EXECUTED*.

EXECUTORY DEVICES: See title *EXECUTORY INTERESTS*.

EXECUTORY INTERESTS. May arise either in wills (in which case they are called executory devises in the case of lands and executory bequests in the case of goods) or in deeds (in which case they are commonly called springing uses or shifting uses). They are governed by the Rule of Perpetuities as regards the limits of time within which they may be created to arise (*see* title PERPETUITY), and in that respect, as in many others, are to be distinguished from contingent remainders.

See titles INCORPOREAL HEREDITAMENTS; SHIFTING USES; SPRINGING USES.

EXECUTORY TRUSTS: *See* titles EXECUTORY AND EXECUTED; TRUSTS, sub-title EXECUTED AND EXECUTORY TRUSTS.

EXECUTORY AND EXECUTED. These words denote respectively *incomplete* and *complete*, and that as well in their Common Law application to *contracts*, as also in their Equity application to *trusts*, and in their Real Property application to *estates*. Thus (1.) In the case of *contracts*,—The contract or consideration is said to be executed when it is completely performed; and it is said to be executory when it is not yet completely or only incompletely as yet performed. And it is clear that a contract may be executed on one side and executory on the other. In the case of executory contracts, a request to perform, together with the consequent promise to pay for the performance, is always implied by law, where it is not expressed in words by the parties; but in the case of executed considerations, that is not always so, although sometimes it is so; and as to when it is and when it is not so, *see* title CONTRACTS.

(2.) In the case of *trusts*,—A trust is said to be executed when it is completely created or declared, and executory when the words of trust are merely directory, and point to some further instrument as being necessary to complete the declaration or creation. Many distinctions are made in Equity according as a trust is executed or executory. Thus, Equity follows the Law in applying, for example, Shelley's Rule to trusts that are executed; but as to trusts executory it takes this distinction, viz., if the instrument containing the executory trust contains a reference to marriage, Equity refuses to follow Shelley's Rule, and moulds the trusts so as best to suit the presumed intention of the testator; but where there is no such reference to marriage, then Equity permits the Law to have its own way. And, again, an executory trust which exceeds the rule against perpetuities, is not therefore void (as an executed one would be), but Equity will mould the executory trust so as to confine

EXECUTORY AND EXECUTED—contd.

it within that rule of Law, believing that the testator could not intend what was illegal.

And (3.) In the case of *estates*,—An estate is said to be executory when the event or condition upon which it is to spring up or come into existence has not yet happened or been fulfilled; and it is an executed estate so soon as it is created where it is not subject to any event or condition happening or being fulfilled, and so soon as the event happens or the condition is fulfilled when it is subject to any such.

See titles EXECUTORY DEVISES; EXECUTORY INTERESTS.

EXEMPLIFICATION. In law is an official copy or transcript made from a record of Court: thus, an exemplification of a *recovery* signifies a copy or transcript of the recovery roll, and the same should be set out *literis et verbis* in an abstract of title comprising it. Similarly, an exemplification of *letters patent* signifies a copy or transcript of letters patent made from the original inrolment.

See title DOCUMENTS, PROOF OF.

EXEMPTION, WORDS OF. It is a maxim of law, that words of exemption are not to be construed to import any liability, the maxim *expressio unius exclusio alterius* or its converse *exclusio unius inclusio alterius* not applying to such a case. For example, an exemption of the Crown from the Bankruptcy Act, 1869, in one specified particular, would not inferentially subject the Crown to that Act in any other particular.

EX FACTO JUS ORITUR. The law slumbers, until roused into activity by some act or event (*i.e.*, fact); in other words, rights and duties may not exist in the abstract, but only around some concrete subject-matter or person.

EXHIBIT. An exhibit is the name given to any particular document or other object which in the course of a cause is *exhibited*, *i.e.*, produced by either party, and (in the case of affidavit evidence) referred to in the affidavit. Such documents, when numerous, are usually marked with some letter of the alphabet as a convenient mode of referring to and distinguishing them, and they are then called "Exhibit A," or "Exhibit B," and so forth.

This use of exhibits is a convenient mode of abridging evidence in the case of written documents. But only some documents may be exhibited, namely, extracts from registries, records from the Bodleian and Museum libraries, and generally all documents coming out of the custody of a public officer having care of them; also, office-copies of records, whether of the

EXHIBIT—continued.

Superior Courts at Westminster or of the Courts of the County Palatine of Lancaster, or of the Inferior Courts of Record; also, and chiefly deeds, bonds, notes, bills of exchange, letters, or receipts, and the like; and in some of these cases, the documents prove themselves if bearing official seals. Documents of other kinds may not be so proved; because generally, no document may be proved as an exhibit, if it requires more to substantiate it than the proof of the execution or of handwriting, *e.g.*, if any ulterior circumstance which might affect it requires to be proved, and the opposite side would have a right to cross-examine upon that circumstance (*Lake v. Skinner*, 1 J. & W. 9, 15); but in such cases, an order of course to prove the exhibit at the trial may be obtained on motion of course or petition of course at the Rolls.

EX NUDO PACTO NON ORITUR ACTIO.

No action lies upon a simple promise or agreement that is without consideration. This maxim holds good of simple contracts; but as regards specialty contracts, the solemnity of the form supplies the want of consideration, and therefore an action will lie on a voluntary covenant to pay money.

See title VOLUNTARY CURTESY.

EX OFFICIO. The oath so called was an oath tendered by the High Commission Court to all persons suspected of Puritanism, and which these latter were obliged to make in their answers to the interrogatories of the Court.

See title HIGH COMMISSION.

EXONERATION. Means the exemption of one property or estate; it is either absolute or relative; when relative, the property remains liable, and is proceeded against after the property, which is liable before it, is exhausted.

See titles ADMINISTRATION OF ASSETS; MARSHALLING OF ASSETS; LOOKE KING'S ACT.

EXPEDIT REIPUBLICAE. It is expedient to the state, *e.g.*, that actions should come to an end (*ut sit juris litium*); also many frauds are redressed on the ground of public policy, where the plaintiff is equally to blame with the defendant; and some evils are evils as being against public policy, and not as being in themselves necessarily evil, *e.g.*, unlicensed distillation.

EXPENSILATIO. In Roman Law was an entry of a *nomen* or debt in the ledger (*codex*) to represent a transaction which appeared in the day-book (*adversaria*); *e.g.*, cochineal sold 4 bags for £50 in day-book would appear in ledger under *nomen*

EXPENSILATIO—continued.

of purchaser as "paid £50," on the debtor's side, and would eventually be discharged by the entry "received £50" on the creditor's side of ledger.

See title ACCEPTILATIO.

EXPERTS, EVIDENCE OF. Was first rendered admissible by the stat. 17 & 18 Vict. c. 125, in the matter of handwriting (see title HANDWRITING); but in matters more strictly scientific, it has been admitted upon the common law principle, "*Cuiuslibet in sua arte credendum est*," which assigns a value (more or less) to the opinions of men experienced in the science or art within which the subject-matter falls.

See title OPINION-EVIDENCE.

EXPLETIVE JUSTICE: See title ATTRIBUTIVE JUSTICE.

EXPRESS AND IMPLIED COVENANTS: See title COVENANTS.

EXPRESSIO UNIUS EXCLUSIO ALTERIUS. The express inclusion of some specified particulars is an implied exclusion of other particulars (of the same class) that are not specified,—a maxim of interpretation which is of frequent application in law, but which (like other maxims) is only a subsidiary aid to ascertaining the intention of the parties.

See title EXEMPTION, WORDS OF.

EXPRESSUM FACIT CESSARE TACITUM. Where but for express words to the same or (more usually) to the contrary effect in a deed or other document, a certain incident (*e.g.* a custom of agriculture) would be inserted in the document as the result of usage or particular custom, there the express words supersede and (more usually) exclude the otherwise implied custom.

See title EXPRESSIO UNIUS, &c.

EXPROPRIATION. In French Law, is the compulsory realization of a debt by the creditor out of the lands of his debtor, or the usufruct thereof. When the debtor is co-tenant with others, it is necessary that a partition should first be made. It is confined in the first place to the lands (if any) that are in the *hypothèque*, but afterwards extends to the lands not in the *hypothèque*. Moreover, the debt must be of liquidated amount.

EXTENSION OF TIME. Various times having been fixed by the rules of procedure for the doing of certain acts and the taking of certain steps in the course of legal proceedings, the Court will (upon sufficient grounds) grant one or more extensions of such times, provided the application to extend be made before the current or normal

EXTENSION OF TIME—*continued.*

time has expired, but (excepting as a very special favour) not afterwards. This extension of time will only be granted when the Court has a discretion to do so, not when the Court has no discretion in the matter.

EXTENT, WRIT OF. Is a writ of execution available in cases in which the Crown has an interest. The extent may either be an extent *in chief* or an extent *in aid*, the distinction being that the former is a hostile proceeding by the Crown against its debtor, or against the debtor of that debtor, while the latter is an extent issued at the instance of the Crown debtor himself against his debtor, to aid his payment of the Crown debt. The extent of the Crown has priority over all executions of the subject.

See titles CROWN DEBTS; EXECUTION, WRIT OF.

EXTINGUISHMENT. Is the destruction of an estate, or right, or power. A debt is said to be extinguished by payment, and a tort by satisfaction, according to the general maxim, *Omnia judicia absolutoria esse*.

See titles CONVEYANCES; POWERS.

EXTORTION. Is a criminal offence when committed by sheriffs or other officers; but, *semble*, a mere civil injury, when committed by other persons, against whom an action for money had and received will lie.

See title DURESS.

EXTRA-PAROCHIAL: See title PARISH.

EXTRA-TERRITORIALITY. The immunity of ambassadors rests on the fiction of extra-territoriality, whereby they are supposed to carry their own country with them, and to plant it down on the site of the embassy. The like fiction attends the sovereign everywhere; also, vessels of war; and (to a more limited extent) merchant-vessels also.

See title TERRITORIAL WATERS.

EXTRA TERRITORIUM JUS DICENTI. A sovereign (or the officers of a sovereign) who legislates (or administers justice) beyond his own realm, may be safely disobeyed beyond his own realm (*impune non parebitur*).

See title FOREIGN JURISDICTION.

EXTRADITION. Denotes the giving up of a criminal by a foreign state in which he has sought refuge from prosecution to the state within whose jurisdiction the offence has been committed. The duty of a state to make extradition of criminals is by no means generally admitted, and at the most it is an exercise of comity only. Generally, no state will make an extradition of its own subjects; and generally, also, no state will make an extradition of

EXTRADITION—*continued.*

political offenders. The present practice of England with regard to the extradition of criminals is expressed in the Extradition Act, 1870 (33 & 34 Vict. c. 52), and the Extradition Act, 1873 (36 & 37 Vict. c. 60), which provide that when an arrangement for that purpose has been made with any foreign state, Her Majesty may by Order in Council direct that the Act shall apply in the case of such foreign state, subject to any conditions to be expressed in the order. But the former Act makes an express exception of political offences, the Secretary of State having it in his discretion to decide whether the offence is or not of a political nature. The Act of 1873 extends the provisions of the principal Act to the case of accessories punishable as principals. See generally Clarke on Extradition, 1874.

EXTRAORDINARIUM JUDICIUM An action in which the magistrate was also the *judex*, and in which, therefore, the distinction between being *in jure* and *in judicio* had ceased to exist.

See title IN JUDICIO.

EXTRAORDINARY REMEDIES. These (which are also called prerogative writs) are the following:—(1.) Writ of Proce-
dendo; (2.) Writ of Mandamus; (3.) Writ of Prohibition; (4.) Writ of Quo Warranto; (5.) Writ of Habeas Corpus; and (6.) Writ of Certiorari. These remedies will be found explained, and their uses or occasions specified, under the particular names of each. They are called extraordinary in contradistinction to the ordinary remedies by action or petition; and they are called prerogative, because they are not the right of the subject, but lie within the discretion of the Crown.

EXTRAORDINARY RESOLUTION: See title RESOLUTIONS, VARIETIES OF.

EXTRINSIC EVIDENCE. This evidence is so styled because it is brought forward to throw light upon a written instrument *ab extra* the instrument.

Even by the rules of the Common Law, independently of statute, extrinsic or parol evidence was inadmissible in certain cases to throw light upon a written document; and the Statute of Frauds, and other statutes which have made writing an absolute *sine quâ non* to the validity of certain obligations, have not been the occasion of the inadmissibility of this species of evidence, but have at the most only rendered that inadmissibility somewhat more express (*Goss v. Lord Nugent*, 5 B. & Ad. 58). Thus, before the Statute of Frauds, the Courts were uniformly governed by the rule—that the judgment of a Court or judge in expounding a will should be simply

EXTRINSIC EVIDENCE—continued.

declaratory of what is in the instrument (Wig. Extr. Ev. p. 6), inasmuch as the admission of evidence to do more than to declare what is in the will, would be to make an additional or other will for the testator which he has not made. The question is, what *has* the testator written, not what (in any one's opinion) he *intended* or *ought* to have written.

(A.) Considering the matter, firstly, with reference to *Wills*. The following are the uses to which extrinsic or parol evidence may be legitimately applied:—

(1.) Where there is nothing in the context of a will shewing that the testator has used words in other than their strict or primary acceptation, but that acceptation is insensible with reference to extrinsic circumstances, then the extrinsic circumstances may be looked at for the purpose of arriving at some secondary or popular sense which shall be sensible with reference to these circumstances.

(2.) Where the written characters of the will are difficult to decipher, or the words of the will are in an unknown or unusual language, the evidence of persons experienced in deciphering written characters or acquainted with the language is admissible for the purpose of informing the Court or judge.

(3.) Extrinsic evidence is also admissible for the purpose of identifying the *object* of the testator's bounty (whether devisee or legatee), and for the purpose of identifying the *subject* of disposition.

(4.) Also for the purpose of defeating a fraud, whereby either the wrong will is executed or an alteration in or omission from the true will is occasioned (*Doe v. Allen*, 8 T. R. 147).

On the other hand, extrinsic evidence is not admissible for the following purposes:—

(1.) To *add* to the contents of a will, by proof of a mistake of the testator (*Brown v. Selwin*, Cas. t. Talb. 240), or of the counsel who prepared the will (*Newburgh (Earl) v. Newburgh (Countess)*, 5 Mad. 364, 1 M. & Scott, 352; but an issue *devisavit vel non*, where that will serve the same purpose (as it would have done in *Newburgh v. Newburgh*, *supra*) may be directed.

(2.) To supply a total *blank* in the will, whether of the name of the legatee or devisee, or of the amount of the legacy or estate given (*Doe v. Needs*, 2 M. & W. 139; *Edmunds v. Waugh*, 4 Drew. 275).

(3.) To identify a legatee or devisee or the estate given, where there being some description, no part of that description is applicable to any person or estate (*Hampshire v. Pierce*, 2 Ves. 218; *Miller v. Travers*, 8 Bing. 244).

EXTRINSIC EVIDENCE—continued.

And generally, although the judgment of the Court or a judge in expounding a will should be simply *declaratory* of what is in the will, yet—

(1.) Every claimant under a will has a right to require that the Court or judge shall, by means of extrinsic evidence, place itself or himself in the situation of the testator, the meaning of whose language it or he is called upon declare; and

(2.) The *intention*, as an independent fact, may be proved by means of the like evidence in all those cases in which the description being *accurate*, i.e., unambiguous on the face of it, its applicability to each of several subjects, or to each of several objects, occasions what is called a latent ambiguity.

See titles LATENT AMBIGUITY; PATENT AMBIGUITY.

(B.) Considering the matter, secondly, with reference to other instruments than wills. The following is an enumeration of the purposes for which extrinsic evidence in connection with written documents may be admitted:—

(1.) To prove the making of the contract;

(2.) To prove the writing not to have been a contract;

(3.) To prove that the contract was induced by fraud, mistake, or duress;

(4.) To prove that the writing was signed conditionally;

(5.) To annex to the contract usages of trade not inconsistent with the express terms thereof;

(6.) To explain terms of a technical trade significance;

(7.) To identify the parties and also the subject-matter; and

(8.) To prove that the contract is illegal.

See Wigram on Extrinsic Evidence; Leake on Contracts, pp. 106-125.

EYRE: See title EIRE OR EYRE.

F.

FACT AND LAW: See title LAW AND FACT.

FACTOR. Is a commercial agent, enjoying certain privileges that are peculiar to him, and not common to agents generally. These privileges are due in some measure to the circumstances that the factor is in a position analogous to that of the consignee of goods. Thus he was able by the Common Law to bind his principal by the sale of the goods entrusted to him, and he still has that power; but he could not pledge

FACTOR—*continued.*

the goods in a valid manner. However, under the stat. 6 Geo. 4, c. 94, usually called the Factors Act, he is enabled to make a valid pledge of the goods, or of any part thereof, to one who believes him to be the *bonâ fide* owner of the goods; and under the stat. 5 & 6 Vict. c. 39, he is further enabled in all respects, as if he were the true owner of the goods, to enter into any contract or agreement regarding them by way of "pledge, lien, or security," as well for an original loan, advance, or payment made on the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement is made valid against the principal, *notwithstanding the lender was fully aware that the borrower was a factor only.* And by the stat. 40 & 41 Vict. c. 39, s. 2, any such pledge is good, notwithstanding that at the time of giving it the factor's agency was in fact revoked, provided the lender has no notice of such revocation. The factor's statutory powers of pledging goods do not extend to antecedent debts.

See title DOCK-WARRANTS.

FACTORIES. Are placed under statutory supervision. The former stat. 42 Geo. 3, c. 73 (regulating the health and morals of apprentices and others employed in factories) 3 & 4 Will. 4, c. 103 (Factory Act, 1833), amended by the Factory Acts, 1844 and 1856 (regulating the labour of children and young persons therein), and 30 & 31 Vict. c. 103, (by which the meaning of the word "factory" was, for the purposes of these Acts, extended to smelting works, copper mills, iron and brass foundries, and to paper, glass, and tobacco manufactories and to letterpress printing and bookbinding) have all been repealed by the Factory and Workshop Act, 1878 (41 Vict. c. 16) by which Act similar but more efficacious and practical provisions have been made, and the factories and workshops to which the Act extends are minutely specified in the Fourth Schedule to the Act.

The employer of labour in factories is also subject, even by the Common Law, to make due provision, *e.g.*, by properly fencing his machinery, for the security of the lives and limbs of his workmen. (*Coe v. Platt*, 7 Ex. 460).

FACTUM PROBANDUM. Is the fact, event, or thing to be proved; and the *factum probans* is the evidence which proves it. The *factum probandum* is sometimes called the "*principal fact*," and the *factum probans* is then called the "*evidentiary fact*."

FACTUM PROBANS: See title FACTUM PROBANDUM.

FACULTY (*facultas*). A privilege or special dispensation granted to a man by favour and indulgence, permitting him to do that which by the law he could not do; as to marry without banns being first published; to hold two or more ecclesiastical livings at the same time; and the like (25 Hen. 8, c. 21; *Les Termes de la Ley*). At the present time a faculty is not unfrequently granted for the removal of a churchyard or church; as to which see 32 & 33 Vict. c. 94.

FAIRS. The right to hold fairs may exist either *ratione soli* (*i.e.*, in a landowner by virtue of his estate in the land) or *ratione privilegii* (*i.e.*, by charter, letters patent, &c.); and a stall-owner derives title through or under the landowner, who may also constitute a lessee of the tolls of the market. Some fairs or markets exist by prescription or at all events by custom.

See titles EASEMENTS-QUASI; MARKET; MARKET-OVERT.

FAIT. This word was used in the old law to signify a deed, *factum*. In jurisprudence, the phrase *fait juridique*, or *factum juridicum*, denotes one of the factors or elements constitutive of an obligation.

See titles ACT; LAW AND FACT.

FALDAGE. Is a privilege enjoyed by certain lords of manors and others of setting up folds, *i.e.*, inclosures for sheep, as well belonging to themselves as to their tenants, in order with the manure thereof to fatten their lands. The privilege is sometimes called suit of fold, *secta faldæ*, or *foldage*. The tenant by paying a fald-fee might have commuted the privilege.

See title CUSTOMS OF MANORS.

FALSA CAUSA NON NOCET. If the motive assigned for making any particular bequest or devise to any particular legatee or devisee is wholly erroneous and mistaken, that does not in general affect the bequest or devise, which accordingly remains good. But if the legatee or devisee has fraudulently conduced to the mistake or error, or if the mistake or error was sufficiently singular as to suggest non-testamentary-capacity, the whole legacy or will would be void for the fraud or insanity.

See title FALSA DEMONSTRATIO NON NOCET.

FALSA DEMONSTRATIO NON NOCET. This maxim (in its full expression "*Falsa demonstratio non nocet cum de corpore constat*") means, that a mere inaccuracy of description will not diminish or enlarge the subject-matter of a devise or bequest, when that subject-matter (*corpus*) is otherwise well ascertained. But of course, the maxim in its very words implies that it

FALSA DEMONSTRATIO NON NOCET

—continued.

has no application to cases in which the corpus is not so ascertained, and in which the corpus must needs, therefore, be gathered either wholly or partly from the alleged inaccurate words of description; in this latter case, these alleged inaccurate words must be taken to be accurate, if there is any subject-matter to which they exactly fit, upon the maxim "*Non accipi debent verba in falsam demonstrationem quae competunt in veram limitationem.*"

See title **FALSA CAUSA NON NOCET**.

FALSA DEMONSTRATIONE LEGATUM NON PEREMI. This is an application of the maxim "*Falsa demonstratio non nocet*" to the case of legacies.

See title **MISNOMER**.

FALSE IMPRISONMENT. An action will lie for false imprisonment as well against officers executing the process of the Courts as also against private individuals assuming to imprison. For the success of the action it is necessary to prove both malice on the part of the defendant and the absence of all reasonable or probable cause, and of course that the accused was acquitted.

See title **MALICIOUS PROSECUTION**.

FALSE JUDGMENT, WRIT OF. This was a writ which lay to the Superior Courts at Westminster to rehear and review a case which had been tried in an inferior Court, and the judgment in which was submitted to be erroneous. In lieu of this writ, an appeal is open to the party dissatisfied with the judgment.

See title **APPEALS, CIVIL, VARIETIES OF**.

FALSE PRETENCES. Obtaining goods or money (whether by way of loan or of gift) under false pretences is a criminal offence, the punishment of which, upon conviction, is penal servitude for five years, or imprisonment not exceeding two years (24 & 25 Vict. c. 96, s. 88). The particular false pretence must be assigned and (of course) proved. This offence differs from larceny, in that the goods or money are obtained with (and not without) the owner's consent.

FALSE REPRESENTATION: See titles **FRAUD; MISREPRESENTATION; WARRANTY, BREACH OF**.

FALSE RETURN: See title **RETURN**.

FALSIFY. This word, as occurring in the phrase "with liberty to surcharge and falsify," means to impugn as false or erroneous certain items or entries in an account. The Court of Chancery, where an account has been stated between parties, and they

FALSIFY—continued.

afterwards disagree regarding it, may either open the whole account or (according to the nature of the case) merely give liberty to surcharge and falsify particular items in the account.

See title **SURCHARGE AND FALSIFY**.

FALSUS IN UNO FALSUS IN OMNIBUS: See title **MALUS IN UNO, &c.**

FAMILIA. In Roman Law, was one of the *Tria capita*. It was in fact the generic name for household with all its belongings, and a paterfamilias was a householder. It comprised the sons and the slaves, but the sons or other children became free at the death, whereas the slaves continued slaves.

FAMILIÆ EMPTOR. In Roman Law was an intermediate person who purchased the aggregate inheritance when sold *per aes et libram*, in the progress of making a will under the Twelve Tables. This purchaser was merely a man of straw, transmitting the inheritance to the *Haeres* proper.

FAMILIÆ ERCSUNDÆ. In Roman Law, was an action for the partition of the aggregate succession of a familia, where that devolved upon co-haeredes; it was also applicable to enforce a contribution towards the necessary expenses incurred on the familia.

FAMILY ARRANGEMENT. When entered into for the sake of preserving peace in the family (say, to avoid some question about the legitimacy of the reputed eldest son), will be upheld, when there has been *bona fides* and honest intention on each side and also the fullest disclosure; but without the fullest disclosure such an arrangement is voidable on the ground of fraud (*Gordon v. Gordon*, 3 Swans. 463).

FAMILY COMPROMISES. Are favoured by the Courts, from a regard to the peace of families. But for their validity, there must be not only honest intention but full disclosure on the part of all the bargaining parties; and the want of full disclosure will be a ground for setting aside the compromise (*Gordon v. Gordon*, 3 Swans. 463).

See title **COMPROMISE OF SUIT**.

FARM. This is the old Saxon *feorme*, and signifies a *provision*. Anciently, rents were reserved in provisions, such as corn, poultry, and the like, a money equivalent not having been finally introduced until the time of Henry I. Originally, therefore, farm meant *rent*, and by a natural transposition it now means the land out of which the rent issues, and even the lease.

See title **LEASEHOLD**.

FATETUR FACINUS QUI FUGIT. Who flies from justice, confesses himself a criminal; literally, confesses his offence.

FATHER AND CHILD. A father is the guardian of his child, and may by will or deed appoint a guardian to act for himself after his death; and the father or the guardian so appointed directs the education of the child: as regards providing him with necessaries, the father is under a moral obligation only and not a legal one. He may use reasonable (but not extreme) chastisement for the correction of the child. For some purposes, the child (when of a certain age), is in the position of a servant to his father, who may therefore have an action for loss of services in case of the child's seduction. The marriage of a child under age is his or her emancipation from the father's power. Under the Custody of Infants Act, 1873 (36 & 37 Vict. c. 12), an agreement in a separation deed by a father to give up the custody of his children to their mother is valid, if otherwise unobjectionable; and the Court may order the mother to have the custody of, and not merely access to, her children under sixteen years of age.

FEALTY. This word signifies fidelity, the phrase "feal and leal" meaning simply faithful and loyal. Tenants by knights' service and also tenants in socage were required to take an oath of fealty to the king or other their immediate lords; and fealty was one of the conditions of their tenure, the breach of which operated a forfeiture of their estates.

FEAR: See title FORCE AND FEAR.

FEE. According to Spelman, is the right which the vassal has in lands to use the same and take the profits thereof to him and his heirs, rendering to his lord the due services therefor. Fees were either Fee Simple or Fee Tail, the former being simply, i.e., generally, inheritable estate, open to heirs *general*, the latter being also an inheritable estate, but in a limited, i.e., tailed manner only, to wit, open to lineal descendants only, or issue or heirs of the body.

See titles ESTATE; ESTATE TAIL, &c.

FEE FARM. This is a species of holding, or tenure, of a mixed nature, partly freehold and partly leasehold only. It corresponds as nearly as may be to the *Emphyteusis* of Roman Law.

See title FEE FARM RENT.

FEE FARM RENT. Is a rent in fee simple, created usually in lieu of or as part of the purchase-money upon a purchase of lands, and created by means of a grant of the lands to X. and his heirs to the use that the vendor and his heirs and assigns

FEE FARM RENT—continued.

receive thereout the rentcharge agreed on, and subject thereto and to the powers incidental thereto to the use of the purchaser, his heirs, and assigns for ever.

See title EMPHYTEUSIS.

FEE SIMPLE. Fee simple estates are such as are granted to a man and his heirs, with or without the words "and assigns" added. These estates are the largest ownerships possible in lands within England. They are of the following varieties, viz.:—

(1.) *Fee Simple Absolute.*—Being an estate given to a man or woman and his or her heirs and assigns absolutely and not subject to any condition either precedent or subsequent. This is the highest estate both in quality and in quantity that is known to the English Law.

(2.) *Fee Simple Conditional.*—Being an estate given to a man and the heirs of his body in certain copyhold hereditaments and in personal annuities, where the statute De Donis (13 Edw. 1. c. 1) does not apply; the condition here is invariably one, viz., the begetting of living issue.

(3.) *Fee Simple Defeasible.*—Being an estate in fee simple absolute, so far as regards all conditions *precedent* of which there are none, but defeasible, i.e., capable of being defeated, by some condition or event *subsequent*, upon the happening of which an executory interest usually starts up and destroys it.

(4.) *Fee Simple Qualified.*—Being an estate in fee simple absolute, so far as regards all conditions precedent and subsequent, but having a *concurrent* condition annexed to its duration, e.g., being and remaining lords of the manor of Dale.

(5.) *Fee Simple Base.* Being merely a base fee.

See titles ALIENATION; BASE FEE; ESTATE.

FEE SIMPLE ESTATE QUASI. Where an estate for life is granted to the tenant *pur autre vie* and his heirs, he takes an estate in fee simple during the life of the *cestui que vie*.

See titles ESTATE; ESTATE TAIL QUASI.

FEE TAIL: See title ESTATE TAIL.

FEEES. Are payments of various kinds, e.g., fees of court, fees of officer, and such like. The *Honorarium* so-called paid to a barrister or other counsel for his services is his fee.

See titles FEES OF COURT; HONORARIUM.

FEES OF COURT. These, which are all taken in stamps, are regulated by three recent orders, viz., the order of October, 1875, as to court fees, the Order of April,

FEES OF COURT—*continued.*

1876, as to fees and percentages, and the order of April, 1877, as to the fees of official referees; and there is also an order of October, 1877, as to fees to be taken in the Manchester and Liverpool district registries. These fees are upon two scales corresponding respectively to the higher and lower scales appointed for the taxation of costs, fees according to the lower scale being received upon production of a sealed copy of the certificate of solicitor that the lower scale is applicable.

See title HIGHER AND LOWER SCALE, COSTS.

FEIGNED ISSUE. This was a fictitious issue, or rather a true issue raised by means of a fiction; *e.g.*, the plaintiff by a fiction declared that he laid a wager of £5 with the defendant that certain goods were his (the plaintiff's) goods, and then averred that the goods were his; whereupon the defendant, admitting the feigned wager, averred that the goods were not the plaintiff's goods, thus raising at once the issue as to the plaintiff's property in the goods. But by the Act 8 & 9 Vict. c. 109, s. 19, feigned issues were abolished.

FELLOW SERVANT: *See title MASTER AND SERVANT.*

FELO DE SE. This means a felon of himself, a suicide, and denotes any one who deliberately puts an end to his own existence, or commits some unlawful or malicious act in committing which he occasions his own death; as, *e.g.*, when unlawfully shooting at another person the gun bursts, and he kills himself.

See title HOMICIDE.

FELONY. Any capital crime short of treason, and being such as occasioned at Common Law the forfeiture of the felon's lands and goods, or at any rate of his goods. The word "felony" in its generic sense includes even treason, and under particular statutes, *e.g.*, 39 & 40 Geo. 3, c. 93, the offence of treason may be prosecuted as a felony. The crime of felony stands midway between treason and misdemeanors.

See titles CRIME; CRIMINAL LAW.

FEME COVERT. A married woman is so called, but whether from the moral or from the physical meaning of the word *cover*, or from both, is uncertain.

See title MARRIED WOMAN.

FEME SOLE. An unmarried woman is so called; also, any woman who, although married, is in matters of property independent of her husband, is a *feme sole quoad* such property, and may deal with it in every respect as if she were unmarried (*Taylor v. Meade*, 34 L. J. (Ch.) 203).

FENCES AND DITCHES. Where there are two adjacent fields separated by a hedge and a ditch, it is a *prima facie* presumption of law that the hedge belongs to the owner of that field which (to outward appearance) the ditch is not in, *i.e.*, on whose side of the ditch it is, the reason being that the ditch must have been made originally within the field of the person making it, and the heaped up earth upon which the hedge was planted must also have been laid upon the same field, because otherwise there would have been a trespass, both in laying the earth and in leaving it to lie; also, the hedge was planted on the heaped up earth on the near side of the ditch (*Guy v. West*, 2 Selw. N.P. 1287). The owners of two adjoining closes, neither of them being under any obligation to fence, must each take care that his cattle do not enter the land of the other (*Churchill v. Evans*, 1 Taunt. 529); but when either is bound to fence, then he cannot distrain as *damage feasant* the cattle of his neighbours straying through his own defect to fence (*Singleton v. Williamson*, 7 H. & N. 410); and in fact he would be liable positively for any damage done to the strayed animals (*Lee v. Riley*, 18 C. B. (N.S.) 722). Railway companies, under 8 & 9 Vict. c. 20, s. 47, are under an obligation to fence, and are liable for damage to cattle, even pigs, straying on the railway from adjoining lands through defective fences (*Child v. Hearn*, L. R. 9 Exch. 176).

See title PARTY-WALL.

FENCING PITS AND SHAFTS. Is an obligation existing under the Mines Regulation Acts, as regards all old disused shafts; and also (for the safety of the miners) of all shafts, &c., in use, and believed to be unsafe. The Common Law imposed a similar duty, but it was difficult to secure its execution, until after the damage was done.

FEOFFMENT: *See title CONVEYANCES, sub-title FEOFFMENT.*

FERÆ NATURÆ. Animals so described are wild animals in which there is no property, but in respect of which, or of some of them, there may be an exclusive right of preserving and of killing, which is analogous to the right of property, and which is designated *Game* (*see title GAME*). Also, property may be acquired in animals *feræ naturæ* in various ways, and principally the following:—

- (1.) *Propter industriam*, *i.e.*, by reclaiming them or taming them, &c.;
- (2.) *Propter impotentiam*, *i.e.*, by preventing them from escaping, *e.g.*, by killing, wounding, clipping wings, &c.; and

FERRÆ NATURÆ—continued.

(3.) *Ratione Privilegii*, i.e., as being in and belonging to a forest, or chase, or park, or even a warren.

See titles CHASE; FOREST; GAME; PARK; WARREN.

FERRY. Is properly a place of transit across a river, or arm of the sea; but in law it is treated as a franchise, and defined as the exclusive right to carry passengers across a river, or arm of the sea, from one vill to another, or to connect a continuous line of road leading from one township or vill to another; it is not a servitude or easement; it is wholly unconnected with the ownership or occupation of land, so much so that the owner of the ferry need not have any property in the soil adjacent on either side (*Newton v. Cubitt*, 12 C. B. (N.S.) 32). The owner of the ferry is bound to maintain it in a proper state of repair.

A ferry may have originated in legal grant; but from a user of thirty-five years a jury will presume that the ferry had a legal origin (*Trotter v. Harris*, 2 Y. & J. 285); and in case of a disturbance of the franchise, it is sufficient for the plaintiff to shew that he was in possession at the time of the disturbance (*Trotter v. Harris*, *supra*); but no action for disturbance lies for the owner of a ferry, for loss of the traffic (in goods or passengers) carried along a new highway or railway (*Hopkins v. G. N. Ry. Co.*, 2 Q. B. Div. 224).

See titles DISTURBANCE; FRANCHISE.

FEUD: See title FEUDAL SYSTEM.

FEUDAL. This is the adjective from *feud*, e.g., the feudal law signifies the doctrine of *feuds*. *Feudal possession* is the same thing as *seisin*; and *feudal actions* is the old name for *real actions*. Thus, a tenant for years had not the feudal possession, and consequently had no real action, for a man's remedies are necessarily only commensurate in extent and in quality with his rights.

See title SEISIN

FEUDAL POSSESSION: See titles POSSESSION; SEISIN.

FEUDAL SYSTEM. Previously to the Norman Conquest, feudalism, strictly so called, was unknown in England, although something analogous to it existed in Anglo-Saxon times. It was introduced into England partially in 1066 as a consequence of the acquisition or conquest of England by William I. in that year; and the system was completely established in England in 1085 by Law 52 of that sovereign, founded on the oath taken at Salisbury in the latter year by all free men. The law is in these words: "*Statuimus ut omnes liberi homines fœdere et sacramento affirment quod*

FEUDAL SYSTEM—continued.

intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo et contra inimicos et alienigenas defendere." The precise nature of the change in the law of land which was thus effected at a stroke was the entire destruction of *ownerships* and the substitution for them of *tenures*; henceforward there was no such thing as absolute ownership in lands, but only a *tenure* of them; whence also lands have ever since been, as they now also are, described as *tenements*. All the land of the kingdom is supposed to be holden mediately or immediately of the king, as lord paramount; and tenants holding immediately under him in right of his crown and dignity, are called his tenants *in capite*, while those that hold mediately under him are called *mesne tenants*, or tenants holding of *mesne lords*.

See title TENURE OF LAND, HISTORY OF.

Feuds are the same thing as tenancies. The services in consideration of which feuds were held were originally purely military, the early princes of Europe parcelling out the lands of their kingdoms among their officers whom they swore to fidelity, and reserving to themselves only the *nudum dominium* or bare absolute ownership of the lands; and the extension of the feudal system to the allodial proprietor must be attributed to the anarchy and private warfare that was prevalent in the early middle ages.

Feuds were originally precarious, and not hereditary; but it was unusual, and would have been thought hard and undeserved, either to determine the tenancy during the life of the feudatory, or to reject the heir of the former feudatory, if otherwise able and unobjectionable. Upon the heir taking up the inheritance by permission of the sovereign, he paid a relief (*relevatum*, or taking-up fine), an incident of the feud which has survived to the present day, although feuds are now no longer precarious, but hereditary. Feuds were afterwards extended beyond the life of the first tenant to the sons of the first tenant, and (but only if the feud was *antiquum*, i.e., had been long in the family) to the grandchildren, and even to the collateral relations of the first tenant. It is an opinion of Spelman's that so long as the tenancy was precarious, it was called simply a *munus*, that when it became certain for life, it was called a *beneficium*, and that only when it became inheritable it was called a *feudum*.

Feuds were either proper or improper feuds. (1.) A *proper feud* was one which was purely military; whence women and

FEUDAL SYSTEM—*continued.*

monks were at first incapable of succeeding to this species of feud; whence also it could not be aliened without the consent of the lord, and in like manner the lord could not alien his seigniorship without the consent of the tenant, the obligations of the superior and inferior being mutual and reciprocal. Proper feuds originally belonged to all the sons equally; but by a constitution of the Emperor Frederic they became indivisible, and descended to the eldest son alone (*see* title **PRIMOGENITURE**).

(2.) An *improper feud*, on the other hand, was not necessarily military at all, much less was it purely military, but was in general granted in consideration of a rent, or *cense*, in lieu of military or other service, whence women were not excluded from it, and it was freely alienable.

The principal obligations incident to the feud were the following:—

(1.) Wardship and Livery, although it is certain that this incident could form no part of the law of feuds before these became hereditary;

(2.) Marriage;

(3.) Relief;

(4.) Aids;

(5.) Escheat; and

(6.) Escuage.

It is so absolute a maxim of the feudal law, or law of tenures, that all lands are holden mediately or immediately of the king, that even the king himself cannot give lands in so absolute and unconditional a manner as to set them free from tenure; and, therefore, in the case of such a gift, the donee would, prior to the 12 Car. 2, c. 24, have held the lands of the king *in capite* by knight service, and would since that statute now hold by socage tenure. The varieties of tenures were classified by Bracton (Henry III.) as follows:—

“Tenements are of two kinds, (I.) Franktenement, and (II.) Villenage. And of Franktenements. (I. a.) some are held freely in consideration of homage and knight-service; (I. b.) others in free socage with the service of fealty only. Of Villenages (II. a.) some are pure, and (II. b.) others are privileged, he that holds in pure villenage being bound to uncertain services of a villein nature, and he that holds in privileged villenage being bound to certain services of a villein nature. whence also the latter is often called a villein-socman.”

All knight-service tenures were commuted into free and common socage by the stat. 12 Car. 2. c. 24, and many of the incidents of feudal tenure were abolished; and by the growth of custom, villenage tenures are now copyhold lands.

See titles **FRANKTENEMENT**; **KNIGHT-SERVICE**; **SOCAGE**; **VILLENAGE**, &c.

FEUDARY: *See* title **FEUDATORY**.

FEUDATORY. This was a name for a feudal tenant or vassal. The word is to be distinguished from *feudary*, which denoted an officer in the Court of Wards, who was appointed by the 32 Hen. 8, c. 46, and abolished by the 12 Car. 2, c. 24, and who, during the continuance of his office, acted as a receiver for the king of the lands of the king's wards and widows.

FEUDUM NOVUM UT FEUDUM ANTIQUUM. Every fee simple estate, although newly acquired by purchase or devise, and although being therefore a *feudum novum*, is regarded in law as a *feudum antiquum* for the purpose of making the collaterals of the first owner capable of inheriting same, in accordance with the canons of descent, the principle underlying all which is,—that the land is only inheritable where there is any of the blood of the original feudal grantee.

See title **DESCENTS**.

FIAT. This is a Latin word signifying “*let it be done*.” Thus, upon a petition to the king for his warrant to bring a writ of error to the House of Lords, he used to write the words *fiat justitia*, “let justice be done,” on the top of the petition. And in like manner, it was under a fiat of the Lord Chancellor, addressed to the Court of Bankruptcy, that the petitioning creditor used to prosecute, and that that Court used to hear the bankruptcy petition. Both those uses of the word “fiat” have gone into disuse, but analogous uses of the word remain; and as so used, the word in every case denotes an authority issuing from some competent source for the doing of some legal act, *e.g.*, the fiat of the Attorney-General is still necessary before certain appeals can be taken to the House of Lords.

FICTIONS. These are assumptions of an innocent and even beneficial character, made for the advancement of the ends of justice, (*In fictione juris semper sequitur existit*). They secure this end chiefly by the extension of procedure from cases to which it is applicable, to other cases to which it is not strictly applicable, the ground of the inapplicability being some difference of an immaterial character. Thus, by the strict law of Rome, a foreigner (*peregrinus*) who had committed or suffered a tort, was neither liable to be sued, nor competent to sue, for the same; but at a very early period the *peregrinus* in such a case was enabled to sue, and was made liable to be sued, upon the assumption, *i.e.*, fiction, that he was a Roman citizen. And similarly in English Law, the procedure

FICTIONS—continued.

of the Court of Exchequer, which was strictly confined to matters affecting the Crown revenues, was extended by means of the fiction *quo minus* to general civil suits in debt, and similarly the procedure of the Court of Queen's Bench was extended by the fiction of the *ac etiam* clause. It was customary also at one time to lay the venue at St. Martin's-le-Grand by a fiction for the true venue in the case of murders committed abroad, *e.g.*, in Jamaica, this being an innocent fiction, the utility of which consisted in giving the Queen's Bench in England jurisdiction to try the offence. And generally, the procedure of Courts of Equity, so far as the same was supplementary to that of Courts of Common Law, depended largely on fictions of the like sort, *e.g.*, that the *cestui que trust* was feudally possessed, and might sue in the absence of his trustee, in whom the legal estate in reality was.

According to Maine, fictions stand midway between early law and modern legislation, as a means of advancing the law. This opinion is corroborated by what actually occurred in the Roman Law, and by what is daily occurring in English Law. Thus, the *actio Rutiliana*, which was the result of legislation, superseded the *actio Serviana*, which was the product of a fiction (Gai. iv. 35); and in English Law, by the C. L. P. Act, 1852, the *cestui que trust* was empowered in certain cases to proceed at Law precisely as he might have done in Equity, a provision which is now made general by the Judicature Act, 1873.

FIDEICOMMISSARIUS. This word denoted in Roman Law the person who in English Law is called the *cestui que trust*, and the word *fiduciarius* denoted the person who in English Law is called the trustee. The *prætor fideicommissarius* was an officer who corresponded to the Lord Chancellor. *Fideicommissa* was the name for trusts which are said to have been introduced for the first time in the reign of Augustus (Just. 2, 23, 1) in the person of Lucius Lentulus.

See title FIDUCIARY.

FIDEJUSSOR. Is a surety in Roman Law. He might be added to any obligation, whether civil or natural, being in this respect (and in a few other respects) different from both a *fidepromissor* and a *sponsor*, who were also sureties. He enjoyed a right against the principal debtor analogous to the right of RECOURSE in English Law, and which was called the *actio depensi*; but after the *Epistula Hadriani* (117 A.D.), he had no right analogous to the English Law right of CONTRIBUTION as between co-sureties, but he had a

FIDEJUSSOR—continued.

better right, viz., the *beneficium divisionis*, which obliged the creditor to split his demand evenly among all the co-sureties, whom for that purpose he might be required to make co-defendants.

See title SURETY.

FIDEPROMISSOR: See title FIDEJUSSOR.

FIDUCIARIUS TUTOR. In the Roman Law, a *fiduciarius tutor* was the elder brother of an emancipated *pupillus*, whose father had died leaving him still under fourteen years of age.

FIDUCIARY. This phrase is derived from the Latin *fiduciarius*, which in Roman Law denoted substantially a trustee; and, accordingly, the word is used in English Law to denote any one who holds the character of trustee, or (more accurately) a character analogous to that of trustee, *e.g.*, agents, guardians, and the like.

FIDUCIARY RELATIONS. Are the relations in which trustees stand towards their *cestuis que trust*, and are so called because the Latin word *fiduciarius* denotes a trustee. It is a cardinal principle of Equity, that one standing in this species of relation shall not make any profit out of it (*Docker v. Somes*, 2 My. & K. 655); and the principle extends even to constructive trustees, that is to say, agents, guardians, partners (*Wedderburn v. Wedderburn*, 4 My. & Cr. 41), directors of companies (*Great Luxembourg Ry. Co. v. Magnay*, 25 Beav. 586), and promoters of companies (*Bagnall v. Carlton*, 6 Ch. Div. 371; *New Sombrero Co. v. Erlanger*, 5 Ch. Div. 73; 3 App. Ca. 1218). Also, one trustee is liable for the acts of his co-trustee, at least practically (Snell's Equity by Brown, 5th ed., pp. 155-157). But time will run in favour of, so as to bar actions against, constructive trustees (*Knox v. Gye*, L. R. 5 H. L. 656), although it will not do so as regards express or even, *semble*, implied trustees.

FI. FA. Is a writ of execution directed to the sheriff, and commanding him that of the goods and chattels of the debtor he do cause to be made (*fieri facias*) the sum recovered by the judgment, together with interest at 4 per cent., and that he have the money and interest, and the writ itself, before the Court immediately after the execution of the writ, to be rendered to the party who sued out the writ. Under the stat. 1 & 2 Vict. c. 110, the sheriff may, upon a *fi. fa.*, seize any money, bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money belonging to the debtor, in addition to things that were already seizable under

FI. FA.—continued.

the Common Law; but by stat 8 & 9 Vict. c. 127, the wearing apparel and bedding of the debtor or his family, and the tools and implements of his trade, to the extent of £5 in value, are protected.

See title EXECUTION, WRIT OF.

FI. FA. AGAINST GARNISHEE: See title GARNISHEE ORDER

FI. FA. DE BONIS ECCLESIASTICIS.

This is a writ of execution which may be issued when the sheriff has returned upon an ordinary *fi. fa.* that the judgment debtor is a beneficed clerk and has no property beyond the profits of his benefice. The writ is directed to the bishop of the debtor's diocese; and the bishop executes the writ forthwith by appointing sequestrators of the profits of the benefice (2 Chitty's Pract., 12th ed., pp. 1283-4).

See title SEQUESTRARI FACIAS DE BONIS ECCLESIASTICIS.

FIFTEENTHS. This was a tax consisting of one-fiftieth part of all the moveable property of the subject. It is said to have been first imposed by Hen. II.

See title TAXATION, HISTORY OF.

FILING OF RECORD. This means entering amongst the records of the Court.

FILIUSFAMILIAS: See title POTESTAS.

FINAL JUDGMENTS AND ORDERS.

A judgment is said to be *final* when it is complete in itself, and entitles the party to obtain at once the fruits of his judgment, without any further inquiry being requisite for the purpose of ascertaining its amount. An order is said to be *final*, when it is equivalent to a final judgment or even to an interlocutory judgment, that is to say, when it disposes finally of any question of liability or of right (subject or not subject to certain accounts being taken); and it is called an order because it is obtained in a summary way on motion, summons or petition, and not at the trial or hearing of an action. The time to appeal a final judgment is one year, but to appeal a final order is only twenty-one days.

See title INTERLOCUTORY JUDGMENTS AND ORDERS.

FINAL PROCESS. As distinguished from *mesne process*, this phrase is used to denote writs of execution, such as *fi. fa.* and *elegit*, being the steps taken at the end of a successful action for the purpose of realizing the fruits of a final judgment or order.

See title MESNE PROCESS.

FINDER OF LOST PROPERTY. Has no property therein, excepting as against a pure wrongdoer (*Armorie v. Delamirie*,

FINDER OF LOST PROPERTY—contd.

1 Stra. 504). And if he should at the moment of finding entertain the intention of appropriating (and should thereupon appropriate) the lost property to his own use without troubling to inquire for the true owner, under circumstances where it is reasonable to suppose the true owner might be discovered, he is guilty of larceny (*R. v. Thurburn*, 1 Den. 388).

See title LARCENY.

FINDING OF A JURY. This denotes the verdict of the jury. They find a mixed verdict, that is, partly of law and partly of fact; and it is competent for them to find the contrary of the truth, for their finding maketh even what is false to be true (*Bushell's Case*, 6 St. Tr. 909).

See title VERDICT.

FINE. A species of assurance abolished by the stat. 3 & 4 Will. 4, c. 74, but which previously to that statute was commonly in use for assuring estates of freehold. It was an amicable agreement (*finis concordie*) of a suit, whether real or fictitious, although most commonly the latter, between the demandant and tenant, with the consent of the judges, and inrolled among the records of the Court. The principal uses of the fine were two, viz.: (1.) To bar estates-tail, and (2.) To pass the interests of married women in real property. It acquired the power of effecting the first of these two purposes by the Statute of Fines (11 Hen. 7, c. 1), as judicially construed in the reign of Henry VIII., and which construction was afterwards confirmed by the stat. 32 Hen. 8, c. 36, which also made the bar immediate. The effect of it was, however, confined to barring the issue only of the tenant. Its modern substitute and equivalent is a disentailing deed, executed by the tenant in tail and inrolled, but in which the protector of the settlement has refused to concur. With reference to the second of the two purposes above mentioned, the fine seems to have always had that power even by the Common Law, the necessity of obtaining the consent of the judges affording a sufficient guarantee for the protection of the rights of the married female. Its modern substitute is a deed acknowledged, the acknowledgment before the Court, or the duly authorized commissioners, affording the like guarantee.

See titles DISENTAILING ASSURANCE; DEED ACKNOWLEDGED.

FINES ON ALIENATION. These were incidents of the tenure by knight service *in capite*, and became payable to the king upon any alienation by his tenant, apparently as the purchase-money for liberty to aliene. In case such a tenant attempted

FINES ON ALIENATION—*continued.*

to aliene without having first obtained in that manner the king's licence so to do, he incurred a complete forfeiture of his lands. Similar fines were also exacted, and still are exacted, upon the alienation of lands of copyhold tenure; these fines are usually called *fines on admittance*, but are not usually payable till after admittance. The amount of the fine on admittance, which was at first arbitrary, is now measured by a well-established custom which ascertains it at two years' net improved annual value of the land. The amount payable by the remainderman after an estate for life is usually one-half of that payable by the tenant for life. In the case of joint tenants, the lord takes a single fine for the first tenant, one half of that for the second, one fourth for the third, and so on (*Wilson v. Hoare*, 10 A. & E. 234). See Deane's Conveyancing

FINIUM REGUNDORUM. In Roman Law, was an action for the ascertainment of the boundaries of adjacent estates. In the formulary procedure, this was one of the three actions in which (and in which alone) the *adjudicatio* was to be found, that is, the clause in the formula which assigned to the respective owners the shares allotted or adjudicated by the *judex* to them respectively, the other two actions in which the *adjudicatio* occurred being the *familix erciscundæ* (for an aggregate or *universitas rerum*) and the *communi dividundo* (for a single or individual *res*)

See titles BOUNDARIES, CONFUSION OF; PARTITION.

FIRE. The law as to fire-brigades and firemen within the metropolis is regulated by the Act 28 & 29 Vict. c. 90; and the general law as to fireworks (their manufacture, sale, and use) is contained in the Act 23 & 24 Vict. c. 139. Under the stat. 14 Geo. 3, c. 78, a person on whose premises a fire accidentally arises is not liable to any action for the injury thereby occasioned to others, any law, usage, or custom to the contrary notwithstanding.

FIRE-BOTE. This is the same as *house-bote*.

See title ESTOVERS.

FIRE INSURANCE. An insurer against damage by fire must have an interest in the subject-matter insured, and he cannot recover beyond the extent of such interest. A policy of fire-insurance is not legally assignable, unless with the assent of the office. A covenant to insure is usual in all leases; likewise in all mortgages of house-property; and such a covenant when in leases runs with the land, so as to be binding on the assignee of the lease

FIRE INSURANCE—*continued.*

(*Simpson v. Scottish Union*, 1 Hem. & Mil. 618). The Courts may relieve, but once only, against breach of contract to insure, provided no damage by fire has happened, and the breach is inadvertent and has been cured (22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 126).

FIRM: See title PARTNERSHIP.

FIRMIOR OPERATIO LEGIS. The operation of law is more powerful than the will of man (*dispositio hominis*); consequently, the right of survivorship in joint tenancy prevails over the devise by either joint tenant of his undivided share. And the operation of law is sometimes in such a case called the *elder title*.

See title ELDER TITLE.

FIRST FRUITS. The first year's whole profits of a benefice or spiritual living. These were originally part of the papal usurpations over the clergy of this kingdom; and as they expressed their willingness to contribute so much of their income to the head of the church, it was thought proper, when the papal power was abolished, and the king declared head of the Church of England, to annex this revenue to the Crown, which was done by stat. 26 Hen. 8, c. 3 (confirmed by stat. 1 Eliz. c. 4), and a new *valor beneficiorum* was then made, by which the clergy have since been rated.

See title QUEEN ANNE'S BOUNTY.

FISH ROYAL. These are the whale and the sturgeon, which, when thrown ashore, or caught near the coast, become the property of the king by virtue of his prerogative, and in recompense for his protecting the shore from pirates and robbers.

FISHERY. The right or privilege of fishing. It is a species of common, and is sometimes described as *common of piscary*. *Free fishery* is the exclusive right of fishing in a public river, and is a privilege of the Crown. *Several fishery* is a right of fishing enjoyed by the owner of the soil of the river, and which he may lease or devolve in any other manner upon a stranger.

See title PISCARY; RIVERS.

FIVE MILE ACT. An Act of 1665, against Nonconformists, whereby ministers of that body were prohibited from coming within five miles of any corporate town, or place where they had preached or lectured.

See title CONVENTICLE ACT.

FIXTURES. As the name denotes, are things fixed or affixed to other things. The rule of law regarding them is that which is expressed in the maxim "*Accessio cedit principali*," the accessory goes with,

FIXTURES—*continued.*

and as part of, the principal subject-matter." This maxim, as applied to lands, has assumed in English Law the form "*Quidquid plantatur solo, solo cedit*," and in Roman Law the form "*Omne quod inædificatur solo, solo cedit*." The rule had its first application in English Law in the case of buildings erected on land for agricultural purposes, whence agricultural fixtures so called present the operation of the maxim in its most general form. But inasmuch as that maxim was thought to operate and undoubtedly did operate, in discouragement of trade, there grew up a mitigation of the rule, applicable to trade fixtures as they were called, and which mitigation was to this effect, that fixtures of the latter sort might be removed during the tenancy by the tenant who had put them in, but not after the determination of his tenancy. This mitigation of the rule was subsequently extended, upon the like grounds of utility, to ornamental fixtures so called, which also were permitted to be removed during the tenancy, but not afterwards.

Fixtures are chattels of an amphibious character, being for some purposes and at some times interests in land and for other purposes, and at other times purely personal chattels. Thus, while fixtures are annexed to lands or houses, they are an interest in land, and are rateable as land, and trover will not lie for their conversion or detention; and yet even while so annexed, they are not an interest in land within the meaning of the 4th sect. of the Statute of Frauds (29 Car. 2, c. 3). On the other hand, fixtures, even while annexed, were purely personal chattels within the meaning of the Bills of Sale Act, 1854, (17 & 18 Vict. c. 36); and yet the Courts held that where they were comprised in one testatum, together with the lands or houses to which they were attached, they were to be treated as part and parcel of the lands or houses, and that the Bill of Sale Act, 1854, intended them to be personal chattels only when treated in a separate testatum by themselves, or when the grantee or mortgagee had the power of removal and of sale. Under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), no such separate dealing with the fixtures will now produce any difference of effect; and there appears to be now no method of so dealing with the ordinary classes of trade or tenant's fixtures (other than the fixed motive powers, the fixed power machinery, and the steam, gas, and water pipes), so as to avoid the necessity of registering the mortgage as a Bill of Sale *quoad* such fixtures. Such registration must also be repeated every five years, and will be efficacious even upon a subsequent

FIXTURES—*continued.*

bankruptcy of the maker (Brown on Fixtures, 3rd ed., 1875).

See title **BILL OF SALE**.

FLOTSAM: See title **JETSAM**.

FÆNUS NAUTICUM. This phrase literally means maritime interest, which is commonly at a higher rate of percentage than ordinary interest, in consideration of the extra risks which are incurred at sea.

See titles **BOTTOMRY**; **MARITIME INTEREST**; **RESPONDENTIA**.

FOLDAGE: See title **FALDAGE**.

FOLK-LAND. In Anglo-Saxon times, lands were divided into boc-land and folc-land, the former being held by writing, and the latter by custom merely. This after the Conquest became *Crown Land*, *terra regis*: and the king exercised the right of granting it away without the consent of Parliament.

FOLK-MOTE. This denotes an assembly of the people. It was in the nature of an inferior Court, and an appeal lay from it to the superior Courts. It is supposed to have been the same as the shire-gemote in counties, and as the burg-gemote in burghs. But in its more general meanings it denoted merely a popular assembly, summoned for any cause, whether permanent or occasional, and either to complain of existing misgovernment or to renew the duty of allegiance to the sovereign. In this latter sense, it seems to have acted as that ultimate tribunal of the Commons themselves, to which (in the words of Austin) the House of Commons and the ministers are subject.

FOOD, UNWHOLESOME: See titles **HEALTH, PUBLIC**; **SANITARY LAWS**.

FOOT-WAY: See title **EASEMENTS**, subtitle **WAY**.

FORBEARANCE.—Is a good consideration to support a simple contract, provided that (like other considerations) it move from the plaintiff at the request of the defendant. In general jurisprudence, *forbearance* is commonly used in contradistinction to *act*.

FORCE AND FEAR. Called also "*vi metusque*," means that any contract or act extorted under the pressure of force (*vis*) or under the influence of fear (*metus*), is voidable on that ground, provided of course that the force or the fear was such as influenced the party.

See titles **FRAUD**; **VOID OR VOIDABLE**.

FORCIBLE ENTRY. This is a criminal offence, and consists of an entry or detainer made with such a number of persons or

FORCIBLE ENTRY—*continued.*

with such a shew of force as is calculated to deter the rightful owner from sending the persons away and resuming his own possession (*Milner v. Maclean*, 2 C. & P. 17). The offence is something more than a trespass (*Ree v. Smith*, 5 C. & P. 201). The entry must have been unlawful, to come within the stat. 8 Hen. 6, c. 9.

See title **STRONG HAND**.

FORECLOSURE. This is one of the remedies of a mortgagee. The claim in the action is for an account of the principal moneys and interest owing on the security, and for a day to be fixed for payment of such amount when ascertained together with the mortgagee's costs; failing such payment at the day ultimately fixed for same, the mortgagor is foreclosed, *i.e.*, is "closed off" and debarred from all right or equity of redemption.

See title **MORTGAGE**.

FOREIGN ATTACHMENT. When the defendant is sued in the Lord Mayor's Court of the City of London, it is the custom of that City and Court to issue an attachment against moneys or debts in which the defendant has a beneficial interest, and for which that defendant might at the time of the attachment have brought an action (*Webster v. Webster*, 31 Beav. 393). It is not necessary that the debt for which the attachment issues should arise within the jurisdiction, or that the parties should be within the jurisdiction, but only that the debt attached should be so. Unlike attachment of debts in ordinary cases, foreign attachment may issue before judgment in the action, and in fact immediately after writ of summons issued.

See title **GARNISHEE ORDER**.

FOREIGN BILL. A Bill of Exchange is a Foreign Bill, when it is either drawn abroad or payable abroad, or both. It is commonly drawn in parts; and is made payable after a usance or usances, and not after so many days, weeks, or months. Scotland, Ireland and the Isle of Man, and the Channel Islands are deemed to be within the kingdom and not abroad (19 & 20 Vict. c. 97, s. 7).

See title **NOTARY**.

FOREIGN ENLISTMENT. The stat. 59 Geo. 3, c. 69, was until recently the Foreign Enlistment Act for England; but during the recent Franco-Prussian war that Act was repealed, and a further and more stringent Foreign Enlistment Act (33 & 34 Vict. c. 90) was passed, declaring illegal, and visiting with penalties, the following offences, *viz.* :—

(1.) Enlisting in military or naval service of any foreign state at war with

FOREIGN ENLISTMENT—*continued.*

another foreign state at peace with England;

(2.) Being in any manner subservient thereto or assisting therein; and

(3.) Building ships or making expeditions in aid of either belligerent.

See title **NEUTRALITY**.

FOREIGN-GOING SHIP. By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 2, is any ship employed in trading going between some place or places in the United Kingdom and some place or places situate beyond the following limits; that is to say, the coasts of the United Kingdom, the Islands of Guernsey, Jersey, Sark, Alderney, and Man, and the continent of Europe, between the river Elbe and Brest inclusive: *Home-Trade Ship* includes every ship employed in trading and going between places within the last-mentioned limits.

FOREIGN JUDGMENT. Are the judgments given in foreign courts, outside of the dominions of the Queen. They do not operate as an estoppel or *res judicata*, but are strong inherent evidence of their own justice. They rank as simple contracts only. The judgments of foreign prize courts are, however, conclusive.

FOREIGN JURISDICTION. Under the stat. 6 & 7 Vict. c. 94, which refers to the jurisdiction, the Crown may exercise beyond its own dominions under "treaty, capitulation, grant, usage, sufferance, and other lawful means," it is provided that the sovereign may exercise any such foreign jurisdiction (then existing or afterwards accruing) in the same and as ample a manner as if the sovereign had acquired such jurisdiction by the cession or conquest of territory; and under the Foreign Jurisdiction Act, 1878 (41 & 42 Vict. c. 67), various Acts ancillary to the first mentioned or principal Act may by order in council of the sovereign be extended to all places within the purview of the principal Act; and the Act of 1878 further extends the principal Act to countries without regular governments where any English subjects are resident.

See titles **COLONIES**; **COLONIAL LAW**; **FOREIGN JURISDICTION ACTS, 1843–1878**; **TERRITORIAL JURISDICTION**.

FOREIGN JURISDICTION ACTS (1843–1878): See titles **FOREIGN JURISDICTION**; **TERRITORIAL JURISDICTION**.

FOREIGN LAWS. Are often the suggesting occasions of changes in, or additions to, our own laws, and in that respect are called *jus receptum*. But foreign laws sometimes prevail almost *proprio vigore* within this country, through our Courts of

FOREIGN LAWS—continued.

Justice choosing invariably to follow them in certain cases. What those cases are, and in what cases the English Courts refuse to follow the foreign law and apply the Law of England, may be learned from a study of the "Conflict of Laws," by Mr. Story or Mr. Wharton, or (more conveniently perhaps) from Westlake's *Priv. Inter. Law*, and Foote's *Priv. Inter. Law*. And for some detailed information of these laws, see the titles *LEX LOCI REI SITÆ*; *LEX DOMICILII*; *LEX LOCI ACTUS* or *CELEBRATIONIS*; *LEX LOCI SITUS*; *LEX LOCI SOLUTIONIS* or *CONTRACTUS*; and *LEX FORI*.

FOREIGN PRINCIPAL: See title *PRINCIPAL AND AGENT*.

FOREIGNERS, SUITS BY AND AGAINST. Provided a contract has been made or has been broken within the jurisdiction, or the party is within the jurisdiction, then although a foreigner he is amenable to the jurisdiction as a defendant; but the Courts are not bound to exercise the jurisdiction where the contract was neither made nor broken here, although they should have seisin by the person of the foreigner. The like rules apply substantially to foreigners being plaintiffs. Where a foreigner is a plaintiff, and is resident out of the jurisdiction, he is obliged to give security for the costs of the action, in the same manner that a British subject would do if he was resident out of the jurisdiction.

FORESHORE: See title *SEA-SHORE*.

FOREST: See titles *CHASE*; *PARK*; *WARREN*.

FOREST-LAW. This was a particular system or body of laws relating to the forests of the Crown. It is popularly associated with everything that was cruel—an opinion to which the frequency of that kind of statute called *Carta di Foresta* seems to give some probability. The officers of the forest, who were charged to preserve the "vert and venison" thereof, were called *foresters*.

FORESTS, WOODS AND: See titles *CROWN LANDS*; *WOODS AND FORESTS*.

FORESTALLING. Called also re-grating or engrossing of the market, is an offence by the Common Law; thus, spreading rumours, with intent to enhance the price of hops, in the hearing of hop-planters, to the effect that the stock is nearly exhausted and that there will be a scarcity, is an instance, of this offence. Some attempt was made by the stat. 7 & 8 Vict. c. 24, to regulate the offence, but apparently with poor effect; the statute was necessary, inasmuch as the Common Law

FORESTALLING—continued.

offence extends only to the necessities of life (*Pettamberdars v. Nockoorseydas*, 7 Moo. P. C. C. 239).

See title *RE-GRATING*.

FORFEITURE. By the stat. 33 & 34 Vict. c. 23, forfeiture or escheat of lands on the ground of treason or felony is abolished, but of course remains for any other cause. The law of forfeiture also still applies as between landlords and their tenants for breaches of covenants contained in leases; and with reference to these, neither Courts of Law nor Courts of Equity have much or any power to relieve; but they may be waived by the landlord.

See titles *DAY AND WASTE*; *ESCHEAT*; *WAIVER*; *YEAR*.

FORFEITURE, QUESTIONS EXPOSING TO. In cross-examination of witnesses and also in involuntary depositions these questions need not be answered, the privilege of witnesses extending to cover them, *sed quære*.

See title *PRIVILEGE OF WITNESSES*.

FORFEITURES, RELIEF AGAINST: See title *PENALTIES, RELIEF AGAINST*.

FORGED BILLS. No title arises through a forgery; and the party who pays a forged bill will be himself the sufferer. But in the case of drafts by one bank on another bank, if merely the indorsement thereon is forged, the paying bank is protected, and the payment so far as concerns that bank is a good payment (16 & 17 Vict. c. 59, s. 19).

FORGED DRAFTS: See title *FORGED BILLS*.

FORGERY. This is a criminal offence, existing partly by Common Law and partly by statute. Forgery at Common Law is the fraudulent *making* or alteration of a writing to the prejudice of another man's right. Under the stat. 24 & 25 Vict. c. 98, and numerous other statutes, offences analogous to forgery at Common Law are made felonies, and are punishable as forgeries; but that punishment is not now death (as formerly), but penal servitude for life, or for any term not less than five years, or imprisonment with or without hard labour, and with or without solitary confinement, for any term not exceeding two years.

FORIS FACTA. Literally "gone away out." Goods forfeited for treason or felony were so called because the property therein had gone away out of the owner.

See title *FORFEITURE*.

FORISFAMILIATED. An antiquated word, which signifies much the same as *set*

FORISFAMILIATED—*continued.*

up in the world (*see* title **ADVANCEMENT**). A son was said to be forisfamiliaried when in his father's lifetime he received his part of the lands, and was contented therewith.

See title **HOTCHPOT**.

FORMA LEGALIS FORMA ESSENTIALIS. The writing required by (*e.g.*) the 4th section of the Statute of Frauds to the validity of the five contracts in such section specified is the *forma legalis* (*i.e.*, the prescribed legal form) of such contracts, so far as regards not the constitution but the proof of the contract; and inasmuch as that section permits no alternative mode of proof, but renders the writing the exclusive pre-appointed evidence of the contract, the legal form is in fact also a *forma essentialis* (*i.e.*, an indispensable form). On the other hand, the 17th section of the same statute allows various alternative modes of proof other than the written proof of the class of contracts with which it deals, and in a contract of that class, the writing would not be essential.

See title **FRAUDS, STATUTE OF**.

FORMA PAUPERIS. A person is said to sue or defend an action or suit *in forma pauperis*, *i.e.*, in the character of a poor person, when, by going through certain forms, he is admitted by the Court so to sue or defend, and has counsel and attorneys assigned to conduct his case free of charge. An order of the Court is necessary, which is to be obtained upon a petition of the party, accompanied with a certificate of counsel. The order must be served on the opposite party, and only takes effect as from the date of such service (*Fray v. Voules*, L. R. 3 Q. B. 214); but, subject to that rule, the party may be admitted to sue or defend in this capacity at any stage of the proceedings. Moreover, he may appeal without making any deposit (*Drennan v. Andrew*, L. R. 1 Ch. 300).

FORMALITIES OF CONTRACT. Are governed in international law by the *lex loci actus*, *i.e.*, the law of the place in which the contract is entered into.

FORMEDON, WRIT OF. This was an action in the nature of a writ of right. There were three species of the writ, *viz.*—

- (1.) *Formedon in the descender*;
 - (2.) *Formedon in the remainder*; and
 - (3.) *Formedon in the reversion*;
- these forms of writ being applicable respectively in the following cases:—

(1.) *Formedon in the descender*, where the tenant in tail aliened the land entailed or was disscised thereof and died, and the heir in tail wanted to recover the land against the then tenant of the freehold;

FORMEDON, WRIT OF—*continued.*

(2.) *Formedon in the remainder*, where the tenant for life or in tail with remainder to a third person in fee or in tail died (and, in the case of tenant in tail, without issue), and afterwards a stranger intruded upon the land and kept the remainderman out of possession, and the remainderman wanted to recover the land from the intruder; and

(3.) *Formedon in the reverter*, where the tenant in tail died without issue, and the reversioner wanted to recover the lands against the then tenant thereof.

All these forms of this writ were abolished by the stat. 3 & 4 Will. 4, c. 27, s. 36, but it would be a mistake to suppose that the analogous remedies are abolished, which they are not.

FORMS OF ACTION. Were at one time very numerous, and were called by distinctive names, *e.g.*, ejectment, trover, trespass, &c.; but under the Judicature Acts, 1873–75, all the varieties of action have been reduced to one uniform character, that is to say, they are all now simply actions on the case, and state simply and naturally the facts of the case, and claim the relief that is due to the plaintiff on such statement.

See title **STATEMENT OF CLAIM**.

FORMS, COMMON. Are the usual clauses in deeds and other documents relating to property, and they are called common, because of their frequent use. They are adapted in general to each particular subject-matter, according to its own nature.

FORMULÆ. In Roman Law, when the *legis actiones* were proved to be inconvenient, a mode of procedure called *per formulæ* (*i.e.*, by means of *formula*) was gradually introduced, and eventually the *legis actiones* were abolished by the *Lex Aebutia*, B.C. 164, excepting in a very few exceptional matters. The *formulæ* were four in number, namely. (1.) The *Demonstratio*, wherein the plaintiff stated, *i.e.*, shewed the facts out of which his claim arose, (2.) The *Intentio*, where he made his claim against the defendant, (3.) The *Adjudicatio*, wherein the judex was directed to assign or adjudicate the property or any portion or portions thereof according to the rights of the parties, and (4.) The *Condemnatio*, in which the judex was authorized and directed to condemn or to acquit according as the facts were or were not proved. These *formulæ* were obtained from the magistrate (*in jure*), and were thereafter proceeded with before the judex (*in judicio*.) Their utility was largely extended by the praetor by means of

FORMULÆ—continued.

fiction inserted in them in order either to found the jurisdiction or to give the plaintiff a legal ground of suing, he having an equitable ground to begin with. The *formulæ* continued in use until 294 A.D., when they were abolished by Diocletian, in whose reign the *extraordinarium iudicium* was introduced. The *formulæ* corresponded very nearly to the old forms of action in English Law, as represented by the writs originally issuing out of the Court of Chancery.

See titles FICTIONS; LEGIS ACTIONES, &c.

FORNICATION. An offence against the laws ecclesiastical, consisting in the illicit sexual intercourse of unmarried persons, adultery being the like illicit relation of persons either or both of whom are married. The offence was punishable by excommunication and otherwise by the Ecclesiastical Courts (27 Geo. 3, c. 44), but (in the case of lay persons) it is now punishable as a misdemeanour only (23 & 24 Vict. c. 32); in the case of ecclesiastics, either deprivation or suspension would be the punishment.

See titles BRAWLING; EXCOMMUNICATIO CAPIENDO, WRIT OF; SUSPENSION; DEPRIVATION.

FORTESCUE AND GOODWIN: See title ELECTIONS, COMMONS' RIGHTS IN.

FORTIOR DISPOSITIO LEGIS: See title FIRMOR OPERATIO LEGIS.

FORUM REI: See titles ACTOR SEQUITUR FORUM REI; VENUE.

FOX'S LIBEL ACT: See title PRESS, LIBERTY OF.

FRANCHISE. An incorporeal hereditament or right, such as a ferry, or a market, entitling the owner of the franchise to take certain tolls or pecuniary payments. Sometimes, also, it denotes an exemption from the ordinary jurisdiction, coupled with the right of exercising a jurisdiction of one's own; and in this last signification it is a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject; e.g., to be a county palatine, to have right to hold a Court leet, to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, and deodands (3 Cru. 278).

FRANCHISE, ELECTORAL: See title ELECTORAL FRANCHISE.

FRANK PLEDGE. Every freeman (not being a hlaforð) was bound to be enrolled in a frith-borh, i.e., an association of ten freemen, who were responsible for the appearance of any of their number when required to answer in a Court of law. The hlaforð was the feudal superior, who was

FRANK PLEDGE—continued.

answerable in like manner for his vassals, and for those landless men who had "commended" themselves to him.

See titles COMMENDATIO; HLAFORÐ; POLICE.

FRANK TENEMENT. Is the same as freehold, the word frank denoting free. It is opposed to the phrases villein tenement and copyhold tenement, which were not free holdings.

See titles FREEHOLD; TENEMENT; FEUDAL SYSTEM.

FRANKALMOIGN. Is a species of tenure of lands granted by the owner to the church or to any monastic body, to hold to the church or monastery for ever free (as the name denotes) of all manner of services to the donor for ever, save and except the saying of prayers and the distributing of charity to the poor for the welfare of the soul of the donor and his family for ever.

FRANKMARRIAGE. Is a species of tenure of lands granted by the owner to his son-in-law, to hold to such son-in-law and the heirs of the marriage free (as the name denotes) of all manner of services to the donor until the fourth generation, other than the sole service of the marriage.

FRAUD. At Law, fraud has been thus variously described:—

(1.) Falsely and fraudulently warranting a specific article sold (*Langridge v. Levy*, 2 M. & W. 519); the *scienter* is an essential part of the definition, and its absence dispels the fraud (*Longmeid v. Holliday*, 6 Ex. 761);

(2.) Falsely and fraudulently representing a man as a safe customer (*Pasley v. Freeman*, 3 T. R. 51), where the representation is intended to be acted upon, and is in writing under 9 Geo. 4, c. 14, s. 6;

(3.) Recklessly asserting, without any knowledge of the matter, the existence of a certain state of circumstances, and inducing the plaintiff, in reliance thereon, to act upon the error, to his loss (*Evans v. Edmunds*, 13 C. B. 777); and

(4.) Asserting without any knowledge of the matter, but with a disbelief of his own assertion, the existence of a certain state of circumstances, and inducing the plaintiff in reliance thereon to act upon it to his loss (*Taylor v. Ashton*, 11 M. & W. 415).

In Equity, fraud has been distinguished into the varieties following:—

I. Actual Fraud, and hereunder two sub-varieties, namely:—

(A.) Frauds from a regard to the peculiar position of the defrauded person,

FRAUD—continued.

(B.) Frauds without any such regard, but arising from conduct generally, as being either

- (1.) *Suggestio falsi*; or,
- (2.) *Suppressio veri*.

II. Constructive Fraud, and hereunder three sub-varieties, namely:—

- (A.) Frauds, because evasions of the rules of public policy.
- (B.) Frauds, because violations of trust or of confidence reposed,
- (C.) Frauds, because of unconscientious nature of acts themselves, either

- (1.) As against the parties; or,
- (2.) As against third persons.

I. The remedies available at Law for a fraud are the following:—

- (1.) An action on the case in the nature of a writ of deceit, and recovering damages for the fraud; and
- (2.) An action on the common indebitatus count for money had and received, and recovering the full amount of the debt.

Generally speaking, the first of these two remedies, viz., an action to recover damages arising from fraud, will lie in every case of fraud; but if the plaintiff chooses to disaffirm the contract on the ground of fraud, he may then bring the second form of action, viz., an action on the common indebitatus count (*Neate v. Harding*, 6 Ex. 349). But some act of disaffirmance must in every case precede the commencement of the latter form of action (*Smith v. Hodson*, 4 T. R. 211; 2 Sm. L. C. 119, and notes).

There is, however, a limit to the right of bringing the first action, i.e., an action on the case in the nature of deceit, it being a rule of the Common Law that such an action will not lie against a principal for the fraudulent representations of his agent, the principal not having either expressly or impliedly authorized the agent to make the representations (*Cornfoot v. Fowke*, 6 M. & W. 358); and therefore an incorporated company cannot as such be made liable in this action for the false representations of its directors, the company not having authorized the directors to make the representations (*Western Bank of Scotland v. Addie*, L. R. 1 S. & D. 162), the remedy (if any) being against the directors only (*Gerhard v. Bates*, 2 El. & Bl. 487).

And there is also a limit to the right of bringing the second action, i.e., an action for money had and received, it being a rule of the Common Law that such an action will not lie if the circumstances have so far changed since the date of the contract that the parties cannot be restored to the

FRAUD—continued.

position in which they stood before or at the time of the contract (*Clarke v. Dickson*, El. Bl. & El. 148); and therefore a contract, although induced by fraud, cannot be avoided if the rights of an innocent vendee have in the meantime intervened (*Queen v. Saddlers' Company*, 10 H. L. C. 420).

At Law, an action to recover damages arising from fraud, or (upon a disaffirmance) an action on the common indebitatus count, will lie in the following cases:—

(1.) Where the defendant has stated or represented as a matter of fact (and not of opinion merely) what is untrue, *knowing it to be untrue*, with intent to induce the plaintiff to act upon it, and has thereby induced the plaintiff to act upon it, to his loss (*Pasley v. Freeman*, 3 T. R. 51);

(2.) Where the defendant has stated or represented as a matter of fact (and not of opinion merely) what is untrue, without knowing whether it is false or true, *but not believing it to be true*, with intent to induce the plaintiff to act upon it, and has thereby induced the plaintiff to act upon it, to his loss (*Taylor v. Ashton*, 11 M. & W. 410);

(3.) Where the defendant has stated or represented as a matter of fact (and not of opinion merely) what is untrue, knowing it to be untrue, *but from defect of memory believing at the time that it is true*, with intent to induce the plaintiff to act upon it, and has thereby induced the plaintiff to act upon it, to his loss (*Slim v. Croucher*, 2 Giff. 37);

(4.) Where the defendant has fraudulently concealed from the plaintiff some defect which it was his duty (either generally or by reason of the special circumstances of the transaction) to disclose, with intent to induce the plaintiff to act upon the assumption of the absence of such defect, and has thereby induced the plaintiff to act upon that assumption, to his loss (*Horsfall v. Thomas*, 1 H. & C. 90); and

(5.) Where the defendant has falsely and fraudulently warranted a specific article sold (*Langridge v. Levy*, 2 M. & W. 519); in which latter case (waiving the fraud) an action would lie for breach of warranty.

But an action will not lie at Law in the following cases:—

(1.) Where the defendant has stated or represented as a matter of fact (and not of opinion merely) what is untrue, knowing it to be untrue, *but without intent to induce the plaintiff to act upon it*, although the plaintiff may have been induced thereby to act upon it, to his loss (*Way v. Hearn*, 13 C. B. (N.S.) 292);

FRAUD—continued.

(2.) Where the defendant has stated or represented as a matter of fact (and not of opinion merely) what is untrue, without knowing whether it is false or true, *but believing it to be true, and not being under any duty to know the contrary*, with intent to induce the plaintiff to act upon it, and has thereby induced the plaintiff to act upon it, to his loss (*Evans v. Collins*, 5 Q. B. 804).

(3.) Where the defendant has stated or represented as matter of *opinion* merely what is untrue, *believing it to be true*, with intent to induce the plaintiff to act upon it, and has thereby induced the plaintiff to act upon it, to his loss; and

(4.) Where the defendant has fraudulently concealed from the plaintiff some defect, which it was not the duty of the defendant (either generally, or by reason of the special circumstances of the transaction) to disclose, but on the contrary the duty of the plaintiff to discover, with intent to induce the plaintiff to act upon the assumption of the absence of such defect, and has thereby induced the plaintiff to act upon that assumption, to his loss.

As to *pleading* fraud at Law, the defence must be specially pleaded, although it is generally sufficient for the defendant to allege that he was induced to make the alleged contract by the fraud of the plaintiff; nevertheless, some particularity must be shewn. Where fraud is pleaded with particularity, no other fraud can be proved than that which is averred (*Tuck v. Tooke*, 9 B. & C. 437), and therefore there should always be a general allegation of other frauds in addition to the fraud or frauds particularised. Sometimes the Court orders particulars of the fraud to be delivered (*Marshall v. Emperor Life Assurance Society*, L. R. 1 Q. B. 35).

II. The remedies available in Equity for a fraud are the following:—

(1.) The Rescission of the Contract, including the *cancellation* and delivery up, and the setting aside, of the agreement

(2.) The specific performance of the fraudulent representation;

(3.) An injunction from profiting by the fraud; and

(4.) A declaration making the defrauding party a trustee for the party defrauded.

Every such remedy is available by action on the case. The statement of claim must not rest upon a mere general allegation of fraud, but must state in a particular manner the details of the transaction which is impugned as fraudulent, in order that the Court may infer from that statement whether there was or not any fraud in the transaction (*Gilbert v. Lewis*, 1 De G. J. & S. 38).

FRAUD—continued.

(A.) Where the remedy sought is the RESCISSION OF THE CONTRACT, the following are the general requisites to the success of the suit:—

(1.) That the party against whom relief is sought can be remitted to his former position, the interests of third parties without notice of the fraud not having meanwhile intervened;

(2.) That the contract may be rescinded *in toto*, unless indeed it be severable in its nature, in which latter case the rescission of the fraudulent portion of it may, subject to the first requisite, be obtained (*Maturin v. Tredennick*, 12 W. R. 740); and

(3.) That the person who committed the fraud or a privy of such person, is the party contracting, and not a mere outside person (*Pulsford v. Richards*, 17 Beav. 95).

The terms upon which a transaction is rescinded are in general upon the plaintiff doing equity. Thus, fraudulent instruments are commonly set aside on repayment by the plaintiff of the actual consideration given, with interest thereon at a reasonable rate; or they are directed to stand as a security for the moneys actually advanced with the like interest, or for what upon taking the accounts shall be ascertained to be really due. And where the transaction affects real estate, it is usual to direct a reconveyance thereof upon repayment of the purchase-moneys and all sums laid out in improvements and repairs of a permanent and substantial nature by which the present value is improved, with interest thereon from the respective times of the actual disbursements, the party in possession accounting on his part for deteriorations and for the rents received and profits made in the meantime out of the estate. But *cestuis que trust* in respect of the frauds of their trustees, and principals in respect of the frauds of their agents, stand upon more favourable terms, being entitled at their option to hold the defrauding person to his fraud if that is more beneficial to them, and at the same time to take the profits he has made by the fraud, or at their option to have the property re-conveyed, and interest paid at the rate of 5 per cent., instead of 4 per cent., which is the usual rate in other cases. In the case of two or more co-partners, where one of them has been induced by fraud to enter into the partnership, the terms of rescission are that his co-partner or co-partners repay him whatever he has paid, with interest thereon, and indemnify him against all liabilities incurred by him through having become and been a partner, he on his part accounting for what profits he has received out of the partnership. Where a man has been fraudulently induced to take shares in a

FRAUD—continued.

company, he is entitled to recover his money and to have his name removed from the register, he accounting to the company for any dividends or other profits in the meantime received by him, assuming always that the rights of third parties (*e.g.*, creditors) have not intervened.

(B.) Where the remedy sought is the SPECIFIC PERFORMANCE OF THE REPRESENTATION, the following are the general requisites to the success of the suit:—

(1.) That the actual subject-matter of the representation substantially exists as it was represented as being, and that the difference accordingly admits of compensation; and

(2.) That the plaintiff is himself innocent in respect of the fraud or misrepresentation.

This remedy is available in the following cases:—

(1.) Against one who is a party to the contract:—

(a.) Where the property is subject to incumbrances concealed from the purchaser, and the vendor can by paying off these make good his assertion that the property is unincumbered; and

(b.) Where the property is subject to some small rent not disclosed at the time of the contract, and the vendor may satisfy or provide for the same by some deduction from the purchase-money, or by some commutation payment.

(2.) Against one who is not a party to the contract:—

(a.) Where a person makes a false representation of the value of property which is agreed to be charged in favour of another person as security for a loan to some third person (*Ingram v. Thorpe*, 7 Hare, 67; also *Burrowes v. Lock*, 10 Ves. 470; *Cleland v. Leech*, 5 Ir. Ch. 478); and

(b.) Where the father of an intended wife promises to her intended husband to leave her a sum of money by his will, and the marriage contract follows upon the faith of such promise (*Barkworth v. Young*, 4 Drew. 1; and see the very similar case of *Hutton v. Rossiter*, 7 De G. M. & G. 9).

It follows that specific performance is excluded in all cases where the property is substantially different to what it was represented as being, *e.g.*, if it is freehold instead of copyhold, or leasehold instead of freehold, and *vice versa*, or if it is an underlease and not an original lease, or *vice versa*, and so forth.

FRAUD—continued.

(C.) When an INJUNCTION is the remedy sought, that remedy is in general available in the following cases:—

(1.) Where a creditor of the intended husband represents to the father or other relation *in loco parentis* of the intended wife that the husband is not indebted to him (*Neville v. Wilkinson*, 1 Bro. C. C. 543).

(2.) Where a brother or other person gives the intended wife a sum of money to swell her fortune, taking a bond for the repayment of the sum (*Gale v. Lindo*, 1 Vern. 475; *Turton v. Benson*, 1 P. Wins. 496).

(3.) Where the defrauding party threatens to part with or transfer property which he has fraudulently obtained, *e.g.*, by paying over moneys, negotiating securities, and such like.

(4.) Where the fraud consists in the piracy of a trade-mark.

(5.) Where a right of prospect was the inducement upon which a person took a lease, and the lessor threatens to destroy the rights by buildings opposite (*Piggott v. Stratton*, John. 359).

(6.) Where a retiring trader has sold the goodwill of his business, upon the express or even implied understanding not to set up the same business next door, and he nevertheless proceeds to do so.

(D.) Where the remedy sought is a DECLARATION that the defrauding person is a TRUSTEE for the defrauded person, that remedy is available in the following cases:—

(1.) In the case of moneys which have been fraudulently appropriated;

(2.) In the case of judgments or decrees fraudulently obtained.

It is clear that a Court of Equity cannot set aside the judgment of a Court of Common Law; but it may decree the successful party who is successful through a fraud to reconvey to, or hold in trust for, the party thereby defrauded any property or profit he may have acquired as the fruit of or under the judgment (*Barnesby v. Powell*, 1 Ves. 120, 285; *Allen v. Macpherson*, 1 Ph. 145; 1 H. L. C. 213).

In the case of the defence of purchase for value without notice of the fraud, that defence must be pleaded specially; but it is sufficient to deny the notice generally, unless particular facts are alleged as evidence of the notice (*Pennington v. Beechey*, 2 Sim. & Stu. 282).

Sometimes Law had jurisdiction in cases of fraud where Equity had none. Thus, (1.) Equity would not rescind a contract, where the parties to it could not be restored to their respective original positions; and Law was, in that case, the only forum

FRAUD—continued.

for redress (*Great Luxembourg Ry. Co. v. Magnay*, 25 Beav. 587). And again, (2), where the party to the contract was neither the person who committed the fraud nor a privy of such person, the party defrauded could have no rescission of the contract in Equity; and unless therefore the misrepresentation might be made good, he had to seek redress at Law against the person guilty of the fraud; whence, for the fraudulent representations of the directors of a company, not being representations authorized by the company, the redress was at Law (*Brockwell's Case*, 4 Drew. 205). Again, (3), where a person had given a general representation of the character or credit of another, which was fraudulent, the person injured thereby, from his reliance thereon, could have no redress in Equity, but was to proceed at Law in an action for damages (*Whitmore v. Mackeson*, 16 Beav. 128). On the other hand, Equity had sometimes jurisdiction where Law had none. For, in general, Courts of Equity acted upon much slighter evidence of fraud than Courts of Law would do. And in the great majority of cases, although there was a remedy at Law, yet the remedy in Equity was concurrent, and it was therefore optional for the plaintiff to sue in either jurisdiction, according as he found the remedy either more convenient or more adequate; thus in *Colt v. Woollaston* (2 P. Wms. 154), a bill for the mere recovery of moneys was held not demurrable, and that case has been often followed since; and in *Barry v. Crosskey* (2 J. & H. 30), a bill in Equity was more convenient, as avoiding a multiplicity of actions. And of course, since the fusion of Law and Equity by the Judicature Acts, 1873-75, all these distinctions between the remedies respectively available in the Common Law and the Chancery Divisions are become of less than secondary importance, as every Division may now mete out all the same remedies, according as the circumstances of the particular cases may require.

FRAUD IN COMPANY LAW. For misrepresentations by its directors, a company is responsible to the extent of the profits (if any) which it has made thereby; and otherwise the remedy is against the directors personally (*Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 145); and the action will lie against one or more of the fraudulent directors without joining the other or others (*Parker v. Lewis*, L. R. 8 Ch. App. 1035); but no action lies against the executor of a deceased fraudulent director, unless to the extent that his estate has profited by the fraud (*Peck v. Gurney*, L. R. 6 H. L. 377). Contracts

FRAUD IN COMPANY LAW—contd.

induced by fraud being valid until avoided, their avoidance or rescission may be rendered impossible through the intervention of the rights of third persons, e.g., after the commencement of a winding-up (*Spackman v. Evans*, L. R. 3 Ho. Lo. 171; *Oakes v. Turquand*, L. R. 2 Ho. Lo. 325). A fraudulent prospectus affords in general a ground of action even by the Common Law; and if it omit to disclose any material contract, it is fraudulent by statute (Companies Act, 1867, s. 38). Purported transfers of shares are fraudulent, where they are subject to some reservation in favour of the transferor (*De Pass's Case*, 4 De G. & Jo. 544). In general the trustees and not the *cestuis que trustent* are liable on shares; but if the trustee is a mere fraudulent nominee, the *cestuis que trustent* are liable (*Cox's Case*, 4 D. J. & S. 53).

FRAUD, INDICTABLE. Misappropriation of the moneys with which persons in a fiduciary relation are intrusted, e.g., by trustees, brokers, agents, &c., is a fraud indictable under the statute 24 & 25 Vict. c. 96.

See title FRAUDULENT TRUSTEES.

FRAUD, LEGAL, APART FROM MORAL FRAUD. The question has been raised whether legal fraud, unaccompanied by moral fraud, is actionable. This question only amounts to this, whether a false representation made without knowledge that it is false, and without any dishonest intention or reckless assertion should make the person (who has made it) liable in damages. The question is rendered more complex where the fraud occurs under the following circumstances: A. employs B. as his agent to sell a house; C. goes to the agent, intending to buy the house, and asks B. whether there is anything objectionable about the house or the neighbourhood. B. answers—no, and honestly believes there is nothing objectionable, but A., his principal, knows that the next house has a bad reputation. C. thereupon sues A. for the false representation of B., his agent:—Held, that A. was not liable, as he did not give B. any instructions to make the misrepresentation (*Cornfoot v. Fowke*, 6 M. & W. 358).

FRAUD ON MARITAL RIGHTS. After the period of intimacy which results in the marriage has *de facto* commenced, any disposition (not being for value) by the female without the knowledge of her then intended husband is a fraud on his rights as a husband (*England v. Downes*, 2 Beav. 528); and that, even although the husband is unaware that she is entitled to the

FRAUD ON MARITAL RIGHTS—contd.

property or in fact to any property (*Godard v. Snow*, 1 Russ. 485), but no such disposition is fraudulent if made for a fair value, or if made with notice to the husband; or if made prior to the commencement of the period of intimacy with the husband that afterwards is, although it was made during the female's *de facto* intimacy with another man whom she eventually rejects (*Strathmore v. Bowes*, 1 Ves. 22).

FRAUDS, STATUTE OF. This is the famous stat. 29 Car. 2, c. 3, which applies as well to Real Property as to Equity and to Common Law.

I. As applying to Real Property. It enacts that all leases, &c., of lands made without writing signed by the parties or their agents lawfully authorized in writing, shall have the force of leases, &c., at will only (s. 1); except, nevertheless, leases not exceeding three years from the making thereof which reserve two-third parts at the least of the full improved value of the lands demised (s. 2); and that no lease, &c., of lands (not being copyholds) shall be assigned, &c., or surrendered, unless it be by writing, signed by the party assigning, &c., or surrendering, or his agent lawfully authorized in writing, except, nevertheless assignments, &c., and surrenders by act and operation of law (s. 3).

II. As applying to Equity. It enacts that all declarations or creations of trusts of lands shall be in writing signed by the party declaring or creating the same (s. 7); except, nevertheless, trusts arising or resulting by the implication or construction of law, or transferred or extinguished by act or operation of law (s. 8); that all grants and assignments of trusts shall be in writing signed by the party granting or assigning the same (s. 9); and that the sheriff may take upon an execution for the debts of the *cestui que trust* all lands of which any one is seised or possessed in trust for him at the time of execution sued in like manner as the sheriff might or could have done if the *cestui que trust* had been himself seised thereof at that time; also, that such lands being fee simple lands descending to the heir of the *cestui que trust* shall be deemed assets by descent for payment of such debts, in like manner as they would have been if the estate had been legal (s. 10).

III. As applying to Common Law. It enacts that no action shall be brought,—

(1.) Whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or

(2.) Whereby to charge the defendant upon any special promise to answer for the

FRAUDS, STATUTE OF—continued.

debt, default, or miscarriage of another person; or

(3.) Whereby to charge any person upon any agreement made upon consideration of marriage; or

(4.) Whereby to charge any person upon any contract or sale of lands or any interest in or concerning them; or

(5.) Whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof,—

Unless the agreement or some memorandum or note thereof is in writing and signed by the party to be charged therewith, or his agent lawfully authorized (s. 4);

And it further enacts, that no contract for the sale of any goods for the price of £10 or upwards shall be allowed to be good; unless

(1.) The buyer shall accept part of the goods so sold and actually receive the same; or

(2.) Give something in earnest to bind the bargain, or in part payment; or

(3.) Some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents lawfully authorized (s. 17).

FRAUDULENT CONVEYANCES. Gifts, whether of lands or of personal estate, which are fraudulent, are so either (a.) By the Common Law; or (b.) By the Statute Law; and where they are fraudulent by Statute Law, they are so, either (aa.) Under the Statutes of Elizabeth against Fraud (13 Eliz. c. 5, and 27 Eliz. c. 4); or (bb.) Under the Bills of Sale Act, 1878; or (cc.) Under the Bankruptcy Act, 1869.

(A.) By the Common Law;—The criterion of fraud at the Common Law is not single but complex, its chief element being, however, the debtor's continuance in possession of the goods after the conveyance thereof (*Edwards v. Harben*, 2 T. R. 587); unless where (as in the case of a mortgage) such continuance in possession is consistent with the conveyance.

(B.) Under the Statutes of Elizabeth:—By the Act 13 Eliz., c. 5, all conveyances whether of lands or of goods, contrived of fraud to the end of delaying creditors and others of their lawful actions, suits, debts, or dues, are declared to be void, but only as against the creditor who is delayed thereby, his heirs, executors, administrators, and assigns; and by the Act 27 Eliz. c. 4, all gifts *inter vivos* of lands made of purpose to defraud or deceive subsequent purchasers thereof (s. 1), and all such gifts made revocable at the will of the maker

FRAUDULENT CONVEYANCES—contd.

thereof (s. 4), are declared to be void, but only as against the subsequent purchaser thereof, his heirs, executors, administrators, and assigns, and other persons lawfully claiming under him or them. And by s. 2 of the former Act and s. 2 of the latter Act, a penalty is inflicted upon the parties and privies to the fraud (*Poulton v. Wiseman*, Noy. 105).

In the construction of the two statutes it has been held that in raising a case of fraud to upset the gift, the fraud against creditors under the 13 Eliz. c. 5, must be proved to have existed and been complete at the date of the conveyance (*Stone v. Grubham*, 2 Bulst. 225), but that the fraud against purchasers under the 27 Eliz. c. 4, is only complete as from the date of the subsequent sale, from the mere fact of which having been afterwards made the fraud is conclusively inferred (*Townshend v. Windham*, 2 Ves. Sen. 1).

And in consequence of this distinction the following points have been established :

I. Under the 13 Eliz. c. 5:—

(1.) There must at the date of the gift have been creditors in existence, or, in other words, the maker of the gift must at that time have been indebted, which means *embarrassed* (*Townsend v. Westcott*, 2 Beav. 340). If, therefore, the maker was not indebted at the date of the gift, the gift is good (*Houghton v. Tote*, 3 Y. & J. 486); as it also is, even where he is indebted at that date, provided he be not also then embarrassed, but have ample (*Skarf v. Soulby*, 1 Mac. & G. 364), or even less than ample (*Holmes v. Penny*, 3 K. & J. 90) means of then clearing off his indebtedness; but the maker's ignorance of his embarrassment will not make the gift a valid one (*Christy v. Courtenay*, 13 Beav. 96), the objective fraud and not the subjective innocence being the criterion looked at (*Spiro v. Willows*, 34 L. J. (Ch.) 365), in this country at the least, although the subjective innocence is regarded in America (*Hinde's Lessee v. Longworth*, 11 Wheaton, 199). Any contrivance to get rid of the creditors existing at the date of the gift, otherwise than by a *bonâ fide* payment of their debts, e.g., a contrivance to substitute fresh creditors in their places, paying the former with the moneys of the latter, will not succeed (*Richardson v. Smallwood*, Jac. 552); but the substituted creditors will be allowed to stand in the places of the former creditors for the purpose of defeating the gift (*Freeman v. Pope*, L. R. 9 Eq. 206).

(2.) The subjective innocence of the person to whom or in whose favour the fraudulent gift is made will not render it good (*Partridge v. Sopp*, 2 Amb. 596), but will save him from being placed in a worse

FRAUDULENT CONVEYANCES—contd.

position (*Turleton v. Liddell*, 17 Q. B. 390) in consequence of the fraud: and if he or any person for him should have given value, the gift will be valid (*Copes v. Middleton*, 2 Madd. 410; *Holmes v. Penny*, 3 K. & J. 90), as it will also be in favour of a purchaser under him (*Doe v. Martyn*, 1 B. & P. 332).

(3.) The creditors intended by the statute are general creditors (*George v. Milbanks*, 9 Ves. 190), not mortgage creditors (*Stephens v. Olive*, 2 Bro. C. C. 90), unless as to the unpaid surplus after realising their securities (*Harman v. Richards*, 10 Hare, 81), or unless, *semble*, as to the whole amount of the debt when they abandon their securities (*Lister v. Turner*, 5 Hare, 281). A voluntary creditor may sue (*Markwell v. Markwell*, 34 Beav. 12), provided he have a legal debt vested in him. (*Sewell v. Moxey*, 2 Sim. (N.S.) 189).

II. Under the 27 Eliz. c. 4:—

(1.) The statute extending only to lands, a fraudulent settlement of goods is not void under it (*Jones v. Croucher*, 1 S. & S. 315). All voluntary conveyances of lands are fraudulent under it, not as being voluntary merely, but as being conclusively fraudulent (*Doe v. Routledge*, 2 Cowp. 705; *Perry Herrick v. Attwood*, 2 De G. & J. 21). If the subsequent purchase is merely a contrivance to get rid of the voluntary deed, that makes no difference under the statute, as neither does *mala fides* in the subsequent purchasers (*Doe v. Manning*, 9 East, 59), at least in this country, although the rule is otherwise in America, (2 N. York Rev. Stat. p. 134). A mortgagee is a purchaser within the meaning of the statute (*Rand v. Cartwright*, 1 Ch. Ca. 59), but a judgment-creditor is not (*Beavan v. Oxford* (Earl of), 6 De G. M. & G. 492). And it does not matter that the voluntary gift is to a charity being private (*Hinton v. Toye*, 1 Atk. 465), or, *semble*, being public, (43 Eliz. c. 4; *Trye v. Corporation of Gloucester*, 14 Beav. 173).

(2.) The purchase-money, *as such*, is not liable to be appropriated by the volunteers in specific recompense for the avoidance of the gift to them (*Daking v. Whimper*, 26 Beav. 568), but, as forming part of the general moneys belonging to the maker of the gift, it is liable to recompense them in certain ways, at any rate where the voluntary conveyance contains a covenant for quiet enjoyment (*Hales v. Cox*, 1 N. R. 344; *Dolphin v. Aylward*, L. R. 4 H. L. 486). Moreover, the voluntary deed is only void so far as the validity of the subsequent purchase or mortgage requires (*Rand v. Cartwright*, 1 Ch. Ca. 59); and anything that has meanwhile been done for value by the donee under the voluntary deed remains

FRAUDULENT CONVEYANCES—contd.

good (Sugden's Vendors and Purchasers, 14th ed. pp. 719-720).

(3.) The subsequent purchase which is to avoid the voluntary deed must be made from the vendor personally (*Richards v. Lewis*, 20 L. J. (C.P.) 177), not from his devisee (*Doe v. Rusham*, 17 Q. B. 724), nor from his heir-at-law (*Lewis v. Rees*, 3 K. & J. 132).

(C.) Under the Bills of Sale Act, 1878.—By the Act 41 & 42 Vict. c. 31, every bill of sale of personal chattels made on or after the 1st of January, 1879, whereby, whether the same be absolute or conditional, the grantee or holder thereof shall have power, either with notice or without notice, and either as from, or at any future time after, the execution of the bill of sale, to seize or take possession of any property comprised in such bill, is as against all assignees or trustees in bankruptcy, general assignees, and execution creditors void to all intents and purposes to the extent of such part of the property therein comprised as consists of personal chattels being in the possession or apparent possession of the maker of the bill of sale at or after the date of the bankruptcy, general assignment, or execution (as the case may be), and after seven days from such date, unless the following requisites have been complied with, namely,

(1.) The bill of sale (including the schedule thereto, if any), or a true copy thereof, is to be filed with the Master of the Court of Queen's Bench within seven days from the execution of the bill of sale;

(2.) An affidavit (a) of the time of making the bill of sale, (b) of the residence and occupation of the maker thereof, and (c) of the residence and occupation of the witnesses attesting the bill, is at the same time with filing the bill of sale (*Grindell v. Brendon*, 6 C. B. (N.S.) 698), and within seven days from the execution thereof, to be filed in like manner as the bill of sale itself; and one of the attesting witnesses must be a solicitor of the Supreme Court, and the attestation clause must state that the effect of the bill was explained by such solicitor to the grantor of the bill before execution thereof.

And by the interpretation clause a bill of sale means or includes assignments and all other assurances of personal chattels; also, licenses, or other authorities, to take possession of personal chattels, as security for a debt; also, attornment clauses, which are mere incidents to the security and are not incident to any demise (ss. 4, 6). Moreover, the phrase "personal chattels" means or includes goods, furniture, and fixtures, meaning tenant's fixtures, as distinguished in the Act.

FRAUDULENT CONVEYANCES—contd.

Moreover, every such bill of sale as aforesaid must be re-registered every five years; such re-registration being made by the Master upon the applicant filing an affidavit in the Master's office in the form given in Schedule A of the Act.

Under this Act (as was decided under the former Bills of Sale Act, 1854, and the Act of 1866 amending same), a bill of sale which would be void in itself is not made valid by registration (*Re Daniel, Ex parte Ashby*, 25 L. T. 188). But assuming that the bill of sale is good in itself, then the assignee has seven days during which he may neglect registration (*Banbury v. White*, 2 H. & C. 300); and if he takes possession during these seven days he obtains a valid possession which dispenses with the necessity for registration altogether (*Marples v. Hartley*, 30 L. J. (Q.B.) 92). The seven days are reckoned exclusively of the day of the execution of the bill of sale (*Williams v. Burgess*, 12 Ad. & E. 635); and in case the last of the seven days falls on a Sunday or other *dies non juridicus*, the next following day is added to the seven (s. 22 Act 1878).

If the first registration is informal and is invalid, the bill of sale may be taken off the file and then put on again, and a proper registration of it made, provided the first seven days have not elapsed (*In re Wright*, 27 L. T. 192; 41 & 42 Vict. c. 31, s. 9).

An unregistered bill of sale, being good in itself, is of course good against the maker of it; it is also good against a subsequent registered bill of sale (*Maugham v. Sharpe*, 17 C. B. (N.S.) 443). Where successive bills of sale are given within every successive period of seven days, there, if a fraud is inferable, the attempt to evade the statute fails (*Ex parte Foxley, Re Nurse*, L. R. 3 Ch. 515); but if no fraud is inferable, the evasion succeeds (*Ex parte Harris, Re Pulling*, L. R. 8 Ch. 48), unless it is made void by the 9th section of the Act of 1878.

Mere registration would not make a bill of sale valid in the case of the subsequent bankruptcy of the maker, unless possession was taken before the act of bankruptcy on which the adjudication was founded (*Badger v. Shaw*, 29 L. J. (Q.B.) 73; *Stansfield v. Cubitt*, 27 L. J. (Ch.) 266); and conversely, the neglect of registration in such a case would make the bill invalid, although otherwise it would have been good (*Ashton v. Blackshaw*, L. R. 9 Eq. 510); but now under the 20th section of the Act of 1878 registration without possession taken will suffice to support the bill (*In re Gibson, Ex parte Bollard*, 8 Ch. Div. 230).

The Bills of Sale Act expressly exempts marriage settlements from its provisions;

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but this exemption extends only to ante-nuptial and not also to post-nuptial settlements (*Ashton v. Blackshaw, supra*).

In the case of a mortgage of land or a messuage with the fixtures, the Courts used to take this distinction—

(a.) That if the fixtures passed with the land or messuage under the words of grant (in the case of freeholds, *Mather v. Fraser*, 2 K. & J. 536), or of demise or assignment (in the case of leaseholds, *Boyd v. Shorrock*, L. R. 5 Eq. 72), then the mortgage deed, being only secondarily and not primarily a bill of sale, required no registration, even as to the fixtures (being tenant's fixtures) comprised therein;

And now, under the Act of 1878, s. 7, no fixtures are to be deemed to be separately assigned, by reason only that they are assigned by separate words, or that there is a power to sell them separately from the land; but trade-machinery (which is declared to be personal chattels) does not include the fixed motive power, or fixed power machinery, or steam, gas, or water pipes (s. 5).

But (b.) That if the fixtures did not pass with the land or messuage under the words of grant (in the case of freeholds) or of demise or assignment (in the case of leaseholds), then the mortgage deed, being primarily and not secondarily merely a bill of sale as to the fixtures (being tenant's fixtures) comprised therein, required registration as to such fixtures (*Begbie v. Fenwick*, 19 W. R. 402; *Hawtrey v. Butlin*, 21 W. R. 638; L. R. 8 Q. B. 290); and so also if there was a power to sell the fixtures separately (*Ex parte Daglish, In re Wilde*, L. R. 8 Ch. App. 1072; *Ex parte Barclay, Re Joyce*, L. R. 9 Ch. App. 576).

(D.) Under the Bankruptcy Act, 1869,—By s. 6 of this Act, a fraudulent conveyance, gift, delivery, or transfer by a debtor of his property, or of any part thereof, is made an act of bankruptcy, upon which he may be adjudicated a bankrupt within six months thereafter. By s. 15 of the Act, all goods and chattels being at the date of such act of bankruptcy in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or has acted as owner thereof, vest in the trustee in bankruptcy upon the adjudication in bankruptcy. By s. 87 of the Act, the proceeds of the goods of a trader which have been taken in execution in respect of a judgment for a sum exceeding £50 and sold, are to be retained in the hands of the selling sheriff or bailiff for a period of fourteen days, and upon notice within these days of a bankruptcy petition having

FRAUDULENT CONVEYANCES—contd.

been presented against such trader are to vest (less the sheriff's or bailiff's expenses) in the trustee in the bankruptcy. By s. 91 of the Act, ante-nuptial settlements remain as under the Common Law, and post-nuptial settlements of property coming to the wife, or to her husband (being a trader) in her right during the coverture, are expressly exempted from the operation of the Act, but all other post-nuptial settlements being voluntary, made by traders on their wives and families are *prima facie* fraudulent in the case of a subsequent bankruptcy, subject to this distinction, viz.:—

(1.) If the settlement is made within two years of the bankruptcy, it is *ipso facto* fraudulent and invalid;

(2.) If the settlement is made within ten years, but outside of two years, of the bankruptcy, it is *prima facie* fraudulent and is invalid, until proof of the absence of fraud is adduced; and apparently

(3.) If the settlement is made outside of ten years of the bankruptcy, it is left to the Common Law, and the *prima facie* presumption of fraud is excluded.

Also, by s. 92 of the Act, any conveyance or charge made within three months of his bankruptcy by a debtor unable to pay his debts with the intent to favour a particular creditor, is a fraudulent preference and void.

But subject to the aforesaid provisions, the 95th section of the Act enacts, that the following transactions being in good faith and for value shall be valid notwithstanding any prior act of bankruptcy, viz.—

(1.) Any contract regarding, or conveyance of, property made by the bankrupt in good faith and for value before the date of the order of adjudication, with or to a person not having notice of any act of bankruptcy;

(2.) Any execution executed in good faith against the debtor's land by seizure, or against the debtor's goods by seizure and sale, before the date of the order of adjudication, on behalf of a creditor not having notice (in the case of lands) before the seizure and (in the case of goods) before the seizure and sale of any prior act of bankruptcy (*Ex parte Villars, In re Rogers*, L. R. 9 Ch. App. 432).

FRAUDULENT PREFERENCE: See title **FRAUDULENT CONVEYANCES (D)** Under Bankruptcy Act, 1869.

FRAUDULENT TRUSTEES. Are of course liable civilly to their *cestués que trustent* to replace and make good the trust estate they have misappropriated, together with interest thereon at 5 per cent. per annum, or (in lieu of interest) the profits

FRAUDULENT TRUSTEES—*continued*. which they have made from the misappropriation. And under the stat. 24 & 25 Vict. c. 96, s. 80, they are also liable to a criminal prosecution, and upon conviction to be punished either with penal servitude for not more than seven nor less than five years or with imprisonment not exceeding two years with or without hard labour and solitary confinement. But the indictment must have the previous sanction of the Attorney-General or Solicitor-General,—but the plaintiff in the civil action may receive the direction of the civil judge to prosecute, and that would suffice.

FRAUS DANS LOCUM CONTRACTUI. A misrepresentation or concealment of some fact that is material to the contract, and had the truth regarding which been known the contract would not have been made as made, is called a fraud *dans locum contractui*, i.e., a fraud occasioning the contract, or giving place or occasion for the contract.

FRAUS EST CELARE FRAUDEM: See title DOLUS CIRCUITU NON PURGATUR.

FREE CHAPELS: See title CHAPELS.

FREE FISHERY: See title FISHERY.

FREE MINERS. Under the stat. 1 & 2 Vict. c. 43, relating to the mines in the Forest of Dean and Hundred of St. Briavel's, all male persons being hundredors of the age of twenty-one years and who have worked a year and a day in any coal or iron mine or stone-quarry within the hundred are declared free miners and entitled to a gale accordingly in their due order.

See title GALE.

FREE SHIPS, FREE GOODS: See title VISIT AND SEARCH.

FREE SOCAGE. Was the commonest form of freehold tenure, and after 12 Car. 2, abolished knight's tenure, it became almost the exclusive tenure of lands.

See titles FEUDAL SYSTEM; SOCAGE; VILLEIN SOCAGE.

FREEBENCH. A name by which the dower of widows is known in the case of copyhold lands. It is wholly dependent on custom, and is subject to many varying customs, but extends usually to one-third of the lands of which her husband at his death was possessed. It is not affected by the Dower Act (3 & 4 Will 4, c. 105).

See title DOWER.

FREEDOM FROM ARREST: See titles ARREST, FREEDOM FROM; PRIVILEGE OF PARLIAMENT.

FREEDOM OF SPEECH. Is a privilege inherent in the constitution of Parliament. It was violated in *Hazey's Case* (20 Ric. 2), but the judgment against him was afterwards annulled, and the privilege fully declared. The privilege was vindicated in *Strode's Case* (4 Hen. 8), and the stat. 4 Hen. 8, c. 8, recognised it as general, and that statute was re-affirmed in the Bill of Rights.

See titles BILL OF RIGHTS; PRIVILEGE OF PARLIAMENT.

FREEHOLD. A freehold is the holding of a freeman; and as no freeman could originally receive more, or would originally accept less, than an estate for his own life, therefore the original freehold was a life estate. And although, at the present day, as indeed from a very early period, freehold estates of larger quantity than for life are numerous enough, yet the original quality of the freehold is still expressed in the customary definition of that term which is, as commonly expressed, the following:—An estate of freehold is any estate of uncertain duration which may possibly last for the life of the tenant at the least. Whence an estate granted to a widow during her widowhood is an estate of freehold.

FREIGHT. This is the reward which is payable for the carriage of goods by sea, whether in a chartered or in a general ship; the usual time for payment being upon completion of the voyage, although (in charterparties more especially) the payment may be otherwise agreed; e.g., it may be specially agreed that freight shall be paid *in advance*; and when this is so, the amount paid cannot be recovered back, even if the voyage fails, unless there is a distinct agreement to that effect.

Where the freight has not been paid in advance, but, the goods having been duly laden on board, the ship has broken ground, i.e., has fairly started on the voyage, then, although the voyage should afterwards fail, the freight is nevertheless due by Maritime Law; but, in such a case, the shipowner acquires by English Law only a right of action against the freighter, i.e., shipper, for the damage consequential on his breach of contract, and not for freight properly so called (*Curling v. Young*, 1 B. & P. 636). In some cases, however, of a failure of the voyage, freight may be recoverable *pro rata itineris* (Kay's Law of Shipmasters, pp. 309–313). The Court of Admiralty possesses an equitable jurisdiction over questions of freight.

Recovery of Freight.—No one can be liable to pay freight unless under an express or implied contract for its payment.

FREIGHT—continued.

Moreover, several such contracts may exist simultaneously binding different persons to pay the same freight. For instance, the shipper is liable on his express contract by charterparty, or on the implied one arising from the shipment, and this notwithstanding the bill of lading should state that the freight is to be paid by the consignee or his assigns; and at the same time the consignee or any assign of his receiving the goods under the bill of lading is liable also. But payment of freight by one discharges all; and where cash has been offered by the consignee, but the master has elected to take from him a bill of exchange in payment, and the bill of exchange is afterwards dishonoured, the remedy against the shipper or consignor is gone (*Tapley v. Martens*, 8 T. R. 451).

Shipowner's Lien for Freight.—The shipowner has, independently of contract, a lien on the goods actually carried for the freight due in respect of them, and also for any sum which by the charterparty is to be paid for the hire of the ship; but his lien does not, in the absence of express stipulation to that effect, extend to claims for dead freight, demurrage, wharfage, or port charges. But the shipowner may deprive himself of his lien by the terms of his contract with the shipper; e.g., if the freight is not to become payable until after the goods are to be delivered (*Lucas v. Nockells*, 4 Bing. 729). Moreover, possession is necessary to a lien. If, therefore, the shipowner absolutely demises the ship to the charterer, and thus parts with the possession of her and her cargo, he has no lien for her earnings; but the Courts endeavour to prevent such an effect, even where the terms of the demise are absolute, provided they can find any expression of a contrary intention in the charterparty. Where, as is now common, a ship is chartered at a lump sum, and it is intended to be put up by the charterers as a general ship, and the charterparty provides that the master shall sign bills of lading at such rates of freight as the charterers may direct, without prejudice to the charter, the shipowner's lien remains against the charterers for the charter-freight, and against the owners of the bills of lading for the bill of lading freight, but, in the case of the latter, only to the extent of the freight they have contracted to pay, although it may be less than the charter-freight.

And see the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), ss. 67-78, and Kay's Law of Shipmasters.

FRESH DISSEISIN. Such a disseisin as a man himself might seek to defeat, that is, by his own power, without the help of

FRESH DISSEISIN—continued.

the king, or judges, or other foreign aid; as where a disseisin had not taken place above fifteen days or other short period (Britton, cc. 43, 55).

FRESH FORCE. A force which had been recently committed in any city or borough, as by disseisin, abatement, intrusion, or deforcement of any lands or tenements within such city or borough; and before the action of ejectment was introduced the party who had a right to the land might, by the usage of the said city or borough, bring his assize or bill of fresh force within forty days after the force had been committed for the purpose of recovering his lands (Fitz. Nat. Brev.; *Les Termes de la Ley*).

FRESH SUIT. When a party robbed diligently and immediately followed and apprehended the thief, or convicted him afterwards, or procured evidence to convict him, this following up of the thief was termed making fresh suit, and the person so robbed should in such a case have restitution of his goods. Fresh suit was also when the lord came to distrain for rent or service, and the owner of the beasts rescued them or made *rescous*, and drove them into another man's ground not holden of the lord, and the lord followed and took them there (2 Hawk. P. C. c. 23; *Les Termes de la Ley*).

FRIENDLY SOCIETIES. The law as to these societies was consolidated by the stat. 13 & 14 Vict. c. 115, and further consolidated by the stat. 18 & 19 Vict. c. 63, and still more recently by the stat. 38 & 39 Vict. c. 60. The members of such a society being duly registered are not liable to be sued individually for the debts of the society (*Burton v. Tannahill*, 5 El. & Bl. 797); the only persons liable to be sued are the officers of the society. All disputes within the society, i.e., between any member and the treasurer or other officer of the society, are to be decided in the manner directed by the rules of the society, and such decision is to be binding and without appeal; nevertheless (subject to the rules of the society), the matter may by consent be referred to the Registrar (or Assistant Registrar) of Friendly Societies, or to justices, or to the County Court judge (ss. 22 & 23 of Act of 38 & 39 Vict. c. 60). By the stats. 38 & 39 Vict. c. 60, s. 25, and 39 & 40 Vict. c. 32, s. 11, provision has been made for the winding-up and dissolution of such societies, which may be (roughly speaking) by consent of five-sixths of the members, or by award of the chief registrar.

See title INDUSTRIAL AND PROVIDENT SOCIETIES.

FRITH-BORH. The Anglo-Saxon equivalent for frank pledge.

See title **FRANK PLEDGE**.

FRIVOLOUS PLEAS. These are pleas which are clearly insufficient upon the face of them, and are generally (when at all) put in for purposes of delay, or to embarrass the plaintiff. Under the C. L. P. Act, 1852, they may, on motion, be ordered to be at once struck out, *secus*, if the plea is not manifestly frivolous on the face of it (see Day's Practice, p. 88); and the rule is the same under the Judicature Acts, 1873-75 (Order xxvii., 1).

FUGITIVE'S GOODS. The goods of a felon who took flight, and which, after the flight, were lawfully found, belonged to the king or to the lord of the manor. 5 Rep. 10 q.

FUNDED AND UNFUNDED DEBT. That portion of the public debt which is in the state of consols, and therefore only redeemable at the option of the Government is called the funded debt; and that other (and much smaller) portion of the public debt which is in the form of Exchequer Bills, &c., and therefore redeemable at a specified period, is called the unfunded debt.

See title **NATIONAL DEBT**.

FUNDS: See titles **FUNDED AND UNFUNDED DEBT**; **NATIONAL DEBT**.

FUNDS IN COURT: See title **SUTOR'S FUND IN CHANCERY**.

FUNGIBLES. Any moveable goods which may be estimated by weight, number, or measure; hence jewels, paintings, statues, and works of art in general are not considered as fungibles, but, on the contrary, as *non fungibles*, because their value cannot be measured by any common standard; whereas *res fungibles* are money, barley, oil, and such-like, which can be repaid in kind.

FURIOUS RIDING. Under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 78, is an offence for which the offender may be summarily convicted before justices, and may be fined not exceeding £10 (if the owner) or £5 (if not the owner). The offence is one because (and only when) it endangers the public safety (*Williams v. Evans*, 1 Exch. Div. 277).

FURNITURE. As opposed to fixtures, consists of the purely moveable articles in a house, which are not complotory to any portion of the house, or to any fixture annexed or belonging thereto. For example, chairs are furniture; but window blinds are fixtures.

See title **FIXTURES**.

FURTHER CONSIDERATION. Where upon a first hearing or trial, accounts and inquiries are directed, then it is necessary to reserve the further consideration of the action to await the result of the accounts and inquiries; and when those are certified, the action comes on again upon the certificate for further trial, *i.e.*, further consideration.

FURTHER DEFENCE. As a general rule, the state of matters existing at the commencement of the action (*i.e.*, at date of writ issued), is the only state of matters that is recognised. But under the old practice pleadings *puis darrein continuance* were introduced, and under the new practice defences of the like character are permitted, that is to say:—

(a.) A defendant may plead to a statement of claim a matter of defence thereto which has arisen subsequently to writ issued, introducing such new matter into his defence (if not already delivered), or into a further defence (if the first defence has been already delivered).

(b.) A plaintiff (or, *semble*, any other party defendant to a counterclaim), may plead to any counterclaim (or set-off) a matter of defence thereto which has arisen subsequently to counterclaim delivered, introducing such new matter into his reply (if not already delivered), or into a further reply (if the first reply has been already delivered).

But a further defence or further reply (as the case may be) cannot be put in, excepting within eight days after the matter has arisen, and by leave of the Court or a judge (Order xx., 1, 2).

See titles **CONFESSION OF DEFENCE**; **PUIS DARREIN CONTINUANCE**.

FURTHER MAINTENANCE OF ACTION, PLEA TO. A plea grounded upon some fact or facts which had arisen since the commencement of the suit, and which the defendant put forward for the purpose of shewing that the plaintiff should not further maintain his action. It was called a plea to the further maintenance of the suit, because it did not, like an ordinary plea in bar, profess to shew that the plaintiff had no ground of action when he commenced the suit, but simply shewed that he had no right to maintain it further. A plea of payment of money into court in satisfaction of the plaintiff's claim is in the nature of a plea to the further maintenance of the suit, such a plea admitting that the plaintiff had a good cause of action, but shewing that he ought not further to maintain it, upon the ground that the money so paid in by the defendant is sufficient to satisfy all damages which the plaintiff has sustained (see Step. Pl. 72, 4th ed.). Under

FURTHER MAINTENANCE OF ACTION, PLEA TO—continued.

the present practice provision is made for pleas of this sort.

See titles **FURTHER DEFENCE**; **PUIS DARREIN CONTINUANCE**.

FURTHER REPLY: See title **FURTHER DEFENCE**.

FURTUM. In Roman Law was any fraudulent dealing with or user of another person's property without the consent of the latter, *e.g.*, hiring a hack for a ride and then hunting it was a theft or *furtum*. Besides larceny and embezzlement, it included therefore almost all indictable frauds, and some merely civil delinquencies. The offence was prosecutable either civilly or criminally.

FYRD. Was the national militia in Anglo-Saxon times, service in which was included in the *trinoda necessitas*.

See titles **ARMY**; **ASSIZE OF ARMS**.

G.

GAGE: See title **NANTISSEMENT**.

GAIN: See titles **INTEREST OF MONEY**; **PROFIT AND LOSS**; **PROFITS OR DAMAGES**; **PROFITS OR INTEREST**.

GALE. In the Forest of Dean and Hundred of St. Briavel's the Crown may grant to any free miner a lease or gale of portion of the minerals; and such gale when once effectively granted is the property of the galee and his assigna.

See title **FREE MINERS**.

GAME. Are certain animals *feræ naturæ* in which the law has recognised a species of qualified property even while the animals remain wild and uncaught or unkilld or unreclaimed. These animals are hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards (1 & 2 Will. 4, c. 32). Where game is both started and killed on the land of A., even although by a stranger, it is A.'s property (*Blades v. Higgs*, 12 C. B. (N.S.) 501, and 13 C. B. (N.S.) 844); similarly, game started by A. on his own property and killed by A. on B.'s property. But at the Common Law game started by a stranger on A.'s property and killed on B.'s property vested in the stranger, although he was a double trespasser (*Churchward v. Study*, 14 East, 249); but the stat. 1 & 2 Will. 4, c. 32, has deprived the stranger in such a case of all property in the game killed. The landowner when leasing lands must reserve the game; otherwise it will vest in the occupying

GAME—continued.

tenant (1 & 2 Will. 4, c. 32; *Indermaur's Com. Law*, 269, 270).

See titles **CHASE**; **DEER**; **PARK**; **SHOOTINGS**; **WARREN**.

GAMING: See title **WAGERING**.

GAOL-DELIVERY. Besides the commission of *oyer and terminer* given to the judges, &c., on circuit, there is a commission of gaol-delivery whereby the gaols may be cleared of every prisoner awaiting his trial, whether or not the indictment has been found by the grand jury at that assize (*Harris' Crim. Law*, 291).

See titles **CIRCUITS**; **COURTS OF JUSTICE**; **JUSTICES OF OYER AND TERMINER**.

GAOLS. Are of many varieties, *e.g.*, County Gaols, Borough Gaols, Military Gaols, Naval Gaols, Gaols in the nature of Reformatories. Until the Prisons Act, 1877 (40 & 41 Vict. c. 21), the county and borough gaols respectively were maintained out of the county and borough rates respectively, but under that Act they are maintained out of the public funds.

See title **PRISONS**.

GARANTIE. In French Law corresponds to warranty or covenants for title in English Law. In the case of a sale this guarantee extends to two things—(1.) Peaceful possession of the thing sold; and (2.) Absence of undisclosed defects (*défauts cachés*).

See titles **GUARANTEE**; **QUIET ENJOYMENT**, **COVENANT FOR**; **WARRANTY**.

GARNISHEE ORDER. The applicant for this order applies in the first instance *ex parte* upon summons or motion supported with an affidavit by himself or his solicitor (Order XLV., 2), and obtains a garnishee order *nisi*,—being an order charging, to the extent (at least) of the judgment debt, all moneys belonging to the debtor in the hands of the garnishee and all debts owing from the garnishee to the debtor. The effect of the garnishee order *nisi* is (like that of a charging order *nisi*) to bind, as from the date of service of the order, all debts owing from the garnishee to the judgment debtor (Order XLV., 3). The garnishee order *nisi* may be made absolute in the following manner:—

(1.) If the garnishee do not appear to the order requiring him to appear to show cause against the order *nisi*, then that order is made absolute at once (Order XLV., 4);

(2.) If the garnishee do appear to such order requiring his appearance, and *bonâ fide* disputes the fact of any moneys belonging to the judgment debtor being in his hands, or any debts being due from him (the garnishee) to the judgment debtor (Order XLV., 5), or alleges some third person

GARNISHEE ORDER—*continued*.

to be owner of, or to have some lien on, such moneys or debts (Order XLV., 6), then as against such third person not appearing (when duly notified so to do), and also as against such third person duly appearing, and as against the garnishee, the order is made absolute, subject to the determination of any issue or question between the garnishee and the judgment debtor and the (appearing) third person (Order XLV., 7).

The garnishee paying under any garnishee order (*semble*, whether *nisi* or *absolute*) is thereby discharged to the extent of such payment, as against the judgment debtor, even though the judgment should be afterwards reversed (Order XLV., 8).

See title CHARGING ORDER.

GASWORKS. The general Act regarding the construction and regulation of such works and of the supply of gas is the 10 & 11 Vict. c. 15 (Gasworks Clauses Act, 1847); but under the *stats.* 33 & 34 Vict. c. 70, and 36 & 37 Vict. c. 89, the Board of Trade must make a provisional order authorizing their construction. Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), the local sanitary authority may acquire gasworks, and purchase same from any existing gas company.

See titles PUBLIC HEALTH; SANITARY LAWS; WATERWORKS.

GAVELKIND. A species of tenure, said to be still prevalent in Kent; its principal characteristic is that all males (in equal degree) succeed equally, primogeniture being unknown. Thus, all the sons succeed equally; and failing sons, then all the daughters equally; and failing both sons and daughters, and (of course) their respective descendants *in infinitum*, then all the brothers equally; and failing brothers, then all the sisters equally; and so on. The husband's curtesy estate is in one moiety only, and continues only until his marrying again; the wife's dower is in one moiety (not one-third), but is during widowhood and chastity only. The husband need not have issue born to entitle him to curtesy in gavelkind lands.

GELD. This is a Saxon word signifying money or tribute. In combination with other words it signifies the compensation for some particular crime, *e.g.*, *wergeld* signifies the value of a man slain; *orfgeld*, the value of a beast slain.

See title DANEGELT.

GEMOTE. This is a Saxon word signifying a convention or assembly, *e.g.*, *witena-gemote* and *shire-gemote* are respectively the assembly of the *witan*, or wise men, and of the *shire* or county, *i.e.*, the freeholders thereof.

GENERAL AVERAGE. Cases of general average arise where loss or damage is voluntarily and properly incurred in respect of the goods on board ship or in respect of the ship for the *general* safety of both ship and cargo; the loss sustained by the particular owners having enured to the advantage of the owners generally, it is only equitable to distribute—*i.e.*, adjust, the loss rateably over all the owners; and such adjustment is general average. The phrase simple or particular average is an inaccurate and misleading phrase, meaning nothing more than that a particular damage—*e.g.*, the souring of a cask of wine—must rest where it falls.

General average is excluded in the case of particular losses arising from the ordinary risks and perils of the sea (*Power v. Whitmore*, 4 M. & S. 149); and, therefore, in the case of the loss of a mainmast, or damage done to the yards, by winds, &c., there is no general average. The distinction is well stated by Lord Kenyon in *Birkley v. Presgrave* (1 East, 220), in this manner:—That all ordinary losses and damages sustained by the ship, *happening immediately from the storm or perils of the sea* must be borne by the shipowners; but that all those articles *which are made use of by the master and crew upon a particular emergency and out of the usual course, for the benefit of the whole concern*, must be paid for proportionably as a general average.

The most usual instance of a case for general average is the case of *jettison*, being the *jactus* of the Roman Law (see title *LEX RHODIA DE JACTU*); and any damage voluntarily and necessarily done to the ship in order to facilitate the jettison, is a general average loss; also, a voluntary stranding of the ship must be made good as a general average, provided the stranding was a proper thing to do, or was prudent and reasonable.

Less usual instances of general average are, where part of the cargo is necessarily sold by the master in order to defray the expenses of repairing injuries to the ship which are themselves matters of general average (*The Gratitude*, 3 Rob. 255); also, where the ship puts into port in distress owing to an injury which is itself matter of general average, and there are incurred expenses for repairs and for unloading, and also port-charges, seamen's wages, and cost of provisions during the detention (*Da Costa v. Newnham*, 2 T. R. 413); also, the expenses of salvage; also, the freight of jettisoned goods.

But general average is excluded in respect of the following losses:—The wages and provisions of the crew in cases of detention by embargo; the expenses occasioned

GENERAL AVERAGE—*continued.*

by an ordinary quarantine, or by waiting for convoy; also (although with exceptions) deck cargoes that are jettisoned; also, damage sustained in resisting capture.

With reference to the articles liable to contribute towards general average, the ship and freight contribute, the former in proportion to its value at the end of the voyage, the latter deducting the expenses of the voyage and the wages of the crew; also, all merchandise put on board for the purpose of traffic must contribute. But the ship's stores and the ship's ammunition do not contribute; as neither do the wearing apparel, luggage, jewels, &c., of the passengers or crew, all these articles being for use and not for traffic.

See titles **ADJUSTMENT**; **AVERAGE**.

GENERAL DENIAL: See titles **EVASIVE PLEADING**; **JOINDER OF ISSUE**.

GENERAL DEVISES: See title **SPECIFIC DEVISES**.

GENERAL ISSUE, PLEA OF. Under the present practice, this plea is a mere denial of the gist of the action, that is, a denial of the principal fact on which the declaration is founded; and every other matter of defence must be pleaded specially. The defence, where appropriate, is available in all sorts of actions and prosecutions, whether founded on contract, or on tort, or in crime, the most common examples of it being "Not guilty," "Never indebted," "Non Assumpsit," "Non est factum," and such like.

In certain cases it is permitted by statute to plead the general issue, and to give the special matter of defence in evidence; and in that case the words "by statute" (specifying also the particular statute) must be inserted in the margin of the plea. By the Act 5 & 6 Vict. c. 97, s. 3, this form of defence is abolished in the case of local and personal Acts.

GENERAL LEGACIES: See title **LEGACIES**.

GENERAL MEETING. Is a meeting of the shareholders generally of a company, or of the creditors generally of a debtor; and it is called an extraordinary general meeting when it is summoned on some extraordinary occasion. It is also opposed to a special meeting.

GENERAL OCCUPANCY: See title **ESTATE PUR AUTRE VIE**.

GENERAL QUARTER SESSIONS: See title **QUARTER SESSIONS**.

GENERAL SESSIONS. Are sessions of the peace which may be held at any time of the year for the execution of the general authority of the justices; they are opposed

GENERAL SESSIONS—*continued.*

to *special petty sessions*, which are held for some particular or special branch of such authority only, and to *quarter sessions* or *general quarter sessions* which are held at four stated times in the year.

See titles **PETTY SESSIONS**; **QUARTER SESSIONS**; **SESSION**; **SPECIAL SESSIONS**.

GENERAL SHIP. Where a ship is not chartered wholly to one person, but the owner offers her generally to carry the goods of all comers, or where if chartered to one person he offers her to several sub-freighters for the conveyance of their goods, she is called a general ship, as opposed to a chartered one. In these cases the contract entered into by and with the ship-owner or master as his agent, is called a bill of lading.

See titles **BILL OF LADING**; **CHARTER-PARTY**.

GENERAL AND SPECIFIC COVENANTS: See title **COVENANTS**, sub-title **GENERAL AND SPECIFIC**.

GENERAL VERDICT: See title **VERDICT**.

GENERAL WARRANTS: See title **SEARCH WARRANTS**.

GENERAL WORDS. In a conveyance of lands are the words beginning "Together with all outhouses, ways, &c.," or other like words according to the principal hereditament conveyed. They do not extend the compass of the grant, but obviate questions arising regarding its content. The general words should always expressly include reputed easements and reputed appurtenances (*Suffield v. Brown*, 3 N. R. 340; *Thomson v. Waterlow*, L. R. 6 Eq. 36).

See title **EASEMENTS**.

GENERI PER SPECIEM DEROGATUR. A particular enumeration may occasionally detract from or diminish the extent of a general phrase or general description; but a general description will not diminish from a particular enumeration,—a maxim of law which must (like other general maxims) be applied with discrimination.

GENTILES. In Roman Law, were the members of a gens or common tribe, and to whom the property of a deceased member anciently belonged, failing any *sui heredes* or *agnati*.

GENTLEMAN: See titles **ESQUIRE**; **YEOMAN**.

GESTATION, PERIOD OF. Is the period of nine months or thereabouts which the law recognises as that during which a widow may produce lawful offspring of her deceased husband. It is allowed in

GESTATION, PERIOD OF—*continued*. reckoning the limits of time prescribed by the Rule of Perpetuities.

GESTIO PRO HÆREDE. This is a phrase of Roman Law, and denotes acting as *hæres*, i.e., successor, to a deceased person, without having made or before making the *aditio hæreditatis*, or entry (See Gaius, ii. 174-8).

See title ADITIO HÆREDITATIS.

GIFT: See title CONVEYANCES, sub-title GIFT.

GIFT, DEED OF. Is in general a deed assigning personal property, e.g., the furniture in a mansion-house. It imports absoluteness; and if possession be taken under the deed, registration under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31) is not required to its validity, if the possession be exclusive of the grantor; but when it is a post-nuptial settlement, the possession under which is not usually exclusive, registration is an essential to its validity under that Act.

See title FRAUDULENT CONVEYANCES, sub-title (C) Under Bills of Sale Act, 1878.

GIFT OF LIVING. A benefice may be bestowed upon any qualified clerk, the acts which regulate and restrain the sale of livings not applying to any gift thereof. And under the stat. 9 Geo. 4, c. 94, a living may be given to A. subject to A.'s agreeing with the donor to resign same either in favour of one person named or in favour of either of two persons that are of near kin by blood or marriage to the donor.

GILD. This word (more commonly spelt *guild*) signifies primarily tribute, and secondarily, the fraternity or company that is subject to the tribute. The company is a body of persons bound together by orders and laws of their own making, the king's licence having been first had to the making thereof. A gild of merchants may be incorporated by grant of the sovereign, and such incorporation, without more, is sufficient to establish them as a corporation for ever. *Guild-Hall* is the name given to the hall of meeting of the guild; the term is applicable to the public place of meeting of the mayor, aldermen, and commonalty of every city and borough, but is applied *par excellence* to the place of meeting of the Lord Mayor, Aldermen, and Commonalty of the City of London.

See titles GUILDEHALL; LONDON, CITY OF.

GIVE. Was the proper word of conveyance in a feoffment. It used formerly to imply a warranty of title, but has ceased to do so.

See title WARRANTY.

GLADIUS. This word, which is the Latin for *sword*, was used as the symbol of jurisdiction; a person created an earl was *gladio succinctus*, he having jurisdiction over his county.

GLEBE. The land annexed to a benefice is so called, and is to be distinguished from the tithes payable to the benefice out of other lands. The rector may not commit waste in the glebe lands, unless with the sanction of both the patron and the ordinary. The glebe annexed to a rectory makes the rectory a corporeal hereditament, although the advowson of the rectory is an incorporeal hereditament.

See title WASTE.

GOOD CONSIDERATION. Consists in "blood and natural affection," as opposed to "money and money's worth," which latter constitute a *valuable* consideration. Good consideration is, however, used in the stat. 13 Eliz. c. 5, to denote a valuable consideration; and generally, the word is too ambiguous for convenient legal use. Considerations are much better distinguished as voluntary, valuable, and meritorious.

See title CONSIDERATION.

GOODS AND CHATTELS. Were and are equivalent to personal property, such as stocks, shares, furniture, moneys, cattle, &c.; and as so used are opposed to lands, tenements, and hereditaments, which latter are commonly called real property. It is doubtful whether in a modern will goods and chattels would include leaseholds, these being now regarded in a will as lands.

See titles PERSONAL; REAL AND PERSONAL.

GOODWILL. As applied to the sale of a business this phrase denotes the sum of money which any one would be willing to give for the purchase of the chance of being able to keep the trade connected with the place where it is carried on. It is the purchase of an expectant advantage that is dependent solely upon *locality*; and therefore a sale of the goodwill without a sale or lease of the premises would be impossible and inconsistent; and an agreement for such a sale would therefore not be enforced in the Court of Chancery (*Austen v. Boys*, 2 De G. & J. 626). It is not to be reckoned as a partnership asset, *semble*, upon a dissolution (*Stewart v. Gladstone*, 10 Ch. Div. 626).

GOODWIN AND FORTESCUE: See title ELECTIONS, COMMONS' RIGHTS IN.

GOVERNORS OF COLONIES: See title COLONIAL GOVERNORS.

GRACE. This word is commonly used in contradistinction to *right*. Thus, in

GRACE—*continued*.

22 Edw. 3, the Lord Chancellor was instructed to take cognizance of matters of *grace*, being such subjects of equity jurisdiction as were exclusively matters of equity. Again, days of *grace* is a phrase denoting the three extra days allowed by the custom of merchants after the maturity of a bill of exchange or promissory note for the payment thereof.

GRAMMAR SCHOOLS : See title **SCHOOLS**.

GRAND ASSIZE : See title **JURY, TRIAL BY, HISTORY OF**.

GRAND JURY. There is no grand jury in civil cases; but in criminal cases, the charge is first found or thrown out by the grand jury, who return a true bill or no true bill, according to the evidence before them; and then the indictment (when a true bill is found) is brought before the petty jury for their ultimate decision. Under the stat. 19 & 20 Vict. c. 54, witnesses giving evidence before a grand jury may be sworn before it, instead of (as theretofore) in open court,—this provision being intended to facilitate the despatch of business before the grand jury. In counties, the grand jurors are notable freeholders within the county; and in boroughs having a separate court of sessions, they are the burgesses (5 & 6 Will. 4, c. 76, s. 121).

See titles **JURY**; **PETTY JURY**.

GRAND SERJEANTY. A species of tenure in chivalry which was not abolished along with knight's tenure generally by the stat. 12 Car. 2, c. 24. Literally, the tenure was "by signal service," i.e., *per grande servitium*, e.g., carrying the king's banner or lance, or being champion, butler, or the like at his coronation. It was a species of fief by office.

See titles **FEUDAL SYSTEM**; **PETIT SERJEANTY**; **SERJEANTY**; **TENURE**.

GRANT : See title **CONVEYANCES**, subtitle **GRANT**.

GRANT, TITLE BY NON-EXISTING. After a lengthened period of adverse possession or of adverse enjoyment, a title is acquired to real property either under the Statute of Limitations (for corporeal hereditaments) or under the Statute of Prescription (for incorporeal hereditaments). The titles in these cases have no documentary root; but the law assumes such a root, and that the same has been lost through long time; and this fiction of law is the making title by non-existing grant (*Read v. Brookman*, 3 T. R. 151; Best on Evidence, 5th ed. 487-492).

See titles **COMMON, RIGHT OF**; **EASEMENTS**; **LIMITATION OF ACTIONS**; **PRESCRIPTION**.

GREAT SEAL. As opposed to the sign-manual, is the seal which the sovereign affixes to documents and acts of a public nature, as opposed to merely personal acts and documents. Edward the Confessor was the first sovereign who had a great seal (1 Stubbs' C. H., p. 352) and a Lord Chancellor, for that high officer is the keeper of the Great Seal, and is appointed by the mere delivery of the Great Seal into his custody. The stat. 40 & 41 Vict. c. 41, contains various regulations as to affixing the Great Seal, and as to the classes of documents to which the same may be affixed. The stat. 6 Anne, c. 11 (Act of Union), provides that there shall be only one Great Seal for England and Scotland; but the stat. 39 & 40 Geo. 3, c. 57 (Act of Union) contains no similar provision for Great Britain and Ireland.

See titles **PRIVY SEAL**; **SIGN MANUAL**.

GROSS. The phrase "in gross" means standing separate from any corporeal hereditaments.

See titles **EASEMENTS**; **INCORPOREAL HEREDITAMENTS**; **LICENCE**; **PROFITS A PRENDRE**.

GROUND RENT. A landlord, having land conveniently situated for building upon, not unfrequently lets it out to a builder at a trivial rent, for a period usually of ninety-nine years, upon the understanding that the builder-lessee shall, within a fixed time, erect upon it one or more messuages of a specified description. When these messuages are erected, the builder sublets them to occupants, who pay him a rent very considerably larger than what he himself pays to the ground landlord, being, in fact, a rent estimated to repay him with a profit within the ninety-nine years for his labour and outlay in erecting the messuages and taking a lease of the land from his own landlord. The builder's rent, or that which he pays to the ground landlord, is called the ground-rent. Under the stat. 4 Geo. 2, c. 28, the ground landlord may distrain on the premises for this rent; so that it is quite possible that the occupying tenant may have to pay not only his own occupation rent but also the ground-rent, unless proper precautions have been taken.

See title **RENTS**.

GROWING CROPS. In general, the outgoing tenant may reap these, either as emblements or under a clause in his lease, or by the custom of the country. Not unfrequently a tenant is restrained from disposing of them, or of parts of them, off the lands, or while his rent is in arrear; and, of course, they are liable to be distrained upon. When assigned separately from the land, growing crops (like fixtures)

GROWING CROPS—continued.

are within the Bills of Sale Act, 1878 (41 & 42 Vict. c. 81), and therefore require registration under that Act.

See titles **BILL OF SALE; FIXTURES; FRAUDULENT CONVEYANCES.**

GUARANTEE. Is a promise to answer for the debt, default, or miscarriage of another person, for which that other person remains liable. It is usually a simple contract; and the agreement or memorandum expressing or evidencing it must be in writing by the Statute of Frauds, and must contain all the material terms (*Saunders v. Wakefield*, 4 B. & Ald. 595), excepting that under the stat. 19 & 20 Vict. c. 97 (Merc. Law Am. Act, 1856), s. 3, the consideration need not appear in the writing. The guarantee may be either for one particular amount, or for any sum not exceeding that amount, or it may be a continuing guarantee, limited or unlimited in amount; e.g., when A. became bound to B. for any debt which C. might contract with him not exceeding £100, the guarantee was held to be a continuing guarantee, and not extinguished by one dealing between B. and C. to that amount (*Merle v. Wells*, 2 Camp. 413); on the other hand, a bond entered into by A. and B. to the plaintiff to enable A. to carry on his trade, conditioned for the payment of all such sums not exceeding £3000 as should at any time thereafter be advanced by the plaintiff to A., was held not to be a continuing guarantee to the extent of £3000 for advances made at any time, but only a guarantee for advances once made to that amount (*Kirby v. Marlborough (Duke)*, 2 M. & S. 18).

See titles **INDEMNITY; SURETYSHIP.**

GUARDIAN. There were at one time a great many varieties of guardians of infants, of which the following enumeration comprises the principal:—

- (1.) Guardians in chivalry, enduring until the age of twenty-one years, but abolished by the stat. 12 Car. 2, c. 24;
- (2.) Guardians in socage, enduring until the age of fourteen years;
- (3.) Guardians by custom, e.g., of gavel-kind lands, enduring commonly till the age of fifteen years;
- (4.) Guardians by nature, enduring till the age of twenty-one years; and for nurture, enduring till the age of fourteen years;
- (5.) Guardians appointed by deed or will in virtue of the Act 12 Car. 2, c. 24, the most common species of guardian at the present day, and enduring till the age of twenty-one years; and
- (6.) Guardians appointed by the Court

GUARDIAN—continued.

of Chancery (*ex inquisitione*), and enduring either for a particular purpose only, or generally till the age of twenty-one years;

The guardian appointed under the stat. 12 Car. 2, c. 24, is entitled both to the custody of the person of the child, and to that of the profits of his real and personal estate; and subject to the control of the Court of Chancery, he regulates generally the entire conduct of the infant and the entire management of his estate. He cannot make or take any profit thereout.

The chief respects in which the Court of Chancery interferes between guardians and infants are the following:—

- (1.) To remove guardians, which it will only do for misconduct upon evidence establishing a clear case against the guardian;
- (2.) To compel security from a guardian;
- (3.) To compel the guardian to render proper accounts;
- (4.) To appoint interim guardians in the absence of the testamentary guardian;
- (5.) To regulate the maintenance and education of the child;
- (6.) To control his marriage; and, generally,
- (7.) To control (without setting aside altogether) the authority of a testamentary guardian (or of a parent himself).

See title **INFANTS.**

GUILD. Guilds were voluntary associations, either for defence or for trade. The merchant guilds gradually coalesced with the town, and monopolised the rights of the free inhabitants. The guild ensured the independence of the town; it became in later times the corporation.

See titles **GILD; MUNICIPAL CORPORATION.**

GUILDHALL. Was originally the hall of a guild, and became the hall of any city or borough corporation. It is *par excellence* the hall of the corporation of the City of London; and at this Guildhall, the assizes for the city are held; and under the Judicature Acts, 1873–75, the High Court holds simultaneous sittings at Westminster and at Guildhall.

See titles **COURTS OF JUSTICE; GUILD.**

GUILT. In its most general sense, is imputability; in its narrower and more usual sense, it is the imputability of some offence to an accused person as its perpetrator. The person alleging such imputability has the *onus probandi* thrown upon him, the presumption of innocence holding good until it is rebutted.

See title **INNOCENCE, PRESUMPTION OF.**

H.

HABEAS CORPUS. This is a writ directed to the gaoler, or other person having the applicant in custody, requiring him to produce the body, i.e., person, of the applicant in Court before the judge on a day named therein. The right to a *habeas corpus* exists by the Common Law, and its availability only has been facilitated by particular statutes, principally the stat. 31 Car. 2, c. 2 (Habeas Corpus Act, and 56 Geo. 3, c. 100 (*In re Besset*, 6 Q. B. 481). But whether at Common Law or under statute, the writ does not issue as a matter of course upon application in the first instance, but must be grounded on an affidavit upon which the Court is to exercise a discretion in issuing it or not (*Rex v. Hobhouse*, 3 B. & A. 420). The writ of *habeas corpus* does not issue out of the English Courts into any colony having efficient courts of justice of its own (25 & 26 Vict. c. 20, passed in consequence of the decision in *Anderson's Case*, 30 L. J. Q. B. 129). The writ may issue in Vacation time, and any judge of the High Court may issue it, even when sitting in chambers. Where a witness is in custody, a *habeas corpus ad testificandum* is issued to bring him up as a witness (1 Arch. Pract. 355; 1 Dan. Ch. Pr. 805). Prior to the C. L. P. Act, 1852, where the defendant was in custody at the suit of a third party, it was necessary for the plaintiff to issue a *habeas corpus ad satisfaciendum* to charge him in execution, but under the 127th section of that Act a judge's order made upon affidavit that judgment has been signed and is unsatisfied suffices (1 Arch. Pract. 1209).

HABEAS CORPUS ACT. Is the Act 31 Car. 2, c. 2, as amended by the Act 56 Geo. 3, c. 100, and by (for certain colonies) the Act 25 & 26 Vict. c. 20. The principal Act is entitled "An Act for the better securing the Liberty of the Subject, and for Prevention of Imprisonments beyond the Seas." The Act may be suspended on occasions of public alarm. The principal Act imposes a fine of £500 (net) upon any judge refusing the writ in a proper case; but the writ, although it is a writ of right, is not necessarily of course, but is granted only upon probable cause being shewn (*Hobhouse's Case*, 3 B. & Ald. 420).

See title HABEAS CORPUS.

HABEAS CORPUS AD SATISFACIENDUM: See title HABEAS CORPUS.

HABEAS CORPUS AD TESTIFICANDUM: See title HABEAS CORPUS.

HABEAS CORPUS JURATORUM. This was a writ commanding the sheriff to bring up the persons of jurors, and if need were, to distrain them of their lands and goods, in order to ensure or compel their attendance in Court on the day of trial of a cause. The writ was abolished by the C. L. P. Act, 1852, s. 104, and a simpler mode of summoning jurors and ensuring their attendance was substituted.

See titles JURY, TRIAL BY; PANEL.

HABENDUM. Is that part of an indenture expressed in the words "To have," and which are usually followed by the words "To hold" (called the *tenendum*). The phrase "to have and to hold," being as a general rule introductory to the declaration of the uses to, for, or upon which the lands are granted,—Its office is only to limit the certainty of the estate granted; therefore no person can take an immediate estate by the habendum of a deed when he is not named in the premises; for it is in the premises of a deed that the thing is really granted (4 Cru. Dig. 272).

See titles PREMISES; TENENDUM.

HABERE FACIAS POSSESSIONEM. When a plaintiff recovered in a real or mixed action (both of which forms of action, with the exception of ejectment, were exploded in 1834), he was awarded a writ for the purpose of putting him in possession of the real or personal property recovered; the writ was called an *habere facias possessionem* in the case of a chattel interest, and *habere facias seisinam* in the case of a freehold interest. And at the present day a writ of possession in the nature of a writ of *habere facias possessionem* is the process commonly resorted to by the successful party in an action of ejectment, for the purpose of being placed by the sheriff in the possession of the land recovered.

See titles DELIVERY, WRIT OF; EJECTMENT; POSSESSION, WRIT OF.

HABERE LICERE. In Roman Law, denoted the permitting a purchaser of property to have the possession and enjoyment thereof; and it was a duty on the part of the vendor, for breach of which an action *ex empto* would lie. It corresponds to the "quiet enjoyment" of English Law.

See title QUIET ENJOYMENT, COVENANT FOR.

HABIT AND REPUTE. Are powerful in law, and in particular they constitute a marriage by reputation in the case of persons living together as man and wife, that is, they give rise to the presumption of wedlock; but the presumption may of course be rebutted if evidence is forthcoming

HABIT AND REPUTE—*continued.*

to the contrary. The phrase is more usual in Scotch than in English Law.

See titles REPUTATION, MARRIAGE BY;
REPUTATION, WHEN EVIDENCE.

HABITATIO. In Roman Law, was a precarious right of enjoyment of houses, just as *usus* was of land, and corresponded very nearly with the tenancy at will or by sufferance of English Law. Such a tenant could, however, let or sell the house,—being in that respect one degree better off than the *usuarius*.

See titles *USUS*: *USUSFRUCTUS*.

HABITUAL CRIMINALS ACT, 1869:

See title PREVIOUS CONVICTION.

HABITUAL DRUNKARDS. Under the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), which came into operation the first day of January, 1880, provision is made for the establishment and licensing of retreats for the reception of drunkards, who may be admitted on their own application. An inspector of retreats is to be appointed; and the County Court judge of the district or any judge of the High Court of Justice may order an inspection to meet any individual case. A justice of the peace may grant the inmate on his application either leave of absence (revocable) or his discharge.

HACKNEY-CARRIAGES. These are properly carriages plying for hire off a stand. The laws relating to those within the metropolis are contained in stats. 1 & 2 Will. 4, c. 22, 1 & 2 Vict. c. 79, and 17 & 18 Vict. c. 86. The driver is liable for negligently losing the luggage of a customer (*Ross v. Hill*, 2 C. B. 877).

HÆREDEM DEUS FACIT: See title SOLUS DEUS HÆREDEM.

HÆREDES. In Roman Law, were the successors by strict law to a deceased person, being called *hæredes legitimi* where the deceased died intestate, and *hæredes scripti* (i.e., devisees) where he died testate. They corresponded to the *bonorum possessores* of Praetorian Law. They were of three principal varieties, viz.—(1.) *Necessarii*, when obliged to accept the inheritance whether they liked to do so or not, e.g., slaves; (2.) *Sui et Necessarii*, when they were obliged by strict law to accept, but were permitted by equity to decline the inheritance, e.g., children; and (3.) *Extranei*, when they were strangers in blood altogether, and were free to accept or to decline the inheritance according to their own good pleasure.

See titles HÆREDITAS; HEIR.

HÆREDITAS. In Roman Law, was a universal succession by law to any deceased

HÆREDITAS—*continued.*

person, whether such person had died testate or intestate, and whether in trust (*ex fideicommisso*) for another or not; the like succession according to Praetorian Law was *bonorum possessio*. The Hæreditas was called *jacens*, until the Hæres took it up, i.e., made his *aditio hæreditatis*; and such hæres, if a *suus hæres*, had the right to abstain (*potestas abstinendi*), and if an *extraneus hæres* had the right to consider whether he would accept or decline (*potestas deliberandi*), the reason for this precaution being that (prior to Justinian's enactment to the contrary) a hæres after his *aditio* was liable to the full extent of the debts of the deceased person, and could have no relief therefrom, except in the case of a *damnum emergens* or *damnosa hæreditas*, i.e., an hæreditas which disclosed (after the *aditio*) some enormous unsuspected liability.

HÆREDITAS DAMNOSA**HÆREDITAS JACENS**

See title HÆREDITAS.

HÆRETICO COMBURENDO. The stat. *de hæretico comburendo* (2 Hen. 4, c. 15), was the first penal law enacted against heresy, and imposed the penalty of death by burning upon all heretics who relapsed or who refused to abjure their opinions. It was repealed by the stat. 29 Car. 2, c. 9, which however abolished the penalty of death only, and left the ecclesiastical jurisdiction for the repression of atheism and false religion otherwise unaffected.

See title CHURCH AND STATE.

HALES, CASE OF: See title DISPENSING POWER.

HALF-BLOOD. Are children and other persons related to each other through one parent only, whether through the father only, or through the mother only. They have an equal right of succession to personal estate upon an intestacy as persons in the same degree of the whole blood; but they were until 1838 excluded from all right of succession to lands, but were admitted by a stat. in that year (3 & 4 Will. 4, c. 106), but in an inferior degree.

See title DESCENTS.

HAMPDEN'S CASE: See title SHIP-MONEY.

HANAPER. This is an office connected with the Court of Chancery: writs, with the returns thereto, were kept in the hamper, or hanaper, in all cases in which the question was one affecting the subject only; writs (with the returns thereto), in which the Crown had an interest mediate

HANAPER—*continued*.

or immediate being kept in the *petty bag*, which phrase is accordingly used in contradistinction to the *hanaper*. Both the Hanaper Office and the Petty Bag Office belong to the Common Law side of the Court of Chancery.

See title **PETTY BAG OFFICE**.

HANDWRITING. The proof of handwriting is in general by resemblance, and is effected in either or any of the following three ways, namely:—

(1.) *Ex visu scriptiois*, i.e., by the comparison of the disputed writing by a witness who has seen the party in the act of writing;

(2.) *Ex scriptis olim visis*, i.e., by the like comparison by a witness who has had frequent correspondence with the party, or otherwise frequently seen writings of his;

(3.) *Ex scripto nunc viso*, i.e., by the like comparison by a witness who is an expert in characters or letters, and their peculiarities of formation.

The third sub-variety was not admissible by the Common Law, but was first made so by the C. L. P. Act, 1854 (17 & 18 Vict. c. 125), s. 27.

See title **EXPERTS, EVIDENCE OF**.

HARBOURS. Under the Harbours Docks and Piers Clauses Act, 1847 (10 Vict. c. 27), as amended by the Act 25 & 26 Vict. c. 69, provision is made for the construction of new harbours, with the necessary accommodation works incidental thereto, and for providing life-boats, and for the collection of rates, and for the discharge of cargoes and the removal of goods, and generally for the protection of the harbour and the peace thereof. A special Act is required for the construction, and the special Act may incorporate the Lands Clauses Act, 1845, in the usual manner and for the usual purposes. The General Pier and Harbour Act, 1861 (24 & 25 Vict. c. 45), applies as well to new harbours as also (when there is no constituted harbour trust) to old harbours, and provides for the levying of harbour rates. Under the stats. 24 & 25 Vict. c. 47, and 24 & 25 Vict. c. 80, advances of money may be made by the Public Loan Commissioners to harbour authorities for the construction and improvement of harbours; and these statutes have been amended by subsequent Acts. The stat. 40 & 41 Vict. c. 16 (entitled the Removal of Wrecks Act, 1877), authorizes the harbour authority to remove or to destroy any vessel sunk, stranded, or abandoned within their jurisdiction, and to sell such portions thereof as are saleable, and out of the proceeds to reimburse themselves their expenses.

See titles **PORT**; **SHIPPING**.

HASTINGS, WARREN. The impeachment (1788) of this gentleman is the latest instance on record (other than that of Lord Melville in 1804). The grounds of the impeachment were charges of alleged misgovernment in India, Warren Hastings having been governor-general. His case decided that an impeachment is not abated by a dissolution.

See title **DANBY, IMPEACHMENT OF**.

HAWKERS. The stat. 50 Geo. 3, c. 41, s. 6, enumerates hawkers, pedlars, petty chapmen, and every other trading person or persons going from town to town or to other men's houses, and travelling either on foot, or with horse or horses, or otherwise, carrying to sell, or exposing to sale, any goods, wares, or merchandise, as the persons who must take out a licence within the meaning of that Act; but no wholesale trader or his servant or agent is to be deemed a hawker; nor are coal agents who carry about and sell by retail coals in carts within the intention of the Act. Any person offending against the Act incurs a penalty not exceeding £40; but under the stat. 23 & 24 Vict. c. 111, the Commissioners of Inland Revenue may remit the penalty, notwithstanding the same, or some portion of it, may be payable to some other party than the Crown.

HAXEY'S CASE: See title **FREEDOM OF SPEECH**.

HEAD-BOROUGH. This was the name of the officer who was at the head of a frankpledge, and who was the chief of the ten pledges (whence called chief-pledge) in a decennary. His nine coadjutors were called *Hand-Boroughs*. His modern equivalent appears to be the head constable of a borough.

See title **POLICE**.

HEALTH, PUBLIC. Has been secured by a variety of statutes, principally by the Public Health Act, 1848 (11 & 12 Vict. c. 63), the Local Government Act, 1858, and the Acts amending same, both which specified Acts have however been repealed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), in which Act the bulk of the law upon this matter is now comprised. Under this statute, and others referred to therein, large powers are given to the local authorities for removing nuisances, regulating burials, checking the sale of injurious food or drink, and otherwise preventing disease.

See title **SANITARY LAWS**.

HEARING. Was the old name for the trial of an action in the Court of Chancery.

See title **TRIAL**.

HEARING IN CAMERA. Is simply

HEARING IN CAMERA—*continued.*

hearing in private. It was a common practice of the old Ecclesiastical Courts, and it continues to be the practice in the Probate Division of the High Court, where reasons of a public nature (*e.g.*, evidence of a delicate or indecent character) suggest the propriety of such a course. But, excepting in such cases, the High Court has no power to hear cases in private even with the consent of the parties, unless it be a matter relating to wards in Chancery or lunatics, or unless the publicity would defeat the object of the action.

HEARSAY: *See* title EVIDENCE, sub-title HEARSAY.

HEARTH-MONEY: *See* title TAXATION, HISTORY OF.

HEDGE-BOTE. This phrase denotes the allowance of wood for the repair of hedges (sometimes called hays, whence hay-bote) made to a tenant for life, or other tenant with a limited interest.

See title ESTOVERS.

HEDGES: *See* title FENCES AND DITCHES.

HEIR. As defined by Blackstone, the heir is one "upon whom the law casts the estate immediately on the death of his ancestor; whence also it is said that the heir cannot *disclaim* the estate of his ancestor (*see* title DISCLAIMER). It is a maxim of the English Law that God and not man maketh an heir (*Solus Deus hæredem facere potest, non homo*); and again it is a maxim of the Roman Law that the law and not the prætor makes an heir (*Prætor hæredem facere non potest, lex facere potest*). The two maxims are, however, very different in what they denote, the maxim of the Roman Law merely pointing at the difference between the *hæres* and the *bonorum possessor* (or, roughly speaking, between the legal and the equitable owner), and not implying that a testator could not (for in fact he always could) in Roman Law constitute his own heir, whereas the maxim of the English Law, on the other hand, points at the difference between an heir and a devisee, and seeks to denote (with a certain feeling of piety that is characteristic of the early law) the inability of any one to determine for himself amidst the multitude of chances who shall be the successor to his real estate if left to descend in due course of law. The popular use of the term *heir* is a mistake for *devisee*. An heir can only be determined upon the decease of the ancestor (*Nemo est hæres viventis*), and he is the heir whom the canons of descent demonstrate when applied at the date of such decease (*see* title DESCENTS).

The following are the varieties of heirs:—

HEIR—*continued.*

(1.) *Heir-Apparent.*—Is he who, if he survive his ancestor, must certainly be his heir and succeed him, *e.g.*, the eldest son in the lifetime of his father.

(2.) *Heir-Presumptive.*—Is he who, if the ancestor were immediately to die, would succeed, but whose right of succession may be defeated by some event other than his own death before the ancestor.

(3.) *Customary Heir.*—Is he who is heir according to any custom, such as that of Borough English, or, in the case of copyhold lands, upon the death of his ancestor.

The *hæres* of Roman Law is more like the executor than the heir of English Law, being both constituted by the appointment of the testator, and taking in general a bare legal estate, which he holds in trust to pass down or to distribute among others.

See title HÆREDES.

HEIR APPARENT**HEIR, CUSTOMARY****HEIR PRESUMPTIVE**

} *See* title HEIR.

HEIR-LOOMS. Such personal chattels as go to the heir along with the inheritance, as being a *loom*, *limb*, or member, *i.e.*, part thereof. They are properly ancient portraits of former owners, coats of arms, paintings, and such like; and are to be distinguished from another class of personal chattels, often but improperly called heir-looms, and which are by express words annexed to the inheritance to go along with it, and which are usually (but not necessarily) fixed to the inheritance in such a manner as does not admit of their severance from it without damaging the inheritance. A bill in equity will lie for the specific delivery up of heir-looms to the owner of the inheritance (*Pusey v. Pusey*, 1 Wh. & Tud. L. C. 735).

See title FIXTURES.

HERALDS' COLLEGE. A royal corporation which is said to have received its charter of incorporation from King Richard III. of odious memory, but who appears to have anticipated several of the beneficial measures of Henry VII., his rival and successor. The Earl Marshal (Norfolk, D.) is the head of the college. The records of the college are kept partly at the college itself (St. Bennet's Hill, St. Paul's, City of London), and partly in the Harleian Library (2 Tayl. on Evidence, 5th ed., 1287). In cases of pedigree an officer of this college has been allowed to explain armorial bearings, especially when these are of a date prior to the Revolution. The records (kept at the college) of visitations made by the heralds in the 16th and 17th centuries under a commission from the Crown, and which visitation-records con-

HERALD'S COLLEGE—*continued.*

tain the pedigrees and coats of arms of the English nobility and principal gentry, are admissible in evidence as official records or public documents, to establish or to defeat pedigrees and peerage claims (2 Tayl. on Evidence, 5th ed. 1511).

See titles CHIVALRY, COURT OF; DOCUMENTS, PROOF OF.

HERBAGE. The liberty which one man hath in or over another man's ground, *e.g.*, his forest, to feed his cattle therein.

See title COMMON, RIGHT OF.

HEREDITAMENT. Is the general name for lands or houses; it may be either a corporeal hereditament, an incorporeal hereditament, or a purely incorporeal hereditament.

See title INCORPOREAL HEREDITAMENTS.

HERESY. Is defined in 1 Hawk. P. C. c. 2, as being the offence of holding a false opinion repugnant to some point of doctrine clearly revealed in the Scriptures, and either absolutely essential to a man's salvation or of essential importance in the Christian faith. The penalty for the offence, which in the case of lay persons has gone entirely into desuetude, used to be either death or excommunication, or other ecclesiastical penalty.

See titles ATHEISM; CHRISTIANITY.

HERIOT. The best beast (whether a horse, ox, or cow) which by the custom of most manors is due to the lord upon the death of his copyhold tenant. Heriots are usually divided into two sorts, heriot-service and heriot-custom; the former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent; the latter arise upon no special reservation whatever, but depend solely upon immemorial usage and custom. In some manors it is the best chattel, under which term a jewel or piece of plate is included; but it is always a personal chattel, which immediately on the death of the tenant, being ascertained by the option of the lord, becomes vested in him as his property, and is no charge on the lands, but merely on the goods and chattels of the tenant (1 Cruise, 323).

HIDAGE. By some it is said to signify an extraordinary tax payable to the king upon every hide of land; by others it is said to be an exemption from that tax (*Les Termes de la Ley*).

See title HIDE.

HIDE. A hide of land was a family holding, variously estimated from 100 to 120 acres.

See title HIDAGE.

HIGH COMMISSION. The Act of Supremacy, 1 Eliz. c. 1, restored all ecclesiastical jurisdiction to the Crown, and empowered the Queen to execute the same jurisdiction by commissioners to be appointed under the great seal, and the power of the commissioners, when appointed, was made to extend to all heresies, schisms, abuses, and offences whatsoever which fell under the cognizance of the spiritual authority. After various temporary commissions had been appointed under this Act, a more permanent commission was appointed under it in 1583, during the primacy of Archbishop Whitgift. This last-mentioned commission was the Court of High Commission, commonly so called. It consisted of forty-four commissioners, twelve of whom were bishops, other twelve of them privy councillors, and the rest either clergymen or laymen, all which commissioners were directed and empowered by jury or by witnesses, or by other means of trial, to inquire into all offences or misdemeanours against or contrary to the Acts of Supremacy (1 Eliz. c. 1), and Uniformity (1 Eliz. c. 2), including thereunder the cognizance of all heretical opinions, seditious books, contempts, conspiracies, false rumours, slanders, &c.; also, incests, adulteries, and the like; also, absence from church, &c. And any three of the commissioners, of whom one was to be a bishop, were empowered to examine suspected persons on oath and to punish the refractory by spiritual censures, fines, or imprisonments, at their discretion, with power also to amend the statutes of schools, colleges, &c.

The procedure of the Court was wholly founded on the Canon Law, and the accused was subjected to a series of interrogatories of an exhaustive and searching character, which he was compelled to answer on oath (called the oath *ex officio*) without evasion, not being allowed the benefit of the Common Law maxim, that no one is bound to criminate himself.

This Court met with the same fate, in the same year, from the same causes, and by the same Parliament, as the Court of Star Chamber. See that title.

HIGH SEAS. Torts committed on the high seas and justiciable in England have the *lex mercatoria* applied to them so far as England recognizes or has varied that general law, and not otherwise. Crimes committed on the high seas and constituting offences against the law of nations are justiciable everywhere.

HIGH TREASON: See title TREASON.

HIGHER AND LOWER SCALE, COSTS. Under the 6th order of the Rules of August, 1875, regarding costs in the Supreme Court,

HIGHER AND LOWER SCALE, COSTS
—continued.

a distinction is taken between costs on a lower scale and costs on a higher scale; and, under rule 2 of that order, all contentious matter (speaking roughly) entitles a solicitor to costs on the higher scale, and under rule 1 of that order, all merely administrative matter (where the estate does not exceed £1000) and all proceedings on specially indorsed writs and the like entitle a solicitor to costs on the lower scale only, unless the Court should expressly allow costs on the higher scale.

HIGHWAY. This is a public way open to all the king's subjects, and leading between two public termini (*Young v. Cuthbertson*, 1 Macq. H. L. 455). The soil of the road is in the freeholders adjoining (*Cooke v. Green*, 11 Price, 736). A highway may be created either by Act of Parliament (*Sutcliffe v. Greenwood*, 8 Price, 535), or by dedication of the freeholder to the public, which dedication must be absolute (*Rex v. Leake*, 2 N. & M. 595), otherwise it is a mere licence (*Stafford (Marquis) v. Coyney*, 7 B. & C. 257). Moreover, the dedication must be in perpetuity (*Dawes v. Hawkins*, 8 C. B. (N.S.) 848). Such a dedication may be presumed from long enjoyment (*Poole v. Huskinson*, 11 M. & W. 827); and it is not material to inquire who the precise dedicating owner was (*Rex v. East Mark Tything*, 11 Q. B. 877). If the owner wants to exclude the presumption of a dedication, while at the same time he wishes to let the public pass over it, he should do some act to shew that he gives a licence only; the common course is to shut the way up one day in the year (*British Museum (Trustees) v. Finnis*, 5 C. & P. 460). Where the parish or township adopts a public way, which becomes such by dedication, it is liable to repair the same, even at Common Law (*Rex v. Leake*, 2 N. & M. 583); and for statutory regulations as to such adoption, see 5 & 6 Will. 4, c. 50 (Highway Act, 1835). A remedy lies by action or indictment for the obstruction of a highway (*Dovaston v. Payne*, 2 Sm. L. C. 132).

See title EASEMENTS, sub-title WAY.

HILL v. BIGGE, CASE OF. Was a decision in the year 1841 of the Privy Council upon an appeal from the Court of first instance of the Island of Trinidad. Hill (the appellant) was governor of the island, and was found liable in the civil court of his own island on an account for jewelry in the sum of £825, or thereabouts. The Privy Council confirmed the decision in the Court below. The jewelry had been supplied, and the debt for same incurred, prior to Hill's appointment to the governorship.

HIRING. A contract whereby a person offers to let to another either some instrument of utility (*locatio rei*), or his services, for a definite period (*locatio operarum*), or his services until thereby a certain work, e.g., a church or a theatre, is constructed (*locatio operis*). The person who undertakes to build, e.g., a theatre, is called a contractor *par excellence*.

See titles LOCATIO CONDUCTIO; LOUAGE.

HLAFORD. A great lord who had vassals under him, and to whom also landless men might commend themselves. He was answerable to produce them when wanted for the purposes of justice.

See title FRANKPLEDGE.

HOLDING OVER. This is the phrase commonly used to denote that a tenant remains in possession of lands or houses after the determination of his term therein. Thus, a tenant by sufferance is one who has come in by right and who holds over by wrong. And by the Common Law, a husband who has been in possession during the coverture in right of his wife, and who afterwards (not having qualified by the birth of a child or otherwise to hold over as tenant by the curtesy) holds over, was also a tenant by sufferance, but for his more speedy ejection by the next successor in right he is made a trespasser by the stat. 6 Anne, c. 18, s. 5.

HOLOGRAPH WILL. A will written wholly by the hand of the testator himself is so called. Before it is admitted to probate, the fixed *animus testandi* must be proved, because (especially before 1 Vict. c. 26) it might have been intended merely as a sketch of the dispositions the testator intended by-and-by to make, if upon further reflection he still approved of same.

HOLY ORDERS: See title ORDINATION.

HOMAGE. This was an incident of feudalism, and was so called because the tenant thereby acknowledged his tenure as that of the lord's man or vassal (*devenio homo vester*). It is to be distinguished from fealty, another incident of feudalism, and which consisted in the solemn oath of fidelity made by the vassal to the lord, whereas homage was merely an acknowledgment of tenure. If the homage was intended to include fealty it was called *liege* homage, but otherwise it was called *simple* homage.

The word homage, or *homagium*, is also a noun of multitude, and denoted the jury of copyholders who made presentment to the lord or his steward of all matters affecting the lands of the manor which had been transacted out of Court. Such presentment has, however, ceased to be re-

HOMAGE—*continued.*

quired in the great majority of cases since the Act 4 & 5 Vict. c. 35.

HOME-TRADE SHIP: See title FOREIGN-GOING SHIP.

HOMICIDE is literally the killing of a human being. It is of the following varieties:—

- (a.) Felonious homicide, and being either murder or manslaughter;
- (b.) Excusable homicide,—as where it occurs by misadventure, or through ignorance, or from necessity; and
- (c.) Justifiable homicide,—as where a sheriff executes, or causes to be executed, a criminal in strict conformity to his sentence; or where a policeman kills a person who resists capture; or where another person commits the act in self-defence; or (in the case of a woman) in defence of her chastity.

HOMINE REPLEGIANDO. This was a writ which lay to replevy a man out of prison, or out of the custody of any private person, in the same manner that chattels taken in distress may be replevied. It was necessary to give security to the sheriff that the man should be forthcoming to answer any charge against him. In *Somerset's Case* (20 St. Tr. 1), it is stated by Mr. Hargreaves in argument that this writ was one (the writ *de nativo habendo* being the other) of the only two writs provided by law for the master's reclaiming a runaway villein.

See titles NATIVO HABENDO; VILLENAGE.

HONORARIUM. A fee paid (*e.g.*, to a barrister, queen's counsel, or physician) for his services, and for the recovery of which no action lies in any court of justice, the liability being honourable and amounting to a moral obligation only.

HONOUR. The seignior of a lord paramount was so called, while the seignior of a mesne lord was simply called a seignior.

HORSES. A person who hires a horse is bound (in the absence of express agreement to the contrary) to provide it with sufficient food during his use of it (*Handford v. Palmer*, 5 Moo. 74); he must also use it in a careful manner, and not drive it when visibly exhausted (*Bray v. Mayne*, Gow. 1). A livery stable-keeper has a lien for his keep and exercise of a horse (*Bevan v. Waters*, 3 C. & P. 520); and other stable keepers may, by special agreement, acquire a similar lien (*Wallace v. Woodgate*, 1 C. & P. 575). Horses standing at livery are liable to be distrained for rent (*Parsons v.*

HORSES—*continued.*

Gingell, 4 C. B. 545). The stats. 2 & 3 Ph. & M. c. 7, and 31 Eliz. c. 12, regulate the sale of horses, which must be in fairs or markets; and horses so sold, although stolen, become the property of the purchaser; but the owner of a stolen horse so sold may redeem it upon payment of the price given, 31 Eliz. c. 12, s. 4.

HOSIERY MANUFACTURE. The stat. 37 & 38 Vict. c. 48, prohibits all stoppages by the master out of the workman's wages, for farm-rents and such like charges; abolishing in effect set-off, and leaving the master to his right of action only.

HOSPITAL. The stat. 39 Eliz. c. 5, enables any person or corporation to found hospitals for the poor, and also to incorporate them (*Newcastle Corporation v. Attorney-General*, 12 Cl. & Fin. 402); prior to that statute, hospitals could only be founded by royal licence or letters patent (*Simpson v. Wilkinson*, 7 M. & G. 50). Hospital lands are exempt from land-tax if that was their application at the time of the passing of 38 Geo. 3, c. 5 (*Cox v. Rabbits*, 3 App. Cas. 473), but not if the hospitals are founded subsequently to that Act (*Lord Colchester v. Kewney*, L. R. 1 Exch. 368; L. R. 2 Exch. 253). Hospitals (together with all the buildings incidental thereto) are also exempt from inhabited house duty (48 Geo. 3, c. 55; *Jepson v. Gribble*, 1 Exch. Div. 151). Of course, hospitals are charities within the meaning of the Mortmain Act.

See title CHARITIES.

HOTCHPOT. This word is the English equivalent for the Latin *collatio*. It denotes that of two or more persons jointly entitled to share equally in the distribution of property, whether real or personal, any one of them who has received part of his or her share previously to the period of the ultimate distribution must bring into the common property the part so received before he or she is entitled to share in the general distribution. Thus, if the owner of fifty acres has two daughters, and gives one of such daughters twenty acres upon her marriage, and afterwards dies intestate, leaving the two daughters his co-heiresses, the daughter who had already received part shall bring that part into hotchpot, and then take her half share of the original fifty acres, or refusing so to do, shall leave all the remaining thirty acres to her sister (22 & 23 Car. 2, c. 10, s. 5). A hotchpot clause is also usual in wills and marriage settlements.

See titles COLLATIO; REDUCTION.

HOTEL: See titles INN; INN-KEEPER'S LIEN.

HOUSE-BOTE. This word denotes the right of the tenant for life, or other tenant with a limited interest, to take wood or timber for the necessary repair of houses, &c., part of the lands in tenancy.

See title ESTOVERS.

HOUSE-BREAKING: See title BURGLARY.

HOUSE OF COMMONS. The lower division of the Legislature. The history of its growth is the history of the English constitution (see title CONSTITUTION, GROWTH OF). For the proper conduct of its business, it enjoys many privileges (see title PRIVILEGE OF PARLIAMENT); and as regards money-bills, its privilege is exclusive of the lords (see title MONEY-BILLS). Its members require no property qualification (see title MEMBER OF PARLIAMENT).

See also titles ELECTIONS, COMMONS' RIGHTS IN; ELECTORAL FRANCHISE; REPRESENTATION IN PARLIAMENT.

HOUSE OF CORRECTION. By the Prison Act, 1865 (28 & 29 Vict. c. 126), s. 56, the distinction between prisons and houses of correction has been abolished; that distinction, while it existed, was this, that houses of correction were in the nature of reformatories rather than of penal establishments, which prisons are.

See titles GAOLS; PRISONS.

HOUSE OF LORDS, JURISDICTION OF. The House of Lords having been originally interchangeable with the *Aula Regis*, was possessed of a twofold jurisdiction, namely,

- (1.) An original jurisdiction; and
- (2.) An appellate jurisdiction.

This twofold jurisdiction appears from various causes to have fallen in early times into comparative disuse. (1.) The disuse of the original jurisdiction is accounted for by the circumstance that the *Aula Regis* had been divided into, firstly, committees, and secondly, permanent Courts, appropriating to themselves the cognizance of special matters; namely, the Court of Exchequer for matters of revenue affecting the Crown; the Court of Common Pleas for matters chiefly of a freehold nature between subject and subject; the Court of Queen's Bench originally for the residuary jurisdiction of the *Aula Regis*, but latterly for a definite but more or less general portion of that jurisdiction; and the Court of Chancery for matters of *grace*. (2.) The disuse of the appellate jurisdiction is accounted for partly by the competency of the jurisdiction of the Courts having original jurisdiction, and more especially by the wide powers of the Court of Chancery, which gave redress in most cases of hardship at Common Law, and partly by the circumstance that the Council or Star Chamber exercised, although

HOUSE OF LORDS, JURISDICTION OF —continued.

illegally, a control over verdicts; and partly also, and perhaps chiefly, by the circumstance that the Court of Exchequer Chamber was established by 31 Edw. 3, st. 1, c. 12, as a Court of Appeal from the Courts of Exchequer and Common Pleas, becoming also a Court of Appeal from the Court of Queen's Bench in virtue of the stat. 27 Eliz. c. 8. Certain it is, at all events, that after the beginning of the fifteenth century the appellate jurisdiction of the House of Lords did fall into disuse, and that it continued in disuse till about the Restoration in 1660, when the jurisdiction of the House of Lords, as well in its original as in its appellate branch, was attempted to be restored.

Thus (1.) With reference to their original jurisdiction,—The Lords did not at the Restoration period hesitate on petition (a) to stay waste on the estates of private persons; (b) to secure the tithes of church livings during vacancies; or generally (c) to interfere in freehold matters affecting a member of their own House. But these pretensions were always objected to by the Commons as an unlawful interference with the ordinary tribunals, and were finally given up in the case, or as a consequence of the case, of *Skinner v. East India Company*, in the reign of Charles II. The plaintiff in that case had petitioned the King for redress and restitution in respect of certain losses sustained by him at the hands of the East India Company's agents, they having plundered his property, taken away his ships, and dispossessed him of an island which he had purchased from a native Indian prince. The King transmitted the petition to the House of Lords, and the Lords called upon the East India Company, through their chairman, Sir Samuel Barnardiston (who was an M.P.) to put in their answer to Skinner's complaint. The Company pleaded in bar to the jurisdiction; but that plea was overruled, and eventually judgment was given for Skinner with £5000 damages. The Company having in the meantime brought the proceedings in the House of Lords to the attention of the Commons, prayed the latter body to interfere and assume jurisdiction in the matter, Barnardiston being a member of their House. The Commons at once took cognizance of their complaint; and the Lords objecting to this unwarranted assumption of jurisdiction on their part, several conferences followed between the two Houses. These conferences proving ineffectual, the Lords and Commons retaliated on each other, the Commons voting Skinner into custody for a breach of privilege, and the Lords committing Barnardiston for the like cause. Subsequently, the Lords released Barnardiston, but the Com-

HOUSE OF LORDS, JURISDICTION OF —continued.

mons persisting in the dispute, passed a bill vacating all the proceedings in the Lords against Barnardiston. The King ultimately quieted the dispute by recommending an erasure of all proceedings from the journals of the two Houses; and the Lords have never from that time made any pretensions to an original jurisdiction.

(2.) With reference to their appellate jurisdiction,—The Lords, in the opinion of Sir M. Hale, never exercised any such jurisdiction in matters coming from Courts of Equity until the reign of Charles I., or more probably the Restoration in 1660; but in matters coming from the Courts of Common Law, the Lords from a very early time exercised an appellate jurisdiction upon writs of error under commission issuing under the Great Seal. This appellate jurisdiction in both of these its branches, was equally reasonable and proper; but upon its attempted revival after the Restoration in 1660, it was resisted by the Commons, principally (it appears) upon the score of privilege, and not upon any more general grounds. Thus, in 1675, in the case of *Shirley v. Sir John Fagg*, the defendant being a member of the Commons' House, the plaintiff brought an appeal to the House of Lords from the Courts of Equity; whereupon the Commons apprehended the counsel engaged in the case and imprisoned them in the Tower; and although the Lords sent their usher to the Tower to deliver them, they remained in custody for some time longer, the Lieutenant of the Tower refusing to release them without a warrant from the Commons. The King, with a view to staying this dispute between the two Houses, prorogued Parliament for three months; but the dispute was revived upon the re-assembling of Parliament, and the King thereupon again prorogued Parliament, on the latter occasion for eighteen months. Shirley's appeal never came on again, but the Lords insisted upon their right to an appellate jurisdiction, and have ever since exercised that jurisdiction, although the Commons upon the re-assembling of Parliament passed some [intemperate] resolutions to the effect that there lay no appeal to the House of Lords from Courts of Equity, and that to assist in any such was to betray the rights and liberties of the subject. The appellate jurisdiction in Common Law matters seems not to have been questioned either after or before the Restoration.

Appeals to the House of Lords are now regulated by the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), and the orders and rules made thereunder and which are applicable to all appeals pre-

HOUSE OF LORDS, JURISDICTION OF —continued.

sented to the House on and after the 1st of November, 1876.

See title APPEALS, CIVIL, VARIETIES OF.

HOUSE-TAX. Otherwise called Inhabited House Duty, is an assessment upon every house that is occupied for the purposes of residence; business premises are exempt from it, even although a house-keeper resides on them (32 & 33 Vict. c. 14. s. 11; repealed but in substance re-enacted by 41 Vict. c. 15, s. 13); and when a house consists in part of residential and in part of business premises, the tax is to be confined to the residential part, and of course is on the assessed annual value of such part as residential.

See title INLAND REVENUE.

HOUSEHOLD SUFFRAGE: See title ELECTORAL FRANCHISE.

HUE AND CRY. This phrase denotes the [old] process provided by the Common Law for the pursuit of felons, and which the sheriff, *semble*, may still put in force. But the modern facilities and provisions for arrest have now, as a general rule, excluded the necessity for it.

See titles WATCH AND WARD; POLICE.

HUNDRED: See title HUNDREDORS.

HUNDRED COURT. } A Hundred Court
HUNDREDORS. } is much the same as a Court Baron, only that it is larger, and is held for the inhabitants of a particular hundred instead of a manor; it resembles a Court Baron in not being a Court of Record, and in the free suitors being the judges, and the steward the registrar. Hundredors are persons empanelled or fit to be empanelled on a jury upon a controversy arising within the hundred where the land in question lies. The word "hundredor" also sometimes signifies he who has the jurisdiction of a hundred and holds the Hundred Court; and sometimes it is used for the bailiff of a hundred (Crompt. Juris. 217). By the Common Law the hundred is liable for all damage done to property within it by rioters, and may make an assessment to raise the amount.

HUSBAND AND WIFE. This relation, which was anciently called that of Baron and Feme, is fertile in legal consequences, as well in the rights which it confers as in the liabilities which it imposes upon either party to the relation.

Firstly, *The rights of the husband*; and hereunder firstly, in the real estate of the wife; and secondly, in her personal estate.

(1.) In the real estate of the wife, the husband takes the following rights:—

(a) The entire rents and profits arising

HUSBAND AND WIFE—continued.

during the coverture; and if he survive the wife, and has had issue by her capable of inheriting,

- (b.) An estate for the residue of his life.

But with respect to marriages which are solemnised after the 9th of August, 1870, and real estate coming to the wife afterwards during the coverture by descent, the wife takes the entire rents and profits thereof independently of her husband; and the husband is left only his curtesy estate. (M. W. P. Act, 1870), unless the wife should (as she apparently may) defeat that right by alienation *inter viros* or even by devise (*Cooper v. Macdonald*, L. R. 7 Ch. Div. 288).

(2.) In the personal estate of the wife, the husband has the following rights:—

- (a.) All that part of her personal estate that is in possession, or which (being chattels personal) he reduces into possession or (but only if chattels real) alienates during the coverture; and if he survive the wife,

- (b.) All that other part of her estate which, as being either choses in action not reduced into possession go to him as her administrator, or as being chattels real not alienated during the coverture, or the residue of the separate estate, simply remain to him *jure mariti*.

But under the M. W. P. Act, 1870 (33 & 34 Vict. c. 93), the wages and earnings of married women from any employment, occupation, or trade, or from the exercise of any literary, artistic, or scientific skill are to be their own separate estate, as are also all investments thereof, and all deposits in savings banks; and further, all personal property coming to married women under an intestacy, and all personal property not exceeding £200 coming to them under a deed or will, are to be their own property; and married women may effect policies of life insurance either on their own or on their husband's lives, and such policies are to form part of their own separate estate.

Moreover, in respect of the before-mentioned rights of the husband as well in the real as in the personal estate of the wife, the same are subject in general to the rule of Equity, called "The Wife's Equity to a Settlement" (see title EQUITY TO A SETTLEMENT), whereby the Court of Chancery in certain cases, and almost, indeed, in the invariable case, sets apart for the wife a proportion of her estate previously to the husband's obtaining the possession thereof.

Secondly, *The rights of the wife*, and hereunder. Firstly, In the real estate of her husband; and, secondly, in his personal estate.

HUSBAND AND WIFE—continued.

(1.) In the real estate of the husband. If the marriage was solemnised before the 1st of January, 1834, and the wife survives her husband, she is entitled for the residue of her life as *dowress* to one-third part of all the lands of which her husband was at any time during the coverture solely seised for an estate of inheritance; and if the marriage was solemnised after the 1st of January, 1834, she is entitled for the residue of her life, as *dowress* to one-third part of the lands of inheritance remaining to the husband undisposed of by him, either by deed or will, and whether he was legally seised, or only equitably possessed, of the same lands during the coverture. But whereas formerly her right of dower, after it had once attached, was indefeasible by any adverse disposition, much less by any adverse declaration, of the husband, the right in the case of marriages solemnised since the 1st of January, 1834, is defeasible by disposition, and even by declaration, of the husband to the contrary, made or contained by or in any deed or will of his.

Thirdly, *The liabilities of the husband*. In respect of his wife, the husband incurs the following liabilities. He is liable to pay all his wife's debts contracted before the marriage, and to provide her with the necessaries of life during the marriage, whether she is living with him, or (from no fault of her own) separate from him (*Ottaway v. Hamilton*, 3 C. P. Div. 393). He is also liable on all the contracts of his wife entered into by her with regard to necessaries, and (upon proof of his assent thereto) with regard also to non-necessaries, being articles of a luxurious and expensive kind. However, under the M. W. P. Act, 1870, when the marriage has taken place after the 9th of August, 1870, the husband is not to be liable for the debts of the wife contracted before marriage, but the wife's own separate estate (if any) is to be liable for the same; but under the M. W. P. Amendment Act, 1874, the husband is again subjected to liability for these debts of his wife, but to a limited extent only, that is to say, to the extent (speaking roughly) of all property of the wife which the husband has acquired or but for his own act or default might have acquired for himself.

Fourthly, *The liabilities of the wife*. In respect of her husband, the wife used formerly to incur no pecuniary liability at all, but only the duties of obedience and chastity. But under the M. W. P. Act, 1870, when her husband becomes chargeable to the parish, she is liable to an order under the Poor Law Amendment Act, 1868, s. 33, charging her to contribute to the

HUSBAND AND WIFE—*continued*.

maintenance of her husband; and she is also liable for the maintenance of her children, as a widow was by law already chargeable therewith. Moreover, under the M. W. P. Amendment Act, 1874, *supra*, she is rendered liable, jointly with her husband, for her own debts contracted before the marriage.

See also titles CONJUGAL RIGHTS; MARRIAGE SETTLEMENTS; &c.

HYPOTHECA. This was a term of the Roman Law, and denoted a pledge or mortgage. As distinguished from the term *pignus* in the same law, it denoted a mortgage whether of lands or of goods in which the subject in pledge remained in the possession of the mortgagor or debtor, whereas in the *pignus* the mortgagee or creditor was in the possession. Such an *hypotheca* might be either express or implied: (1.) Express, where the parties upon the occasion of a loan entered into an express agreement to that effect; or (2.) Implied, as, e.g., in the case of the stock and utensils of a farmer (*colonus*), which were subject to the landlord's right as a creditor for rent; whence the Scotch law of hypothec.

The word has suggested the term *hypothecate*, as used in the mercantile and maritime law of England. Thus, under the Factors' Act, goods are frequently said to be hypothecated; and a captain is said to have a right to hypothecate his vessel for necessary repairs. See Kay's Law of Shipmasters and Seamen.

See next title.

HYPOTHECATION. Is a term in Shipping Law, and denotes the Act of pledging ship or cargo or both by master of vessel, to enable him (in a given emergency) to prosecute his voyage with success. Before resorting to hypothecation, the master should endeavour to raise the needful funds on his own personal credit. Bottomry and respondentia are the two principal forms of hypothecation.

See titles BOTTOMRY; CARGO; RESPONDENTIA.

HYPOTHEQUE. In French Law is the mortgage of real property in English Law, and is a real charge, following the property into whosoever hands it comes. Such a charge may be either (1) *Légale*; or (2) *Judiciaire*; or (3) *Conventionnelle*. It is *legale*, as in the case of the charge which the state has over the lands of its accountants, or which a married woman has over those of her husband; it is *judiciaire*, when it is the result of the judgment of a Court of Justice; and it is *conventionnelle*, when it is the result of an agreement (which must be express) of the parties.

HYPOTHETICAL YEARLY TENANCY.

Is the basis of rating lands and hereditaments to the poor rate, and to other rates and taxes that are expressed to be leviable or assessable in like manner as the poor rate.

See titles POOR RATE; RATING; UNION ASSESSMENT ACT.

I

ID CERTUM EST, QUOD CERTUM REDDI POTEST: See title CERTUM EST &c.

IDEM SONANTIA. Where two words (usually surnames) sound the same, although spelt differently. In criminal indictments, a mistake in spelling the surname is immaterial, so long as the sound is the same, and there is no mistake as to the party, e.g., Segrave for Seagrave (*Williams v. Ogle*, 2 Str. 889), White for Whyte, and such like.

IDENTITY. In conveyances of land, it is necessary to identify the property sold with that described by the parcels in the title-deeds. This is usually done by a comparison of all maps and the successive descriptions in the successive deeds, coupled with a declaration of identity by some old credible person. And in actions and suits, it is often necessary to establish the identity of parties and of deponents; but such evidence need not be strict, as the similarity of name throws the onus of disproving the identity on the party affirming the negative. An affidavit of identity is also required of the names in certificates of births, baptisms, marriages, and burials; otherwise the question of identity is for the jury to determine (*Hubbard v. Lees*, L. R. 1 Ex. 255).

IDIOCY: See title LUNACY.

IGNORAMUS (*We are ignorant*). Formerly the grand jury used to write this word on bills of indictment when, after having heard the evidence, they thought the accusation against the prisoner was groundless, intimating that, though the facts might possibly be true, the truth did not appear to them; but now they usually write in English the words "not a true bill," or "not found," if that is their verdict; whereupon the party is forthwith discharged; and the jury are in so doing said to ignore or throw out the bill. A notable instance of the finding of an *ignoramus* was the *Karl of Shaftesbury's Case*, 8 St. Tr. 759, temp. Charles II.

IGNORANTIA FACTI.**IGNORANTIA JURIS.**

It is a general rule that ignorance of *law* (*jus*) is no excuse, either for committing a crime or for bargaining away (without knowing it) a private civil right, at least where the circumstances out of which the civil right arises are known to the parties at the time (*Pullen v. Ready*, 2 Atk. 591); *secus*, if the circumstances were not then known (*Cooper v. Phipps*, L. R. 2 H. L. 149), or if the other party committed a fraud upon the ignorant party (*Ormond v. Hutchinson*, 13 Ves. 51). On the other hand, ignorance of *fact* is always an excuse, assuming that the fact is a material one (*Cochrane v. Willis*, L. R. 1 Ch. App. 58).

ILLATA ET INVECTA. Things brought into the house for use by the tenant were so called, and were liable to the *jus hypothecæ* of Roman Law, just as they are to the landlord's right of distress in English Law.

ILLEGALITY. In a contract vitiates same, even although the illegality were purely technical or general (*Sykes v. Beadon*, 11 Ch. Div. 170; *South Wales Atlantic S.S. Co. 2 Ch. Div. 763*).

ILLEGITIMACY: See titles **BASTARD**; **LEGITIMACY**, **DECLARATION OF**; **LEGITIMATION**.

IMMEUBLES. These are, in French Law, the immoveables of English Law. Things are *immeubles* from any one of three causes: (1.) From their own nature,—*e.g.*, lands and houses; (2.) From their destination,—*e.g.*, animals and instruments of agriculture when supplied by the landlord; or (3.) By the object to which they are annexed, *e.g.*, easements.

IMMORALITY. If the consideration for a contract, *e.g.*, in a bond to ensure future co-habitation, vitiates the contract, in like manner as illegality in the consideration would vitiate it. *Semble*, in a legacy the immoral condition would be read as not inserted in the will (*pro non scripto*).

See title **CONDITIONS**, **IMPOSSIBLE**.

IMMOVEABLES: See title **MOVEABLES**.

IMPANEL. To impanel a jury signifies the entering by the sheriff upon a piece of parchment termed a panel the names of the jurors who have been summoned to appear in Court by a certain day to form a jury of the country to hear such matters as may be brought before them.

See title **PANEL**.

IMPARLANCE. An indulgence formerly granted to a defendant to defer pleading to the action until a subsequent

IMPARLANCE—continued.

term. It is said that the reason of allowing an imparlance was to give the plaintiff an opportunity of settling the matter amicably with the defendant without further prosecuting his suit; and the Court is in the habit in a proper case of allowing the parties time to consider about a compromise of the action. By the 2 Will. 4, c. 39, imparlances as such were abolished; and more recently, by r. 31 T. T. 1853, no entry or continuance by way of *imparlance* or otherwise was to be made on any record or roll whatever, or in the pleadings.

See title **CONTINUANCE**.

IMPEACHMENT. A proceeding against ministers and other public servants of eminence instituted by the Commons as prosecutors, and determined by the Lords as judges (see title **ATTAINDER**, **BILLS OF**). The impeachment of Michael de la Pole (chancellor) in 1386 (10 Ric. 2), is the earliest recorded instance, and resulted in the removal of that officer from the chancellorship. William de la Pole, Duke of Suffolk (the grandson of Michael the chancellor), is the second well-defined instance of impeachment (1449, 28 Hen. 6), but the impeachment in that case assumed afterwards the character of a bill of attainder, and the bill was shelved by the king banishing the duke for five years. The next notorious instances of impeachments are those of Mompesson (1621) for his violation of the Monopolies Act,—and of Bacon, L.C. (1621), for alleged bribery in his office,—and of Middlesex, Earl (1624), for alleged bribery. Between the year 1621 and the Revolution in 1688, there were about forty cases of impeachment, of which the principal were:—

- (1.) Buckingham, Duke, in 1626;
- (2.) Mainwaring, Dr., in 1628;
- (3.) Strafford, Earl, in 1640;
- (4.) Laud, Archbishop, in 1641;
- (5.) Clarendon, Earl, in 1667;
- (6.) Danby, Earl, in 1679; and
- (7.) Fitzharris, Mr., in 1681.

Since the Revolution in 1688, the principal impeachments have been,—

- (1.) The Four Whig Peers (Portland, Orford, Halifax, and Somers), in 1701;
- (2.) Sacheverell, Dr., in 1710;
- (3.) The Three Tory Peers (Oxford, Bolingbroke, and Ormond), in 1715;
- (4.) Warren Hastings, in 1788; and
- (5.) Lord Melville, in 1804.

To an impeachment, the king's pardon cannot be pleaded in bar of the prosecution; but after conviction, that pardon is efficacious (see title **DANBY**, **IMPEACHMENT OF**). An impeachment is not abated by a pro-

IMPEACHMENT—*continued.*

rogation of parliament (Oxford's Case, 1715), nor yet by a dissolution (Warren Hastings' Case, 1788).

IMPEACHMENT OF WASTE: *See* title WASTE.

IMPERITIA CULPÆ ANNUMERATUR. Want of skill is equally culpable with negligence.

See titles MASTER AND SERVANT; SERVICE, CONTRACTS OF.

IMPERTINENCE: *See* title SCANDAL AND IMPERTINENCE.

IMPLICATION. This word signifies something implied in law, though not formally expressed in words. The natural meaning of the word is also the technical one. Such implications are raised in the matter both of estates and of rights; *e.g.*, prior to 1 Vict. c. 26, an estate tail by implication arose from words importing an indefinite failure of issue of the donee of the estate for life or in fee simple; and although that particular implication is now expressly discontinued by statute, yet similar implications hold good in other matters; also, a subsequent ratification by A. of the contract of B. amounts in law by implication to a previous command on the part of A. to B. to enter into the contract.

IMPLIED CONTRACTS. Are of two great classes, either (1.) Implied in Law, or (2.) Implied by the law from circumstances. Those contracts which are implied in law, are *e.g.*, the landlord's right of distress, these contracts being raised or given by the law without any (or any proximate) consideration of the circumstances or conduct of the parties; on the other hand, those contracts which are implied by law from circumstances are, *e.g.*, a contract or promise of marriage, or a contract of agency, either of which contracts may be implied without any express engagement and without any writing to evidence the contract, and solely from the conduct and dealings of the parties. The quasi-contracts of Roman Law, undoubtedly comprise all those contracts that are implied by law from the conduct of the parties; but it is the opinion of Maine (in his *Ancient Law*) that they do not comprise the contracts which are implied in law, *sed quære*.

See title QUASI-CONTRACT.

IMPLIED TRUSTS. Are trusts created in Equity by regard to the unexpressed but presumed intention of the parties; they are distinguished on the one hand from express trusts in which that intention is expressed, and on the other hand from constructive trusts in which no question of intention either express or implied is con-

IMPLIED TRUSTS—*continued.*

sidered, but the Court raises, *i.e.*, constructs, the trust for its own purposes simply.

See title TRUSTS.

IMPLIED USES: *See* title USES, IMPLIED.

IMPLIED WARRANTIES: *See* title WARRANTY.

IMPOSITIONS. A general name for taxes (*see* title TAXATION, HISTORY OF). Illegal impositions so called were those levied, or attempted to be levied, by the sovereign without the authority of Parliament.

See titles BATES'S CASE; IMPOSITIONS, CASE OF.

IMPOSITIONS, CASE OF: *See* title BATES'S CASE.

IMPOSSIBILITY. May be either physical (*e.g.*, from natural causes) or legal (*e.g.*, from illegality, immorality, or the like). Some distinction is made by law, according as the impossibility existed at the date of the contract, or only arose subsequently thereto.

See titles ALTERNATIVE OBLIGATIONS; CONDITIONS, IMPOSSIBLE.

IMPOSSIBLE CONDITION: *See* title CONDITIONS, IMPOSSIBLE.

IMPOTENCE: *See* title NULLITY OF MARRIAGE.

IMPOTENTIA CULPÆ ADNUMERATUR. Want of strength, when strength is warranted expressly or impliedly, is equally blame-worthy with want of care, *i.e.*, negligence.

IMPOUND. The placing—*i.e.*, confining—cattle, goods, or chattels taken under distress in a lawful pound, which may be either open or close. An *open pound* is any place in which the owner of the cattle may give them to eat and drink without trespass, and by the Common Law he was in fact bound to do so at his own peril. A *pound close* is some private place, selected by the impounder, where the owner has no right to enter to them, but the impounder must sustain them, and that without any allowance for it. But now, by 12 & 13 Vict. c. 92, it is enacted that every person who shall impound or confine any animal in any common pound or inclosed place *shall* provide it with food and water; and by the 17 & 18 Vict. c. 60, it is further enacted that the impounder may, in the manner directed by the Act, sell the cattle impounded, or any of them, openly in the public market, and apply the produce of the sale in discharge of the expenses of food and nourishment, rendering the overplus (if any) to the owner of the cattle.

See titles POUND; POUND-BREACH.

IMPRESSMENT. Was declared illegal by the Long Parliament in 16 Car. 1., unless for home-defence, or unless in virtue of the obligations of tenure. But the king with the sanction of Parliament has impressed men, *e.g.*, under 19 Geo. 3, c. 10, all disorderly and homeless vagabonds were made liable to impressment for service in the army in the then pending war with America (1779); and as regards service in the navy, there being no feudal provision for that, the king's prerogative was more frequently exercised, and was at no time declared illegal, although it has been long practically obsolete (*see* the Report of 1859 drawn up by the Commission for Manning the Navy; and *see* 3 May's Const. Hist. 20-24).

See titles ARMY DISCIPLINE ACT, 1879; CONSCRIPTION.

IMPRISONMENT FOR DEBT. By the stat. 32 & 33 Vict. c. 62 (The Debtors Act, 1869), s. 4, it is enacted that no person shall, after the 1st of January, 1870, be arrested or imprisoned for making default in payment of a sum of money, with the following exceptions:—

- (1.) Persons making default in the payment of a penalty, not being a penalty in respect of any contract;
- (2.) Persons making default in the payment of any sum recoverable summarily before a justice of the peace;
- (3.) Persons being trustees or *quasi* trustees making default in the payment of a sum in their possession or under their control, after they were ordered by a Court of Equity to pay the same;
- (4.) Persons being attorneys or solicitors making default in the payment of costs ordered to be paid for misconduct, or in the payment of a sum of money ordered to be paid by them as officers of the Court;
- (5.) Persons being bankrupts or liquidating or compounding debtors, making default in the payment of any portion of a salary ordered by any Court of Bankruptcy to be paid; and
- (6.) Persons making default in the payment of sums in respect of the payment of which orders are in the Debtors Act, 1869, authorized to be made, being principally a debt or the instalment of any debt due from such persons in pursuance of any order or judgment of the Court which inflicts the imprisonment; s. 5.

See title DEBTORS ACTS, 1869 and 1878.

IMPROPRIATE RECTOR. Commonly signifies a lay rector as opposed to a spiritual rector, just as impropriate tithes are tithes in the hands of a lay owner, as opposed to appropriate tithes, which are tithes in the hands of a spiritual owner.

See titles APPROPRIATION; IMPROPRIATION; TITHES.

IMPROPRIATION. The annexing of an ecclesiastical benefice to the use of a lay person, whether individual or corporate, in the same way as *appropriation* is the annexing of any such benefice to the proper and perpetual use of some spiritual corporation, whether sole or aggregate, to enjoy for ever.

The origin of appropriations is commonly attributed to the policy of the monastic orders, and is explained in this manner: At the first establishment of the parochial clergy, the tithes of the parish were distributed in four parts—one part being assigned to the bishop, one other part for the maintenance of the fabric of the church, a third part for the support and relief of the poor, and the remaining fourth part for the support of the incumbent. The bishops having afterwards received ample endowment from other sources, the tithes were freed of their liability in that respect; and the monasteries by gradually obtaining possession of the tithes, by grant or otherwise, retained the entirety of them to their own use, subject only to maintaining the fabric of the church, supporting and relieving the poor, and discharging by themselves or their deputy (the vicar) the duties of the incumbent. In this manner the tithes became mostly *appropriated* to the monastic bodies.

Upon the dissolution of the monasteries by stat. 27 Hen. 8, c. 28, and 31 Hen. 8, c. 13, all these various appropriations were given to the king by clauses contained in these statutes; and the king having since granted out from time to time to his subjects the tithes so given to himself, there have thence arisen the *impropriations*, or lay parsonages of the present day.

IMPROVEMENTS: *See* title MINISTERIAL POWERS.

IMPUTATION DES PAIEMENTS. In French Law, denotes the same as Appropriation of Payments in English Law.

See title APPROPRIATION.

IN ÆQUALI JURE MELIOR EST CONDITIO POSSIDENTIS. The defendant (*possessor vel possidens*) prevails when the rights of plaintiff and defendant are equal. Thus, also, when the equities are equal the law prevails.

See title EQUITIES EQUAL, LAW PREVAILS.

IN AUTRE DROIT. In another's right. Thus, when an executor or administrator sues a person for a debt due to the testator or the intestate, he is said to do so *in autre droit*, that is, in right of another, viz., in the right of the testator or intestate, whom he represents. So also a husband, in right of his wife, acquires certain interests in her estates, both real and personal, and may also in her right sue on the contracts of his wife made before marriage, and on all obligations coming to her as the meritorious cause of action during the coverture.

INADEQUACY OF CONSIDERATION. In a Court of Equity, is not usually sufficient by itself to raise a case of fraud; but when coupled with other circumstances of a suspicious character, it becomes a material element in making out the fraud. This view of the matter is that substantially adopted in the Sales of Reversions Act, 31 Vict. c. 4.

See title REVERSIONS, SALES OF.

INCAPACITY. There are various incapacities in law, and arise either at Common Law or under the provisions of particular statutes. By the Common Law, incapacity usually depends on intelligence, and sometimes, of course, on legal or physical inability or some ground of public policy. Under statutes, the incapacity is sometimes removed or qualified, sometimes extended.

See title INFANTS, INCAPACITIES OF.

INCENDIARISM. Under the Malicious Injuries to Property Act, 1861 (24 & 25 Vict. c. 97), the setting fire to churches, or church-like buildings (s. 1), to houses, coach-houses, out-houses, offices, barns, store-houses, and the like, with intent to injure (s. 3), to public buildings (s. 5), or to any other building (s. 6), or to goods in any building (s. 7), is a felony and punishable accordingly. It is the felony of arson; and when arson is wide-spread, and a general feeling of alarm is created thereby, the felony is commonly called incendiarism.

See title ARSON.

INCIDENT. This phrase is properly used to denote anything which is inseparably belonging to, connected with, or inherent in, another thing which is called the principal. Thus, a Court Baron is incident to a manor, and also inseparably incident, so much so that it cannot be severed from it by grant; for a Court is an essential ingredient in every manor, without which it will cease to be a manor. Again, rent is said to be incident to a reversion; i.e., one of the inseparable quali-

INCIDENT—*continued.*

ties, or one of the necessary characteristics of a reversion (*Les Termes de la Ley*).

But the word is also used less properly to denote anything which is connected with another thing, even separably. Thus, in the common phrase, "costs of and incidental to" any suit or legal proceeding, the word can only be taken as meaning properly incurred in connection therewith. Also, the incidents of property may be either inseparable or separable, e.g., the right of alienation is separable in Equity although, *semble*, inseparable at Law, from a fee simple or fee tail estate in lands, or an absolute interest in personal estate.

INCIPIATUR, ENTRY OF. The phrase *entering the incipitur* on the roll may be thus explained. When the contending parties in an action had come to an issue, the plaintiff, in strictness, should have entered the same, together with all the pleadings prior thereto, on a roll of parchment called the issue-roll; but this was seldom done, the commencement of the pleadings only being entered thereon, and the entry of such commencement was termed *entering the incipitur* (i.e., the beginning) on the roll (1 Arch. Pract. 350; Tidd's Pract.). The entry even of the *incipitur* is now, however, by a recent rule of Court rendered unnecessary (see 1 Pl. R. H. T., 4 Will. 4).

See title ISSUE ROLL.

INCLOSURE. Provision has been made by numerous Acts in the present reign, following the principal Act, 41 Geo. 3, c. 109 (General Inclosure Act), for the inclosure, exchange, and improvement of commons and other lands, subject to commonable rights and incidents in England and Wales. A board of commissioners is constituted by the Act 14 & 15 Vict. c. 53, and their continuance in office is regulated by the Act 25 & 26 Vict. c. 73. The usual method of procedure is for the commissioners to make an order for allotment, which, in the first instance, is provisional only, but which is afterwards made absolute by statute upon a certificate to Parliament that a proper valuation and adjustment of the rights of all parties affected has been made. The Court of Chancery has no power, in general, to restrain the commissioners (*Harris v. Jase*, L. R. 1 Eq. 34).

See titles COMMON, RIGHT OF; WASTE LANDS, &c.

INCOME, ACCUMULATION OF: See title ACCUMULATION.

INCOME or CAPITAL: See title CAPITAL OR INCOME.

INCOME TAX. The first instance of

INCOME TAX—continued.

any tax resembling that upon income or personal property is, that of the Saladin tithe granted in 1188 to Henry II.; and the second is that of Rich. I. in 1193 for the ransom of that king (see title **TAXATION, HISTORY OF**). But the income tax in its present shape dates from the year 1842, having been imposed by the stat. 5 & 6 Vict. c. 35; and ever since the tax has been continued, only the rate in the pound having varied. Residence within the kingdom appears to be the criterion which determines the liability of a person to pay income tax, just as in the case of the property tax the situation of the property determines the liability. And when a corporation engaged in mining operations abroad has a registered office in England, it is liable to the income tax (*Cesena Sulphur Co. v. Nicholson*, 1 Exch. Div. 428).

See title **PROPERTY TAX**.

INCOMPETENCY OF WITNESSES: See title **COMPETENCY OF WITNESSES**.

INCONSISTENCY. In the case of two inconsistent clauses in a deed, the first prevails; and in a will, the last; but before this interpretation is resorted to, the reconciliation of the clauses must be hopelessly impossible, because otherwise they must be read together as modifying each other. Inconsistency is a great fault in pleadings, and renders same demurrable; but by leave of the Court, amendments may be made that are inconsistent with previous pleadings, the ultimate pleading being, however, consistent *in se*. Alternative relief may be claimed, but not when there is an inconsistency between the two alternatives, or where either relief is inconsistent with the case.

See title **CONDITIONS, REPUGNANT**.

INCORPORATION. A company or association of persons may be incorporated by Act of Parliament, or by charter, or by letters patents of the Crown. The oldest incorporated companies were constituted by charter or letters patent. In modern times, companies established for a public object, *e.g.*, gas and water companies, railway and canal companies, and such like, are usually incorporated by special Act of Parliament. On the other hand, at the present day, joint stock companies are usually established under the Companies Acts, 1862, 1867, the memorandum of association (see title **MEMORANDUM OF ASSOCIATION**) being registered with the registrar of joint stock companies; and with the memorandum articles of association (see title **ARTICLES OF ASSOCIATION**) signed by each member MAY in the case of a company

INCORPORATION—continued.

limited by *shares*, and SHALL in all other cases be delivered to the registrar. If the company be limited by guarantee, or unlimited, these articles must state the number of the shares where the capital is divided into shares, and the proposed number of the members where the capital is not so divided. The registrar retains and registers the memorandum and articles thus delivered to him, and certifies under his hand that the company is incorporated, and in the case of a limited company that it is limited, whereupon the subscribers of the memorandum, together with such persons as may from time to time become members of the company, are constituted a body corporate with perpetual succession, a common seal, and power to hold lands; and this certificate is conclusive evidence that the statutory requirements with respect to registration have been complied with.

INCORPOREAL HEREDITAMENTS.

These comprise the following varieties of hereditaments:—

- (A.) Incorporeal hereditaments simply so called; and
- (B.) Purely incorporeal hereditaments.
- (A.) Incorporeal hereditaments, simply so called, comprise the following varieties of hereditaments:—
 - (1.) Reversions;
 - (2.) Remainders, which again are either
 - (a.) Vested remainders; or
 - (b.) Contingent remainders; and
 - (3.) Executory interests.

The definitions of these varieties of incorporeal hereditaments are the following:

- (1.) A *reversion* is that portion of the tenant's original estate which remains undisposed of after he has granted a particular estate, or particular estates, out of it.
- (2.) A *remainder* is that part of the grantor's own original estate which remains in him after he has granted thereout one or more particular estate or estates, and which he afterwards by the same instrument whereby he creates the particular estate or estates which precede it grants out also, so as to take effect (if at all) subsequently to and upon the determination of the last-mentioned particular estate or estates. And such a remainder is either

(a.) A *vested* remainder, if (be it ever so small) it is always ready from its creation to its close to come into possession the moment the prior estate or estates (be they what they may) happen to determine; or

(b.) A *contingent* remainder, if (be it what it may) it is *not* always ready from its creation to its close to come into possession the moment the prior estate or

INCORPOREAL HEREDITAMENTS— continued.

estates (be they what they may) happen to determine.

(3.) An *executory interest* is a future estate which in its own nature is indestructible, and which arises when its time comes of its own inherent strength, not waiting for, or depending on, the determination of the prior estate or estates (as the remainder does), but, on the contrary, putting an end to any prior estate or estates which may at the time be subsisting.

There are certain rules which regulate the creation of contingent remainders and executory interests respectively.

Firstly, the rules which regulate the creation of the contingent remainder are the following:—

(a.) The *seisin*, or feudal possession, must never be without an owner; in other words, every contingent remainder of an estate of freehold must have a particular estate of freehold to support it; and as a corollary to this first rule, there is also the following rule, viz., every contingent remainder must vest, i.e., become transmuted into a vested remainder or actual estate, during the continuance of the particular estate which supports it, or *eo instanti* that such particular estate determines; but under the stat. 40 & 41 Vict. c. 33, a contingent remainder so created as to comply with the rules nextly stated for the creation of an executory interest, if it fail to vest under this present rule, has a further chance of vesting as an executory interest.

(b.) An estate cannot be given to an unborn person for life, followed by an estate to the child of such unborn person.

Secondly, the rules which regulate the creation of the executory interest are the following:—

(a.) An executory interest (not being subsequent to an estate tail) must be made to commence (if at all) within the period of any fixed number of lives existing at the date of the instrument creating it and an additional term of twenty-one years, allowing further for the period of gestation, should gestation actually exist; but if no lives are fixed on, then the term of twenty-one years only is allowed. See title PERPETUITIES.

(b.) The income of real or personal estate cannot be directed to be accumulated for any longer term than one or other singly (but not two or more together) of the following periods, so as to be given over with or without the *corpus* of the estate to a grantee, or devisee, or legatee, that is to say,—

(aa.) For the life of the grantor or settlor (in the case of a deed);

(bb.) For twenty-one years from the

INCORPOREAL HEREDITAMENTS— continued.

death of such grantor or settlor (in the case of a deed), or of the deviser or testator (in the case of a will);

(cc.) For the minority of any person living or *in ventre sa mère* at the death of the grantor or testator; or

(dd.) For the minority only of any person who under the deed or will would for the time being, if of full age, be entitled to the income so directed to be accumulated (39 & 40 Geo. 3, c. 98, commonly called the *Thellusson Act*)
See title ACCUMULATIONS.

(B.) Purely incorporeal hereditaments comprise the following varieties:—

(a.) Appendant incorporeal hereditaments;

(b.) Appurtenant incorporeal hereditaments; and

(c.) Incorporeal hereditaments in gross.

Firstly, (a.) *Appendant* incorporeal hereditaments are such hereditaments of an incorporeal character as are necessarily, and have therefore from the earliest of times, been attached to some corporeal hereditament, and never have been separated therefrom. They comprise the following three varieties, viz.:—

(1.) A seigniorial appendant;

(2.) A right of common appendant; and

(3.) An advowson appendant.

Secondly, (b.) *Appurtenant* incorporeal hereditaments are such hereditaments of an incorporeal character as were not necessarily or originally attached to some corporeal hereditament, but have been attached thereto either by some express deed of grant, or by prescription, which presumes a grant. Thus a right in the copyholders of manor A. to have common in the waste of manor B. would be an appurtenant right, while their right to have common in the waste of A. is an appendant right.

Thirdly, (c.) Incorporeal hereditaments *in gross* are such hereditaments of an incorporeal character as are not attached to any corporeal hereditament, but stand separate and alone. They comprise the following six (among other) varieties:—

(1.) A seigniorial in gross;

(2.) A rent seck;

(3.) A rent-charge;

(4.) A right of common in gross;

(5.) An advowson in gross; and

(6.) Tithes;

Many of these incorporeal hereditaments in gross may have been at one time incorporeal hereditaments either appendant or appurtenant to some corporeal hereditament, from which in some manner or other

INCORPOREAL HEREDITAMENTS—
continued.

they have been separated; and it is a rule of law that when an appendant incorporeal hereditament (e.g., an advowson) is once separated from the corporeal hereditament to which it was theretofore attached, it can never become appendant again, but must always for the future either remain in gross or become appurtenant by some grant, express or presumed.

INCREASE, COSTS OF. It had become a practice with the jury to award to the successful party in an action the nominal sum of 40s. only for his costs; and the Court assessed by their own officer the actual amount of the successful party's costs; and the amount so assessed, over and above the nominal sum awarded by the jury, was thence called "costs of increase" (Lush's Pr. 775). The practice has now wholly ceased.

See title Costs.

INCUMBENT. Is a clerk duly possessed of and resident on a benefice with cure. It is said there are four things necessary to being a complete incumbent. 1st, *Presentation*, that is, the patron's free gift or commendation of the clerk to the benefice by presenting or offering him to the bishop; 2ndly, *Admission* of the clerk by the bishop by his allowance or approbation of him after due examination; 3rdly, *Institution* of the clerk to the benefice by the bishop; and 4thly, *Introduction*, whereby the clerk takes actual possession of the benefice, by taking the keys of the church door, or by the ringing of a bell or the like.

See title ADVOWSON.

INDEBITATUS ASSUMPSIT. That species of the action of assumpsit in which the plaintiff first alleged a debt, and then a promise in consideration of the debt; such promise, however, was not usually an express but an implied one, the law always implying a promise to do that which the party is legally liable to perform. By the C. L. P. Act, 1852, s. 49, all statements which need not be proved, such as the statement of time, quantity, quality, and value, where these were immaterial; the statement of losing, and finding, and bailment in actions for goods and their value; the statement of acts of trespass having been committed with force of arms and against the peace of our lady the queen; *the statement of promises which need not be proved, as promises in indebitatus counts*, and mutual promises to perform agreements; and all statements of a like kind, were to be admitted; and that is also the present practice.

INDEBITATUS COUNT. Is such a short claim as this,—For money lent, &c.

See titles COUNTS, COMMON; INDEBITATUS ASSUMPSIT.

INDECENT ASSAULT.

INDECENT EXPOSURE.

INDECENT PRINTS.

These are offences under the Criminal Law, 24 & 25 Vict. c. 100,

s. 52, and other statutes, punishable respectively with imprisonment or fine, or both, and with or without hard labour. *See Greenwood and Martin's Magisterial and Police Guide, 1874.*

INDEMNITY. It is usual to insert in settlements and wills a clause of indemnity for the protection of the trustees acting in the trusts created thereby. And where (as not unfrequently happens) the trustees at the urgent request of their *cestuis que trust* commit what is technically a breach of trust, but the act is done *bona fide*, and for a present advantage, it is not unusual to give, and the trustees have a right to demand, from the *cestuis que trust* requiring them so to act, an express deed of indemnity. Such deed may either consist in the mere personal covenant of the parties, or in such personal covenant, together with the setting apart of a fund, called an indemnity fund, to recoup the trustees any outlay which they may have to incur or be put unto in consequence of their having so acted. Also, upon the sale of lands where the title is not certainly clear of some charge or incumbrance, the purchaser (if willing) may have an indemnity fund set apart to meet the event of the charge or incumbrance becoming payable or demanded.

See title GUARANTEE.

INDEMNITY, ACTS OF. Acts of Indemnity are such, e.g., as are passed for the relief of those who have neglected to take the necessary oaths, or to perform other acts required to qualify them for their offices and employments. So Acts of Indemnity, after rebellions, have been passed for quieting the minds of the people, and throwing former offences into oblivion. Similarly, in 1766, when the Privy Council, being driven to do so by an urgent necessity, issued certain Orders in Council without having the authority of any Act of Parliament so to do, an Act of Indemnity was passed in the following year for the protection of all persons concerned in the issuing or execution of the orders.

INDEMNITY FUND. *See title INDEMNITY.*

INDENTURE. Deeds or writings which are cut or indented at the top or side are called indentures. They formerly used to be cut in acute angles (*instar*

INDENTURE—*continued.*

dentium) like the teeth of a saw, but now they are usually cut, where cut at all, in a waving line on the top. Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some word or letters of the alphabet written between them; through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on one part and half on the other; but at length indenting only came into use, without cutting through any letters at all; after which the process of indenting came to serve for little other purpose than to give name to the species of the deed, and accordingly, by the stat. 8 & 9 Vict. c. 106, the necessity for indenting was abolished altogether in the case of ordinary deeds, and by the stat. 24 Vict. c. 9, it was abolished as a requisite in deeds conveying lands to charities.

INDIA. The two rival companies theretofore engaged in the East India trade were consolidated into one company in the year 1708, and incorporated into the East India Company (6 Anne, c. 17; 3 & 4 Will. 4, c. 85). The Company eventually become sovereigns *de facto* of the Indian peninsula. In 1784, a "Board of Control" in England was constituted to regulate the Company's Indian Government; and the East Indian trade was thrown open to every subject of the Queen, in 1813, and more completely in 1832 (3 & 4 Will. 4, c. 85), in which last-mentioned year the sovereignty also of the English Crown over the Company was distinctly formulated, and a "Governor-General" was established, and a board of councillors assigned to him for his direction, with full legislative powers subject only to the control of the Imperial Parliament. In 1858, after and in consequence of the Sepoy rebellion of 1857-1858, the powers and rights of the East India Company were transferred to the Queen (21 & 22 Vict. c. 106), and the Board of Control was abolished together with the Court of Directors and the Court of Proprietors of the company, and a principal secretary (called the Secretary of State for India) was appointed to represent the Crown in England, an Indian council being assigned to him for his assistance; and this transfer to the Crown has recently been denoted by the Queen's assumption, under the stat. 39 Vict. c. 10, and by royal proclamation, of the title of Empress of India, in addition to her other titles.

INDIA STOCK. Under the provisions of the stat. 22 & 23 Vict. c. 35, and the stat. 30 & 31 Vict. c. 132, trustees, executors, and administrators (unless expressly for-

INDIA STOCK—*continued.*

bidden so to do), may invest the trust funds on East India stock. The stock has from time to time been created under the provisions of the stats. 22 & 23 Vict. c. 39, 23 & 24 Vict. c. 130, 24 & 25 Vict. c. 25, and particularly 26 & 27 Vict. c. 73, which last-mentioned Act is called "The India Stock Certificate Act, 1863," and provides that every inscribed proprietor of a share in India stock in the Bank of England (or of Ireland) may obtain a certificate or certificates of title to the share, having coupons annexed entitling the bearer thereof to dividends; but the share must be in respect of £100, or £500, or £1000 of stock; and the certificate is transferable by delivery. The certificate may also at any time be re-exchanged for stock.

INDICATIVE EVIDENCE. Is not evidence properly so called, but is the mere suggestion of evidence proper, which may possibly be procured if the suggestion is followed up.

INDICTMENT. An indictment is a written accusation brought, or (speaking technically) laid, against one or more persons of a crime or misdemeanor preferred to and presented upon oath by the grand jury. Strictly speaking such a written accusation is not called an indictment until the grand jury has heard the evidence against the accused, and pronounced the accusation to be well grounded, or in other words has found "a true bill:" and in this case the indictment is said to be found, and the party is said to stand indicted. The person who indicts another man of an offence is sometimes termed the indictor, and he who is indicted the indictee. Hawk. P. C.

See titles CRIMINAL INFORMATION; CRIMINAL LAW.

INDORSEMENT. Any writing on the back of a deed or other instrument is an indorsement; thus the receipt for consideration money on the back of a deed is an indorsement; so is the attestation clause when written on the back of a deed. So also in the negotiating of bills of exchange, he who writes his name on the back of a bill is termed the indorser, and he in whose favour it is indorsed, the indorsee.

An indorsement upon a bill of exchange is of two kinds, viz., either (1.) in blank, or, (2.) special. An indorsement *in blank* (which is much the more usual of the two) is where the indorsing person merely writes his name across the back; an indorsement *special* is where he prefixes to his own signature on the back the name of a third person expressed as his payee. The effects of the two indorsements are different, an indorsement in blank rendering a bill or note

INDORSEMENT—continued.

payable to bearer generally. while a special indorsement limits the payment to the special payee or to his order.

INDORSEMENT OF CLAIM. Is the indorsement upon the writ of summons with which an action is commenced. The indorsement shews the nature of the claim made; but it is not essential (although, of course, it is desirable) to specify very precisely the nature of the claim; and the indorsement may, if necessary, be amended, but only by leave of the Court (Order III., 2; xxvii., 11). The claim should expressly ask an account, in all ordinary actions involving the taking of accounts as a matter of course (Order III., 8). When possible, the indorsement should be special, that is, should specify the items of the debt or liquidated demand claimed, where that is so (Order III., 6).

See title **INDORSEMENTS UPON WRIT.**

INDORSEMENTS UPON WRIT. Besides the indorsement of claim, the nature of which is stated under that title, the writ contains the following other indorsements, that is to say, an indorsement of the representative capacity of the plaintiff or defendant, if either sues or is sued in that capacity (Order III., 4); an indorsement of the name and address of the solicitor of the plaintiff, or (if the plaintiff sues in person) of the plaintiff himself.

INDUCEMENT. That portion of a declaration or of any subsequent pleading in an action, which was brought forward by way of explanatory introduction to the main allegations. Thus in a declaration for libel, all that introductory part which stated "that whereas the plaintiff was a good, true, honest, just, and faithful subject of the realm, and as such had always conducted and behaved himself, &c., &c.," was the inducement, and the matter thus brought forward was thence termed "matter of inducement;" and in general, not being a material or essential part of the pleading, it could not be traversed. It commonly happened that in declarations on contract there was no inducement, as the declaration in such cases began by alleging the contract; on the other hand, in actions for wrongs independent of contract, i.e., on torts, all that part of the declaration which preceded in logical order the statement of the act which was complained of as wrongful, comprising the allegation of the right, or of the circumstances of the right, was commonly known as the inducement. In actions of trespass for assault and battery and for false imprisonment there was no inducement. Inducements which were calculated to prejudice or embarrass the defendant might have been struck out

INDUCEMENT—continued.

under the C. L. P. Act, 1852, s. 52. If the inducement contained any allegation that was material to the action, it might of course in such a case be traversed. Under the present practice, there is an inducement in effect, although not in name, in almost every statement of claim, but every such inducement being material is now traversable, and if immaterial may be struck out.

See titles **DECLARATION; STATEMENT OF CLAIM.**

INDUCTION. The giving the clerk or parson corporal possession of the church; and it is generally effected by taking hold of the ring of the door, tolling the bell, &c. It is the investiture of the temporal part of the benefice, as institution is of the spiritual (Co. Litt. 300).

See title **INSTITUTION.**

INDUSTRIAL AND PROVIDENT SOCIETIES. Are now regulated exclusively by the stat. 39 & 40 Vict. c. 45 (the Industrial and Provident Societies Act, 1876). These societies are societies for carrying on any labour, trade, or handicraft, whether wholesale or retail, including the buying and selling of land (but as to the business of banking subject to the restrictions contained in the Act), in which no member has or claims an interest in the funds exceeding £200 sterling. Any such society, if it consist of seven persons at the least, may be registered in accordance with the Act, with the word "limited" annexed to its name, its rules being sent to the Registrar of Friendly Societies. The effect of the registration is to incorporate the society, and thereafter it may contract (speaking roughly) like any joint stock company; and the society may in fact constitute itself into a company. It may also be wound up under the Companies Act, 1862.

See title **FRIENDLY SOCIETIES.**

INDUSTRIAL AND REFORM SCHOOLS. Children may be sent to such schools, to be therein detained, by order of justices, and sometimes upon the request of the parents of the children or of the board of guardians; and the school boards may also in certain cases enforce the attendance of children at such schools. The children need not be actually criminal (29 & 30 Vict. c. 118, 39 & 40 Vict. c. 79).

IN ESSE. In being, in existence, as opposed to *in posse*, signifying something that may possibly be or exist at some future time (Co. Litt.).

INFANTS, AGES OF. Full age is in general fixed at twenty-one years. For certain purposes, however, it arrives much earlier. Thus, in criminal cases, a person

INFANTS, AGES OF—continued.

of the age of fourteen years may be capitally punished, but under the age of seven he cannot. The intermediate period, between seven and fourteen, is subject to much uncertainty, for the infant between seven and fourteen shall be judged *prima facie* innocent; yet, if he was *doli capax*, and could discern between good and evil, he may be convicted even of a capital offence (other than rape). A male at twelve years of age may take the oath of allegiance; at fourteen is so far at the years of discretion that he may enter into a binding contract of marriage; and at twenty-one he is at his own disposal, may alienate his land, and generally perform all the duties and enjoy all the privileges attaching to a citizen. A female also is at maturity at twelve years of age, and may therefore at that age enter into a binding contract of marriage; and at twenty-one she may dispose of all her property.

The full age of twenty one years is completed on the day preceding the anniversary of a person's birth; and as, in the computation of time, the law in general allows no fraction of a day, it follows that if an infant is born on the 1st of January, he is of an age to do any legal act on the morning of the last day of December, though he may have lived nearly forty-eight hours (or two days) short of the twenty-one years.

See titles AGE; DAY.

INFANTS, INCAPACITIES OF. An infant may be liable both for tort (*Lempriere v. Lange*, 12 Ch. Div. 675), and in crime; but with reference to his liability on contract, the law may be stated as follows:—(a.) In the case of contracts for necessities, he is fully liable for these; and as to what are necessities, see that title; (b.) In the case of contracts for non-necessaries, the general rule of law is that infants bind others, but are not bound themselves (*obligant, sed non obligantur*). This general rule is, however, or at least was, subject to another one, viz., that every contract is or was *prima facie* presumed to be for the infant's benefit, and until the contrary is or was shewn, and he chooses or chose upon attaining his majority to disaffirm it, the law will or would hold him to it, the contract of an infant in such cases being or having been voidable only, and not absolutely void. In case an infant, upon becoming an adult, chose to promise to pay a debt incurred during his or her infancy, he or she must have put the promise in writing, and have personally signed the same, under Lord Tenterden's Act (9 Geo. 4, c. 14). There are, however, some contracts entered into by infants which are absolutely void, and therefore

INFANTS, INCAPACITIES OF—contd.

ex vi termini, not confirmable by them upon their attaining full age, e.g., generally such contracts as cannot possibly be for their benefit, such as a bond in a penal sum. And now under the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), the contracts of infants which were heretofore voidable only, are rendered absolutely void, and as a consequence are not confirmable by them upon their becoming adults,—an enactment which has been held to apply to all contracts whatsoever entered into by an infant for non-necessaries (*Coxhead v. Mullis*, 3 C. P. D. 439). It is not competent for a plaintiff to treat a breach of contract as a tort, for the purpose of suing the infant on it (*Jennings v. Randall*, 8 T.R. 535).

INFANTS, JURISDICTION OVER. The origin of this jurisdiction is in the Crown as *parens patrie*, whereby the Crown is laid under certain duties towards children, and the discharge of which duties the Crown anciently committed to the Lord Chancellor sitting in Chancery, and the jurisdiction has consequently since remained in the Court of Chancery, although the other Courts have acquired jurisdiction in the matter, all the Court divisions being now only one Court, under the Judicature Acts, 1873-75. An appeal lies to the House of Lords and not to the Privy Council.

An infant is said to become a ward of Court so soon as an action is commenced relative to his estate, or an order for his maintenance is made on summons without suit (*In re Graham*, L. R. 10 Eq. 530). It is not necessary that the infant should have any property in order to found the jurisdiction, although without some property the jurisdiction cannot be either conveniently or profitably exercised (*Wellesley v. Beaufort*, 2 Russ. 21).

The control of the Court over infants extends to their maintenance, education, and marriage; and the Court visits any disregard of its authority in these matters with the punishment of imprisonment for contempt.

See title GUARDIANS.

INFANTS' MARRIAGE SETTLEMENT ACT. This is the stat. 18 & 19 Vict. c. 43, under which an infant male (not under twenty years) or an infant female (not under seventeen years) may with the sanction of the Court of Chancery, to be obtained on petition, make a valid and binding settlement of his or her property upon the occasion of his or her marriage. Except as regards estates tail and powers of appointment, such a settlement will hold good, even though the infant settlor should die under the age of twenty-one years.

INFANTS' RELIEF ACT, 1874: *See* title INFANTS, INCAPACITIES OF.

INFECTIOUS DISEASES: *See* title CONTAGIOUS DISEASES.

INFERIOR COURTS. All Courts of a less dignity than the High Court of Justice are called by this general description; *e.g.*, County Courts, Petty Sessions, Quarter Sessions, and even the Lord Mayor's Court, but not the Court of the County Palatine of Lancaster. All appeals from inferior Courts are to a Divisional Court of the High Court (Judicature Act, 1875, s. 45; Order LVII. a, 1.)

IN FICTIONE JURIS SEMPER ÆQUITAS. In law, whenever a fiction is resorted to, it is justified upon some ground of equity or principle of extending the jurisdiction to cases that ought to fall within it. It frequently consists in assuming compliance with some technical formality when compliance with it is impossible, and it is right that the plaintiff should not be thereby damnified.

See title FICTIONS.

IN FORMÂ PAUPERIS: *See* title FORMÂ PAUPERIS.

INFORMATION. Informations are accusations for criminal offences, and are of two principal kinds:—

FIRSTLY, in the name of the king only, and these are filed in the Court of King's Bench for the punishment of offences affecting the safety of the Crown, or the interests of the public; and when affecting the king, his ministers, or the state, are filed *ex officio*, by his immediate officer, the Attorney-General, but when more particularly affecting individual rights, are filed by the king's coroner, or master of the crown office.

SECONDLY, in the name of the king and a subject, or in the name of a subject only, these latter being commonly called informations *qui tam*, from those words *qui tam pro domino rege quam pro se ipso*, &c., and being usually brought before justices of the peace, upon penal statutes, which inflict a penalty upon conviction of the offender, one part thereof going to the king, and the other part thereof to the informer.

The proper matters for informations *ex officio* are such misdemeanors as peculiarly tend to disturb or endanger the king's government, or to molest or affront him in the regular discharge of his royal functions, *e.g.*, seditious libels and riots not amounting to high treason, libels upon the king's ministers, his judges, &c., reflecting upon their conduct in the execution of their official duties, obstructing such officers in the execution of their duties, offences by

INFORMATION—continued.

such officers for bribery or for corrupt or oppressive conduct, and the like (*see* title CRIMINAL INFORMATION). There are also informations regarding matters of a civil nature but affecting the public also, *e.g.*, in the case of a nuisance primarily affecting an individual person, but also generally affecting the public in an appreciable degree (*Attorney-General v. Great Eastern Ry. Co.* 11 Ch. Div. 449).

See titles CHARITABLE INFORMATION; CRIMINAL INFORMATION.

INFORMER: *See* titles INFORMATION; QUI TAM ACTIONS.

INGENUUS. In Roman Law, was a person who immediately that he was born was a free person. He was opposed to *libertinus* or *libertus*, who having been born a slave was afterwards manumitted or made free. It is not the same as the English law term *generosus*, which denoted a person not merely free but of good family. There were no distinctions among *ingenui*; but among *libertini* there were (prior to Justinian's abolition of the distinctions) three varieties, namely, those of the highest rank (called *Cives Romani*), those of the second rank (called *Latini Juniani*), and those of the lowest rank (called *Dediticii*).

INGRATITUDE. In Roman Law was, and in French Law is, but in English Law is not, a sufficient cause for revoking a donation or gift of property or of liberty.

IN GROSS. At large; independent of; not annexed to, or dependent upon, anything. The phrase "easements in gross" was used to designate rights of way and the like, enjoyed by an individual or individuals as such, and not as being owner or owners of some adjoining land. But such rights are now called *licences* only, and not easements. Also powers *in gross* are those powers (not being simply collateral) which are not appendant or annexed to any estate.

See titles EASEMENTS; INCORPOREAL HEREDITAMENTS; LICENCES; &c.

INHABITANTS: *See* titles HUNDREDORS; POOR RATE; &c.

INHABITED HOUSE DUTY: *See* title HOUSE-TAX.

INHERENT AND COLLATERAL COVENANTS: *See* title COVENANTS.

INHERITANCE. Such an estate in lands or tenements, as may be inherited by the heir, and it is divided into inheritance corporate and inheritance incorporate: the former consisting of messuages, lands, and other substantial or corporeal things; the latter consisting of advowsons, ways, com-

INHERITANCE—continued.

mons, and such like, that are or may be appendant or appurtenant to inheritances corporate (*Les Termes de la Ley*).

INHIBITION. A writ to inhibit or forbid a judge from proceeding further in the cause depending before him. It is nearly the same thing with Prohibition at Common Law and Injunction in Equity. Under the stat. 37 & 38 Vict. c. 85, being the Public Worship Regulation Act, 1874, an inhibition or monition may issue from the Court thereby established or remodelled for the effectual procuring the discontinuance of any offence against that Act, after the offender has been adjudged guilty thereof, and nevertheless continues the Act (*Martin v. Mackonochie*, 3 Q. B. Div. 730; 4 Q. B. Div. 697).

IN JUDICIO. In Roman Law, meant in presence of the *judex*, and was opposed to the phrase *in jure*, which meant in presence of the magistrate (e.g., the *prætor*). The distinction between the phrases *in jure* and *in judicio* was abolished after Diocletian's introduction of the *extraordinarium judicium* and his abolition of the formulary procedure,—the reason being that under the new procedure the magistrate combined in himself the functions both of magistrate and of judge, like a Vice-Chancellor in English equity.

See titles EXTRAORDINARIUM JUDICIUM; FORMULÆ.

INJUNCTION. This is a writ remedial which formerly issued almost exclusively out of the Court of Chancery restraining the commission by the defendant of some act which he was threatening to commit, or restraining him in the continuance thereof; but under the C. L. P. Act, 1854, and now more completely under the Judicature Act, 1873, every Court may issue injunctions of all kinds.

Injunctions have hitherto been issued chiefly in restraint of two classes of acts, viz. :—

- (1.) The institution or continuance of legal proceedings; and
- (2.) The commission of acts *in pais*, of a wrongful nature.

The former of these two groups of cases will no longer be restrained by the Courts of Equity, but may be stayed by all the Courts equally, and probably upon the like grounds with those upon which hitherto Courts of Equity have been induced to act, viz.,—cases where the plaintiff had a legal right, which it was inequitable that he should exercise at law, e.g., upon a bond or other security obtained by fraud or undue influence (*Tyler v. Yates*, L. R. 11 Eq. 265); or against an executor whose

INJUNCTION—continued.

assets have been lost without his act or default; or where a creditor vexatiously sues an executor at law, after a decree has been obtained upon a creditor's bill for administration of assets in Equity (*Perry v. Phelps*, 10 Ves. 38). See title STAY OF PROCEEDINGS.

The latter group of cases in which Equity would restrain by injunction comprised such cases as the following :—

(1.) Where the case was one for specific performance, and an injunction (which is the negative side of that remedy) was the only available means of enforcing it (*Lumley v. Wagner*, 1 De G. M. & G. 616);

(2.) In cases of waste, where either from the nature of the waste or from the titles of the parties, no writ of waste could be had at Law (*Downshire (Marquis) v. Sandys*, 6 Ves. 109; *Garth v. Cotton*, 1 Ves. Sen. 524);

(3.) Nuisances, whether of a public or of a private nature; and

(4.) Infringements of patent, copyright, and trade-marks.

And under the stat. 21 & 22 Vict. c. 27 (Lord Cairns' Act), the Court may award damages either in addition to or in lieu of an injunction in a proper case (*Soames v. Edge*, Johns. 669), a provision which has certainly not been abridged, but may have been extended by the Judicature Acts, 1873-75.

IN JURE: See title IN JUDICIO.

IN JURE CESSIO. In Roman Law, was a species of conveyance according to the old strict civil law; it took place before a magistrate (*in jure*); it was effected by the intended alienee laying claim to the thing in the presence of the intending alienor, and by the intending alienor silently letting the ownership pass to the alienee, that is, solemnly surrendering it (*cessio*).

INJURIA.—Has been defined as everything done without a right to do it (*omne quod non jure fit*).

INJURIA CUM DAMNO. Is a wrong done, and which is accompanied with damage. Usually all torts comprise both these two elements, and are classified under this heading as *injuriæ cum damno*. But there is a considerable group of torts in which the mere *injuria* or wrong suffices to support an action, without either alleging or proving that the wrong has been accompanied with or has produced damage, and this latter group of torts is designated by the phrase *injuria sine damno*. Whenever the *damnum* is a constituent part of the action, that damage must be both alleged and proved, as in cases of *injuria cum*

INJURIA CUM DAMNO—*continued*.

damno; and even in the case of a tort which is *injuria sine damno*, special damages may (and if it is desired to recover them should) be both alleged and proved.

INJURIA SINE DAMNO: See title **INJURIA CUM DAMNO**.

INLAND BILLS OF EXCHANGE. Bills of exchange are so called when the drawer and drawee are both resident within the kingdom where drawn (Bayley on Bills of Exchange). If the bill is either drawn abroad or made payable abroad, it is a foreign bill and not an inland one.

See titles **BILLS OF EXCHANGE**; **FOREIGN BILL**.

INLAND REVENUE. In the year 1849–50, by the stat. 12 & 13 Vict. c. 1, the boards theretofore existing of *excise*, and of *stamps*, and of *taxes*, were consolidated into one board under the style of the Commissioners of Inland Revenue, with the respective powers of the three former boards; and as the principal officers of the board, a receiver-general and an accountant and controller-general were appointed.

See titles **CUSTOMS**; **EXCISE**; **REVENUE**; **STAMP DUTIES**; **TAXATION**, **VARIABLES OF**.

IN LOCO PARENTIS. In the position of parent or father to a child, with reference to providing for the child's pecuniary necessities (*Powys v. Mansfield*, 6 Sim. 514; 3 My. & Cr. 359). Such a person may even appoint a guardian to the child in the lifetime of its proper parent; and the equitable doctrine of satisfaction applies equally to him as to the proper parent.

INN. A house where the traveller is furnished with everything he has occasion for while on his way (*Thomson v. Lacy*, 3 B. & A. 283).

A mere coffee-house, or boarding or lodging-house, is not an inn. Upon the keeper of an inn the law throws a peculiar responsibility in guarding the goods of his guests; and if the goods are lost, unless it be through the gross negligence of the owner, the innkeeper shall be liable; but his liability is limited to goods in the house (*infra hospitium*) and to the goods of regular guests, a resident boarder or lodger not being such a guest (1 Smith, L. C. 50; *Calye's Case*, 8 Coke, 32; 2 Stephen's Bl. 133; Cro. Jac. 224). However by stat. 26 & 27 Vict. c. 41, goods exceeding 30*l.* in value must be declared to him, otherwise he is not liable beyond that amount for their loss, unless where the loss is through the felony of his own servants.

See title **INNKEEPER'S LIEN**.

INNKEEPER: See title **INN**.

INNKEEPER'S LIEN. Is the lien which an innkeeper has upon the goods of his guest in the inn for the expenses of his entertainment as a guest and for the custody of his luggage and belongings. Under the stat. 41 & 42 Vict. c. 38, an innkeeper may after six weeks' notice realise his lien by sale of the goods.

INNOCENCE, PRESUMPTION OF. Is a presumption in criminal law, and which presumption is drawn by the Common Law in favour of accused persons. The Crown in prosecuting presumes the guilt, but the jury (as expressing the Common Law) presume the innocence until the guilt is proved. The presumption may be shifted by statute, at least as regards offences of the smaller character, such as misdemeanors.

INNOCENT CONVEYANCES. As opposed to *tortious* conveyances, are those which convey only that amount of estate which the conveying party has in him to grant, and subject to all such conditions and provisions as the estate is subject to in his hands. Generally, all conveyances at the present day are innocent.

See title **TORTIOUS CONVEYANCE**.

INNOCENT PARTIES, TWO. It is a rule of Equity and now also of Law (*Babcock v. Lawson*, 4 Q. B. Div. 394), that in the case of two innocent persons, one or other of whom must suffer from a fraud committed on them, that one of them shall suffer whose want of care left open the door for the commission of the fraud.

INNOMINATE CONTRACTS. Literally are the "unclassified" contracts of Roman Law; they are contracts which are neither *re*, *verbis*, *litteris*, nor *consensu* simply, but some mixture of or variation upon two or one of such contracts. They are principally the contracts of *permutatio*, *de aestimato*, *precarium*, and *transactio*.

INNS OF CHANCERY. Such societies as Clement's Inn, Symond's Inn, &c., were so called.

INNS OF COURT. The societies of the Middle Temple, Inner Temple, Lincoln's Inn, and Gray's Inn, are so called because the students of the several Inns dine periodically therein and also study the law to fit them for practising in the Courts. These Inns are said to have formed one of the most famous universities in the world for the study of law; the degrees which they conferred were those of barristers, who answered to bachelors at the universities, as the degree of a serjeant (*servientis ad legem*) answered to that of doctor. Tho

INNS OF COURT—*continued.*

studies at these Inns are now under the control of the Council of Legal Education, who have endeavoured to re-invigorate them by appointing well-paid professors and tutors, and by holding out to students rewards for excellence in the various branches of legal study, and particularly in Roman Law and Jurisprudence, and by making a certain standard of excellence compulsory upon all students seeking admission to the degree of barrister.

INNUENDO. That part of the declaration in actions of libel and slander which explained the meaning or pointed the application of the libellous or slanderous matter complained of was so called. An innuendo is frequently necessary where the language of the defendant is apparently innocent and inoffensive, but where, nevertheless, by virtue of its connection with known collateral circumstances, it conveys a latent and injurious imputation. So where, from the ambiguity of the defendant's expressions, it is doubtful who was meant, it is the proper office of the innuendo to render the allusion clear, by specifically pointing out the meaning, as *e.g.*, where but one or two letters of the name are expressed, or the plaintiff is libelled under a fictitious or borrowed name, or where the libel is couched under a fable or allegory, whose tendency and meaning it is necessary to explain by reference.

See titles **LIBEL**; **SLANDER**.

INOFFICIOSUM TESTAMENTUM. In Roman Law, was the "*unduteus*" will, that is to say, a will made without due regard to the claims of the nearest relations, *e.g.*, where a father gave nothing to his son, or a brother to his sister, and such like. To prevent the complaint on this ground (*querela de inofficioso testamento*) these relations must have got one equal fourth part of the estate among them; and this fourth was called the *Quarta Legitima*.

IN PARIBUS MATERIEBUS, &c. : *See* title **PARIBUS, IN, MATERIEBUS, &c.**

IN PERSONAM. Against or upon a person, as distinguished from *in rem*, against or upon a thing, *e.g.*, a judgment *in personam* is commonly contrasted with a judgment *in rem*. Almost all judgments in actions are *in personam*, *i.e.*, binding him only and his representatives and privies. A judgment *in rem* is an adjudication pronounced upon the *status* of some particular subject-matter, as for instance, the sentence of the Court of Admiralty condemning a vessel or prize, or of the Court of Probate and Divorce establishing or nullifying a marriage; which latter case, although clearly affecting the personal position of the par-

IN PERSONAM—*continued.*

ties, is yet included in the class of judgments *in rem*, for it decides the permanent *status* of those concerning whom it was instituted.

Besides being used to denote the diversity in the effect of a judgment according as it is *in rem* or *in personam* as distinguished above, the phrases *in personam* and *in rem* are also used to denote the compass or extent of rights; thus a *jus in rem* has been, and commonly is, defined as a right availing against the world at large (*facultas personæ competens sine respectu ad certam personam*); and on the other hand, a *jus in personam* as a right availing against some one individual in particular (*facultas personæ competens cum respectu ad certam personam*). But this distinction has reference only to the proximate diversities, for a *jus in personam* also avails remotely against all the world (Austin's Jurisprudence).

INQUEST. An inquiry by a jury duly impanelled by the sheriff into any cause, civil or criminal. The term "inquest" is sometimes used to signify the jury itself before whom the question is brought.

INQUIRY, WRIT OF. A writ directed to the sheriff, commanding him to summon a jury, and to inquire into the amount of damages due from the defendant to the plaintiff in a given action. The necessity for this writ, and the inquiry under it, occurs in certain cases when the defendant has suffered judgment to pass against him by default or *nil dicit*, by confession, or *cognovit actionem*, &c., in an action, the damages in which are not ascertained or ascertainable by mere calculation.

In such cases it becomes absolutely necessary that the *quantum* of damages should be assessed by a jury, as in a trial at Nisi Prius; and after their verdict the sheriff returns the inquisition, which is entered on the roll in the manner of a *postea*. However, under the present procedure, the damages may in nearly every case be assessed or ascertained either by a Master in the Common Law Divisions, or by the Chief Clerk in the Chancery Division, excepting only in the cases of libel, slander, compensation for breach of promise, or for a railway accident, and such like; in these latter cases a writ of inquiry would still be necessary, whenever judgment was obtained without finding at the same time the amount of the damages.

See title **ASSESSMENT OF DAMAGES**.

INQUISITION OF OFFICE. Is an official inquiry directed by the Crown in certain cases, as a preliminary step to the seizure of property, when that can only

INQUISITION OF OFFICE—*continued.*
be done after "inquest of office," or after "office found."

See title OFFICE, INQUEST OF.

INQUISITORS. These (who were called also *ministri*), were sheriffs, coroners *super visum corporis*, or the like, empowered to inquire into certain matters or occurrences.

IN REM : *See* title IN PERSONAM.

INROLMENT. The transcribing a deed on to a roll of parchment, according to certain forms and regulations, is termed inrolling a deed. It is a common practice to inrol deeds for safe custody; that is, to get them transcribed upon the records of one of the King's Courts at Westminster, or at a Court of Quarter Sessions, or in the Court of Chancery. The inrolment of a deed does not make it a record; but it thereby becomes a deed recorded. For there is a difference between a matter of record, and a thing recorded to keep in memory. A record is the entry on parchment of judicial matters controverted in a Court of record, and whereof the Court takes notice; but an inrolment of a deed is a private act of the parties concerned, of which the Court takes no cognizance at the time when it is done (4 Cruise, 503). The copy of an inrolled deed of bargain and sale is by the stat. 10 Ann. c. 18, s. 3, made as good evidence as the original deed itself; and where the bargain and sale is for an estate of inheritance or freehold, it is required to be inrolled by the Inrolment Act, 27 Hen. 8, c. 16.

INSANITY : *See* title LUNACY.

INSENSIBLE. A term used in pleading to signify unintelligible; and the rule relating to it is, that if a pleading be insensible owing to the omission of material words, &c., it is bad (Stephen on Pleading, 414).

INSIMUL COMPUTASSENT. A species of *assumpsit* so called, because one of the counts of the declaration alleged that the plaintiff and defendant had settled their accounts together, and that the defendant engaged to pay the plaintiff the balance, but had since neglected to do so.

INSOLVENCY. By stat. 7 Geo. 4, c. 57, a Court for the relief of insolvent debtors in England was established; that Court continued until 1861, when it was abolished by the stat. 24 & 25 Vict. c. 134, all its jurisdiction being by that Act transferred to the Court of Bankruptcy; and by the stat. 32 & 33 Vict. c. 83, further provision has been made for the winding up of the late Court of Insolvency. Imprisonment necessarily preceded insolvency proceedings; and the debtor, being in prison,

INSOLVENCY—*continued.*

petitioned for his discharge, having first made a *bond fide* surrender of all his property to his creditors. He was then let out of prison upon terms, the principal of those terms being that he should execute a warrant of attorney authorizing the creditors' assignee to enter up judgment for the unsatisfied debts; and subsequently execution might by leave of the Court, issue on such judgment against the subsequently acquired property of the debtor.

See titles BANKRUPTCY; IMPRISONMENT FOR DEBT.

INSPECTION OF DOCUMENTS : *See* title DISCOVERY, sub-title INSPECTION OF DOCUMENTS.

INSPECTION OF PROPERTY. For the purposes of obtaining full information or evidence, the Court or a judge may, upon the application of any party to the action, make any order for the inspection of any property, being the subject of such action, and for that purpose may, upon the same or any further application, authorize any person or persons to enter upon or into any land or building in the possession of any party to the action, and to take samples, and to make observations, and to try experiments (Order LII., 3).

See title DISCOVERY.

INSPECTION, TRIAL BY. Trial by inspection or examination is, when the point in dispute is an object of sense, and the judges take upon themselves to decide the question upon the testimony of their own senses: for it is not thought necessary to summon a jury to decide it, that being called to inform the conscience of the Court in respect only of dubious facts (9 Rep. 31).

INSPEXIMUS. Letters patent are so called from the circumstance of this being the first word with which they begin (after the title of the king), thus, "*Rex omnibus, &c., Inspeimus, &c.*" (*Les Termes de la Ley.*)

INSTALMENTS. Are different portions of a debt payable at different successive periods as agreed.

In the case of debts payable by instalments, the whole amount of which is made recoverable on default, Equity will not relieve against the consequences of default (as from a forfeiture or penalty), *sed quære*. Similarly, upon the failure of a compounding debtor to pay his instalments, the whole original debt revives, less only the amount thereof already paid.

INSTANTER. Immediate, without loss of time. In this sense it is used when applied to the word trial; thus, a trial

INSTANTER—continued.

instanter, means an immediate trial, a trial that is to take place forthwith.

INSTITUTIO HÆREDIS. In Roman Law, was the appointment of the *hæres* in the will; it corresponds very nearly to the nomination of an executor in English Law. Without such an appointment the will was void at law, but the prætor (i.e., equity) would under certain circumstances carry out the intentions of the testator.

See title HÆREDES.

INSTITUTION. A kind of investiture of the spiritual part of the benefice, as induction is of the temporal; for by institution the care of the souls of the parish is committed to the charge of the clerk. By institution, the church is full, so that there can be no fresh presentation till another vacancy; and the clerk may enter upon the parsonage house and glebe, and take the tithes, but he cannot till induction grant or let them, or bring an action for them.

See title INDUCTION.

INSURANCE, or ASSURANCE. A security or indemnification, given in consideration of a sum of money, against the risk of loss from the happening of certain events. The person who so insures is termed the insurer, and he whose property is insured is termed the insured, or assured, and sometimes *a-surée*; and the instrument by which he effects such insurance is termed the policy of insurance. A policy of insurance may be defined to be a contract between two persons, stipulating that if one pay a sum of money (or premium), estimated to be an equivalent to the hazard run, the other will indemnify (or insure) him against the consequences which may ensue from the happening of any particular event. Thus, if I pay an insurance company 10s. a year to indemnify me against the loss which I might sustain by my house being burnt down, this is termed insuring my house, the company undertaking, in consideration of the money which I pay, to give me a certain sum to rebuild it in case of fire. The same system is pursued in the insurance of ships (commonly called marine insurance), and in the insurance of the lives of individuals, commonly called life insurance.

There is this difference between life insurance policies and all other kinds, that the latter are contracts of indemnity merely, and the moneys secured thereby cease to be payable if no damage arises: but the former, if duly kept up until the death of the party assured, are payable at all events (*Dalby v. India and London Life Assurance Co.*, 15 C. B. 365). However,

INSURANCE, or ASSURANCE—contd.

for the validity of a life-assurance policy, it is necessary, that the person who takes it out should have some interest in the life assured at the time of his so taking it out (14 Geo. 3, c. 48); but the subsequent cessation of such interest does not vitiate the policy (*Wms. P. P.* 177).

As regards marine insurance, there are implied in the contract of insurance (being a voyage-policy) the following warranties, —(1) That the ship is seaworthy at the commencement of the risk, i.e. of the voyage; and (2.) That the ship shall not deviate. In a time-policy, neither of these warranties can be implied.

See titles FIRE INSURANCE; LIFE INSURANCE; MARINE INSURANCE.

INSURE, COVENANT TO. Is usually entered into by lessees of houses. An inadvertent breach of this covenant may be relieved against once (22 & 23 Vict. c. 35, 23 & 24 Vict. c. 126).

INTENDMENT. Understanding, meaning, or construction, is so called.

See title COMMON INTENDMENT.

INTENTIO: See title FORMULÆ.

INTENTION. In questions of damages, the intention with which a contract has been broken is wholly immaterial; the intention with which a tort has been committed is (strictly considered) not material, as it does not augment the damages, but it is almost invariably considered by the jury, and it is not altogether without a certain influence even with the judge. The intention is, however, an all important element in crime, e.g., homicide is a crime or not according to the intention, or is of a greater or less degree of criminality according to that same test. In some few statutory crimes, and hardly even in these, the question of the intention is not material, but may be taken into account in mitigation of punishment.

INTERCESSIO. In Roman Law, was the act of becoming surety. The principal varieties of sureties were *sponsores*, *fidepromissores*, and *fidejussores*. Women could not be sureties at all; and men, by a statute of Sulla, could not be sureties for more than 20,000 sesterces in one year to one creditor for one and the same debtor.

See title SURETYSHIP.

INTERCOMMONING. When the commons of two adjacent manors join, and the inhabitants of both have immemorially fed their cattle promiscuously on each other's common, this is called intercommoning (*Les Termes de la Ley*). As the very name denotes, there can be no intercommoning

INTERCOMMONING—*continued.*

between more than two manors (*Commissioners of Sewers v. Glasse*, L. R. 19 Eq. 134).

INTERDICT. An ecclesiastical censure, prohibiting the administration of divine service in particular places, or to particular persons (22 Hen. 8, c. 12).

As used in Roman Law, an interdict was equivalent to the injunction in equity.

See titles INJUNCTION; INTERDICTA.

INTERDICTA. In Roman Law, were the injunctions of English Law. They were of three varieties (1.) *Prohibitoria*, which forbade the doing of certain acts; (2.) *Restitutoria*, which required the restitution of property; and (3.) *Exhibitoria*, which required the production of some specific individual person or thing. In relation to the possession of property, they were either for the acquiring of the possession in the first instance (*adipiscendæ possessionis causâ*), or for the recovering of a possession which had been lost (*recuperandæ possessionis causâ*), or for the protection or retention of an existing and continuing possession (*retinendæ possessionis causâ*),—there being two principal interdicts for such last-mentioned protection of the possession, viz, the *uti possidetis* for immoveables, and the *utrubi* for moveables.

See title INJUNCTION.

INTERDICTION. In French Law, a person over twenty-one years of age, if he is in an habitual state of imbecility or insanity, may be excluded the management of his goods, upon the application of any of the relatives, whom failing, upon the application of the Attorney-General (*procureur du Roi*), to the Court of first instance, who will thereupon direct an inquiry before the *conseil de famille*. The interdiction may be either absolute or limited; in the case of a limited interdiction, the party is able to act with the approval of a *conseil judiciaire*.

See title CONSEIL JUDICIAIRE.

INTERESSE TERMINI. That species of property or interest which a lessee for years acquires in the lands demised to him, before he has actually become possessed of those lands; as distinguished from that property or interest vested in him by the demise when reduced into possession by an actual entry upon the lands and the assumption of ownership therein, and which is then termed "an estate for years." Thus, where an estate for years in lands is granted to commence at a future period, the grantee, of course, cannot enter until that period has arrived; but still he has acquired a kind of estate or at least interest in the lands; and the

INTERESSE TERMINI—*continued.*

estate or interest so acquired, and which he would continue to have until the period at which the term was to commence, had arrived, and he had entered upon the possession of the lands, would be simply an *interesse termini* (1 Cru. Dig. 239).

INTEREST. In its legal signification, means the estate or property which a man possesses either in land or chattels, the quantum of which, of course, depends upon the title under which he holds, and which, therefore, varies in exact proportion to the different titles under which property can be held. Thus, in land a man may be possessed of a freehold interest, or of an interest less than freehold; which main classification may again be divided into his interest in fee-simple, fee-tail, or for life, or his interest for a term of years, or at will. So also with regard to the interest or property in goods and chattels, it may be either joint or several,—joint if shared with others, several if possessed by one person exclusively or by more than one, their interests however, not being in common.

See titles ESTATE; INTERESSE TERMINI.

INTEREST ON LEGACIES AND ANNUITIES: See title LEGACIES.

INTEREST OF MONEY. Called also *Usury*, was not favoured by the English Common Law. However, the custom of merchants gradually introduced it in the following cases, in all of which it is therefore payable without any express agreement for that purpose:—

- (1.) On bills of exchange;
- (2.) On promissory notes;
- (3.) On bonds; and
- (4.) On mortgages.

Interest is also payable, even by the Common Law, in the following cases:—

- (5.) Under an express contract to pay it;
- (6.) Under a contract to pay it, which is implied from previous dealings between the parties.

Equity, on the other hand, always favoured the allowance of interest upon money lent or owing, when the amount was either certain or ascertainable, and invariably in such cases from the date of demand made for payment and refusal to pay; and now under the stat. 3 & 4 Will. 4, c. 42, s. 28, "Upon all debts or sums certain payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable: (a.) if such debts or sums be payable by virtue of some

INTEREST OF MONEY—*continued.*

written instrument at a certain time; or (b.), if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment."

See title DISCOUNT.

INTEREST REPUBLICÆ UT SIT FINIS LITII: *See* title EXPEDIT REPUBLICÆ.

INTERLINEATIONS: *See* title ERASURES.

INTERLOCUTORY. Something intervening or happening between the commencement and the termination of an action; thus, an interlocutory decree in a suit in Equity signifies a decree that is not final and does not conclude the suit, for it seldom happens that the first decree can be final; for the Court usually directs an inquiry in chambers to be made, after which the matter is to come on again for further consideration, and the final decree is therefore suspended until the result of such inquiry is made known; nevertheless, there are degrees of finality, *e.g.*, some judgments which reserve further consideration are in reality final; and again, a judgment may be final where it disposes of the rights of the parties, even although that should be (as it sometimes is) upon an interlocutory application. An interlocutory judgment in an action at law signifies a judgment that is not final, but which is given upon some plea, proceeding, or default, occurring in the course of the action, and which does not terminate the suit; *e.g.*, when, although the right of the plaintiff in the action is established, yet the amount of damages he has sustained is not ascertained. This happens when the defendant in an action suffers judgment by default, or confession, or upon a demurrer, in any of which cases, if the demand sued for be damages and not a specific sum, then a jury must be called to assess them; therefore the judgment given by the Court previous to such assessment by the jury is interlocutory and not final because the Court knows not what damages the plaintiff has sustained. An interlocutory order is an order made during the progress of a suit upon some incidental matter which arises out of the proceedings, as an order for an injunction, and the like.

INTERLOCUTORY JUDGMENT: *See* title INTERLOCUTORY.

INTERLOCUTORY ORDER: *See* title INTERLOCUTORY.

INTERNATIONAL COPYRIGHT: *See* title COPYRIGHT.

INTERNATIONAL LAW. As opposed to Municipal, *i.e.*, Civil Law, is the law common to nations generally. It is either public or private, *public* international law having to treat of sovereign and semi-sovereign states, ambassadors, treaties, war, peace, commercial tariffs, &c., &c.,—and *private* international law dealing with those questions of property and of status which affect individuals, and which may arise under wills, contracts, settlements, intestacy, and such like.

INTERPLEADER. When two or more persons claim the same thing of a third, and he, laying no claim to it himself, is ignorant which of them has a right to it, and fears he may be prejudiced by their proceeding against him to recover it, he may make them litigate their title between themselves instead of litigating it with him, *i.e.*, cause them to *interplead*.

The jurisdiction at Law in interpleader was originally confined to the single case of joint bailment (*Crawshay v. Thornton*, 2 My. & Cr. 21) *i.e.*, to cases in which the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, had a common origin; but under the C. L. P. Act, 1860, s. 12, this community of origin in the titles of the interpleading parties was no longer necessary. But the titles must at Law still have been legal in their character, and not equitable. Whence the remedy in Equity was still more extensive than that at Law. The grounds of an interpleader suit in Equity used to be the following:—

(1.) That the plaintiff has no personal interest, either in respect of rights (*Mitchell v. Hayne*, 2 S. & S. 63), or in respect of liabilities (*Crawshay v. Thornton*, *supra*) in the subject matter;

(2.) That the adverse rights of the defendants are such as can be finally determined in the interpleader suit; but

(3.) These rights may be legal or equitable, either all or some of them indifferently, unless the jurisdiction should be exclusively at Law.

Under the Judicature Acts, Law and Equity are fused into one system, and the practice in interpleader in all the divisions of the High Court is now as follows:—

After a defendant has appeared to a writ of summons, and at any time before he delivers his statement of defence, he may (if he is in no way interested in, otherwise than as being the custodian of, the subject-matter of the litigation) take out an interpleader summons, and obtain on such summons (supported by an affidavit of his own absence of interest in, and some

INTERPLEADER—continued.

third person's claim to, the subject-matter of the litigation) an order calling upon such third person to appear and state the nature and particulars of his claim, and staying meanwhile all proceedings in the action (Order L, rule 2, and 1 & 2 Will. 4, c. 58, s. 1); and in the result, the judge may order such third person (appearing to the summons) to litigate his claim either as a defendant to the action, or as a defendant to some other action, or as a party to some issue designed to determine his right, or the judge may order such third person (not appearing to the summons) to be barred of all claim as against the defendant (1 & 2 Will. 4, c. 58, s. 3). In cases where the third party appears to the summons, the judge may also in all cases (with the consent of the plaintiff and such appearing third person), summarily dispose of the question between them (3 & 4 Will. 4, c. 38, s. 1), and the judge may also in all cases where the subject-matter is trivial (at the request either of the plaintiff or of such appearing third person), summarily determine the question (23 & 24 Vict. c. 126, s. 14), in which latter case there is no appeal from the judge's summary decision (23 & 24 Vict. c. 126, s. 17; *Dodds v. Shepherd*, L. R. 1 Exch. Div. 75).

N.B. Sheriff also may obtain summons to interplead; he obtains same immediately upon discovery that execution is stopped by third person's claim to property.

INTERPRETATION. This consists in ascertaining the true meaning of the words and conduct of men.

FIRSTLY, with reference to wills, the following six rules of interpretation are generally recognised:—

(1.) A testator is always presumed to use words according to their strict and primary acceptation, until from the context of the will it appears that he has used them in a different sense.

(2.) Where there is nothing in the context of a will shewing that the testator has used words in other than their strict and primary acceptation, and his words when so interpreted are sensible with reference to extrinsic circumstances, then the words are to be interpreted in their strict and primary sense and in no other, notwithstanding the strongest presumption to the contrary.

(3.) But where the testator's words when so interpreted are insensible with reference to extrinsic circumstances, then the extrinsic circumstances may be looked into for the purpose of arriving at some secondary or popular sense which shall be sensible with reference to these circumstances.

(4.) Where the written characters of the

INTERPRETATION—continued.

will are difficult to decipher, or the words of the will are in an unknown or unusual language, the evidence of persons experienced in deciphering written characters or acquainted with the language, is admissible for the purpose of informing the Court or judge.

(5.) Extrinsic evidence is also admissible for the purpose of identifying the *object* of the testator's bounty (whether devise or legatee), and for the purpose also of identifying the *subject* of disposition.

(6.) Where the words of a will remain unintelligible after the application of the five preceding rules, the will is void for uncertainty.

SECONDLY, with reference to other instruments. The principal rules regarding the interpretation of these are the following:—

(1) The agreement shall have a reasonable construction according to the intent of the parties;

(2.) The construction shall be liberal and favourable, *ut res magis valeat quam pereat*;

(3.) The popular meaning of the word is to be adopted until proof of a preciser technical or acquired meaning;

(4.) Every word is to be regarded in the light of its context, *ex antecedentibus et consequentibus optima fit interpretatio*;

(5.) An erroneous particularisation does not affect a precedent generality that is true (*falsa demonstratio non nocet, cum de corpore constat*); and *vice versa*, a subsequent generality shall be confined by the precedent particularisation (this is called the construction *ejusdem generis*);

(6.) Custom shall control a contract, unless the contract exclude the custom.

(7.) The words of a deed are to be construed most strongly against the grantor (*verba cartarum fortius accipiuntur contra proferentem*); but this rule is only to be relied upon when other rules of construction fail (*Lindus v. Melrose*, 3 H. & N. 177);

(8.) Every contract binds the executor or administrator of the party, although he be not named; but to bind the heir, he must be particularly mentioned;

(9.) Parol evidence may in certain cases be admitted in connection with written agreements;

(10.) In interpreting statutes, the *ratio legis* is not to be considered, if the words of the statute in themselves are clear, and these words (being clear) are neither to be extended beyond nor restricted within their simple extent; but if the words are not in themselves clear, then the *ratio legis* may (among other things) be considered; and

(11.) In interpreting decided cases, the *ratio decidendi* is to be gathered, and when

INTERPRETATION—*continued.*

once gathered it is the only permanently valuable part of the decision.

See title **EXTRINSIC EVIDENCE**.

INTERROGATORIES. The examination of the parties to a Chancery suit was not ordinarily conducted *virâ voce* in open Court (as was the case in Common Law Courts), but upon written questions previously prepared by counsel, which were called interrogatories; hence the phrase examining a witness upon interrogatories. Under the Act, 17 & 18 Vict. c. 125, ss. 51-57, interrogatories might, subject to certain restrictions, be also exhibited at Law by either party to the action. But whereas in Equity there was almost no question which the plaintiff might not extract from the defendant by means of interrogatories, the practice at Law was subject to the following restrictions:—

(1.) Interrogatories must not have been made the means of evading the rule which requires the production of primary evidence (*Herschfield v. Clark*, 11 Exch. 712);

(2.) Interrogatories did not deprive a witness of his privilege; consequently, he was not compellable to state the contents of, or to describe, documents which were his muniments of title, nor (except under very special circumstances) to answer questions tending to criminate him, or to expose him to penalties or forfeitures; and

(3.) Fishing interrogatories were sternly discouraged.

Under the present practice, the rules of Law now prevail in Equity as regards interrogatories, and interrogatories are now not in exclusion of *virâ voce* evidence but in aid of it.

See title **DISCOVERY**, sub-title **INTERROGATORIES AND ANSWER THERE TO**.

INTERVENER. The interposition or interference of a person in a suit in the Court of Probate and Divorce in defence of his own interests is so termed, and a person is at liberty to do this in every case in which his interest either in regard to his property or his person is affected. Thus, in a matrimonial cause, if proceedings be taken against a party who has either solemnised or contracted marriage with another, such other or third party may, if he or she pleases, interpose in such suit to protect his or her own rights at any part or stage of the proceedings, even after the conclusion of the cause. The Queen's Proctor may also in a proper case intervene under the stat. 23 & 24 Vict. c. 144, as in case of suspected collusion between the parties (*Dering v. Dering*, L. R. 1 P. & M. 531).

INTERVENTION or MEDIATION. In international law, intervention is such an

INTERVENTION or MEDIATION—*continued.*

interference between two or more states as may (according to the event) result in a resort to force; while mediation always is, and is intended to be and to continue, peaceful only. Intervention between a sovereign and his own subjects is not justified by anything in international law; but a remonstrance may be addressed to the sovereign in a proper case.

INTESTATE. Without making a will. An intestate is the opposite to a testator or testate, the latter word signifying a man who dies having made a will. It was a rule of the Roman Law that no one could die partly testate and partly intestate (*neque enim idem ex parte testatus et ex parte intestatus decedere potest*, Just. ii. 14. 5); but nothing is more common in English Law than that the same man should die testate as to part, and intestate as to the rest of his property, unless indeed he has made a residuary bequest or devise, and even in that case a partial intestacy is not infrequent.

INTIMIDATION OF WORKMEN. Is endeavoured to be repressed by the Masters and Workmen Molestation Act, 1871 (34 & 35 Vict. c. 32), which declares criminal, and visits with imprisonment with or without hard labour, the following (among other) facts, viz., using violence to person or property, molesting or obstructing any workman in or about his work, threatening any workman so as to put him in bodily fear, various forms of indirect coercion, hiding tools, picketing, and such like.

INTOXICATION: *See* title **DRUNKENNESS**.

INTRA VIRES: *See* title **ULTRA VIRES**.

INTRUSION. A species of injury by ouster, or amotion of possession from the freehold, being an entry of a stranger, after a particular estate of freehold is determined before him in remainder or reversion, as when a tenant for life dies seised of certain lands and tenements, and a stranger enters thereon after such death, and before any entry made by him in remainder or reversion (F. N. B. 203, 204; 1 Cruise, 161, 316). The writ which lay against such intruders was also called a writ of intrusion (*Les Termes de la Ley*; Old Nat. Brev. 203).

INVENTORS AND INVENTIONS: *See* title **PATENTS**.

IN VENTRE SA MÈRE. Every legitimate child *in ventre sa mère*, or in its mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or of receiving a surrender

IN VENTRE SA MÈRE—*continued.*

of copyhold lands; so if lands are devised to B. for life, remainder to such child or children as shall be living at the time of his decease, a posthumous child will take equally with those who were born before B.'s death (*Doe v. Clark*, 2 Hen. Bl. 399; *Pearce v. Carrington*, L. R. 8 Ch. App. 969). But in the case of lands, the produce or profits go in the interim to the heir-at-law, or residuary devisee, if there be any such (*Hopkins v. Hopkins*, Ca. t. Talb. 44, and Tud. Convey. L. C. p. 711).

INVESTITURE. A ceremony which, in the feudal ages, accompanied the grant of lands, and which consisted in the open and notorious delivery of possession in the presence of the other vassals, and thus, at the time when the art of writing was very little known, the evidence of the property was reposed in the memory of the neighbourhood, who in case of disputed title were afterwards called upon to decide upon it.

INVESTMENTS. The properties in or upon which trustees may invest trust funds are designated the range of investments. Apart from statute or express provision in the deed or will creating the trust, trustees are confined to mortgages of real estate in England, Government securities, and Consolidated Bank Annuities; but by various statutes (principally Lord St. Leonards' Act, 22 & 23 Vict. c. 35), they may invest the trust moneys on mortgages of lands in the United Kingdom, in stock of the Bank of England, in stock of the Bank of Ireland, and in East India stock; and generally in Parliamentary funds, when the interest is guaranteed by Parliament.

I. O. U. Is evidence of an account stated, and an action of assumpsit or in the nature of an assumpsit will lie thereon against the maker at the suit of the person to whom it is addressed; and if it is addressed expressly to nobody, the holder is *prima facie* the person with whom the account was stated.

See title ACCOUNT STATED.

IRELAND. By the stat. 3 & 4 Will. 4, c. 42, s. 7, no part of the United Kingdom of Great Britain and Ireland shall be deemed to be beyond the seas, within the meaning of the Statutes of Limitation, as to personal actions, nor is it beyond seas within the meaning of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), whereby every bill of exchange or promissory note drawn or made in any part of the United Kingdom of Great Britain and Ireland, and made payable in or drawn upon any person resident in any part of the said United Kingdom, shall be deemed to be an inland bill, excepting (if at all) as

IRELAND—*continued.*

to the stamp duty. Nevertheless, under the orders and rules of procedure in actions, a writ of summons cannot be issued against or served upon a British subject in Scotland or in Ireland, in respect of a cause of action accruing in England, unless by special leave of the Court; and for many other purposes of procedure, Scotland and Ireland are like foreign countries. It is a rule of law, that every Act of Parliament since the Union (1801) embraces Ireland, unless that country is expressly excluded (*Reg. v. Mallow Union*, 12 Ir. L. R., Q. B., 35); and the like rule appears to apply to Scotland.

IRREBUTABLE PRESUMPTIONS.

Those presumptions which are called *juris et de jure* are irrefutable, that is, they are not only drawn *by the law*, but they have themselves the force of *law*. The number of these presumptions is very small, and is constantly tending to diminish.

See title PRESUMPTIONS, QUALITY OF.

IRREPLEVIABLE or IRREPLEVISABLE. Not to be replevied, or set at large on sureties (Cowel). It is contrary to the nature of a distress for rent to be irrepleviable (Tomlins).

ISSUABLE PLEA. An issuable plea is that which puts the merits of the cause, either on the facts or on the law, in issue; in other words, which will decide the action (*Steele v. Harmer*, 14 M. & W. 139). It seems, however, to be by no means clear that a plea to be "issuable" must put the substantial or moral merits of the cause at issue. Thus, a plea which goes simply to shew that the plaintiff had no present cause of action, as in an action by an attorney for work and labour, that the plaintiff had not delivered a signed bill a month before action brought, has been held an issuable plea (*Wilkinson v. Page*, 1 Dowl. & L. 913; see also *Staples v. Holdsworth*, 4 Bing. N. C. 144). Where the Court granted an extension of time or other like indulgence to a defendant, it was generally upon this condition (among others) that within that extended time he should "plead issuably" (See Smith's Action at Law).

ISSUE. Is the disputed point or question to which the parties in an action have narrowed their several allegations, and upon which they are desirous of obtaining the decision of the proper tribunal. When the plaintiff and defendant have arrived at some specific point or matter affirmed on the one side and denied on the other, they are said to be *at issue* (*ad exitum*, i.e., at the end or result of their pleading); the question so set apart is called the issue, and is designated, according to its nature,

ISSUE—continued.

an issue in fact, or an issue in law. If it is an issue in fact, it is almost universally tried by the country (*i.e.*, by a jury of twelve men); if it is an issue in law, it is tried by the judge constituting the Court in which the action has been brought (Steph. on Pleading, 25, 4th edit.).

ISSUE ROLL. It ancient times it was the practice of the Courts, when the pleadings were carried on orally, to have a contemporaneous record of the proceedings made out upon a parchment roll called the "Issue Roll." This practice, although long grown into disuse, was until recently still supposed in contemplation of law to exist; and the Courts still required that it should be made up, or at all events commenced, or an *incipitur*, as it was called, entered upon the roll, and certain fees were paid to the officers for making it up. Practically, however, this roll was of no use, and in consequence it was abolished; and the only entry of the proceedings upon record came to be that upon the Nisi Prius Record, or upon the Judgment Roll, according to the nature of the case (1 Pl. R. H. T. 4 Will. 4). And at the present day, there appears to be no issue roll at all in use, unless it should be in the House of Lords.

See title ENTRY ON THE ROLL.

ISSUE OF WRIT. A writ of *summons* is said to be issued when the same is sealed with the seal of the Court or Division out of which it is issued, *i.e.*, taken out; the writ of summons must before issue contain the names of the parties and (among other indorsements) the indorsement of the claim that is made in the action. Upon a judgment or order, whether final or interlocutory, a writ of *execution* may issue, certain varieties of execution being, however, confined to certain varieties of judgments and orders, and the appropriate variety requiring to be selected.

See title EXECUTION, WRIT OF.

ISSUES, PREPARATION OF. The pleadings in an action being simple statements of fact, it occasionally happens that they do not sufficiently define the real issue or issues in dispute between the parties; and in that case, counsel moves the Court before trial for an order directing the preparation of issues, that is, the further and more accurate definition of the points in dispute (Order xxvi.).

See title ISSUE.

ISSUES, TRIAL OF. A notice of trial is required to specify whether the trial is of the action generally, or of some (and what?) issues therein (Order xxxvi., 8). And either before or at the trial (when that is without a jury), the judge may

ISSUES, TRIAL OF—continued.

direct any issue of fact to be tried by a judge and jury (Order xxxvi., 27); and in a trial without a jury, the judge may from time to time direct any question or issue of fact, or partly of fact and partly of law, to be tried at *nisi prius* (Order xxxvi., 29). When the issues involve intricate scientific or local inquiries or investigations, the judge may also refer the trial of them to a referee official or special (Judicature Act, 1873, s. 57).

See title ISSUE.

ITER. Is a road for foot-passengers only, *actus* is a road for passengers on foot or on horseback, and *via* is a general way for all purposes.

See title EASEMENT, sub-title WAY.

ITERATIO. Is repetition. In Roman Law, a bonitary owner might liberate a slave, and the quiritary owner's repetition (*iteratio*) of the process effected a complete manumission.

ITINERANT. Travelling or moving about; thus the judges who are now called justices of assize, were formerly called justices itinerant, from the circumstance of their travelling into several counties to hear causes ready for trial (3 Bl. 59). These judges were appointed for the first time by King Henry II., at the Parliament of Northampton, in 1187.

J.

JACENS HEREDITAS. An estate in abeyance. This was one of the fictitious *personæ* of law referred to by Austin. It was supposed to continue the *persona* of the deceased person, until the entry (*aditio*) of the *hæres* (executor) upon the estate. In English Law, the authority of the executor or administrator arises from the grant of probate or administration; and until such grant is made, the Judge Ordinary is the only legal personal representative of the deceased; but the subsequent grant to the executor or administrator when made relates back (for most purposes) to the date of the death.

JACTITATION. A false boasting. The word is commonly used with reference, 1st, to marriage; 2nd, to the right to a seat in a church; and, 3rdly, to tithes.

(1.) *Jactitation of marriage* is the boasting or giving out by a party that he or she is married to some other, whereby a common reputation of their matrimony may ensue. To defeat that result, the person may be put to a proof of the actual marriage, failing which proof she or he is put to silence about it.

JACTITATION—*continued*.

(2.) *Jactitation of a right to a seat in a church* appears to be the boasting by a man that he has a right or title to a pew or sitting in a church to which he has legally no title.

(3.) *Jactitation of tithes* is the boasting by a man that he is entitled to certain tithes, to which he has legally no title (See Rog. Eccl. Law, 482).

JEOPAILLE (from the Fr. *j'ai faillé*, I have failed). An oversight in pleadings or in other law proceedings. The Statutes of Jeopails were so called because when a pleader perceived any mistake in the form of his proceedings, and acknowledged such error (*j'ai faillé*), he was at liberty by those statutes to amend it (Stra. 1011). These old statutes were superseded by the more liberal powers of amendment conferred by the C. L. P. Act, 1852; and now under the Judicature Acts, 1873-75, all sorts of amendments may be made, if not without leave, at all events with leave, and the power of amending extends even to permitting inconsistent amendments; but the object of all this apparent facility or laxity is to ascertain the real issue between the parties, and that is its justification.

See title AMENDMENT.

JETSAM, JETSON, or JETTISON. By this appellation are distinguished goods which have been cast into the sea, and there sink and remain under water. Jetsam is in this respect distinguished from *Flotsam*, where the goods remain swimming on the surface of the waves, and from *Lagan*, where they are sunk, but tied to a buoy or cork in order to mark their position, so that they may be found again. Jetsam was one of the sources of the royal revenue (see title WRECK).

Jettison is never resorted to, excepting for the purpose of lightening or relieving the ship in case of necessity or emergency, and the necessity must be imminent and real. The loss occasioned by jettison is made good by contribution, assessed on what is saved of ship, cargo, and freight (Kay's Shipmasters, p. 259).

The king, or his grantee, shall have *flotsam, jetsam, or lagan* when the ship is lost and the owners of the goods are unknown. (F. N. B. 122; Kay's Ship. and Seamen, p. 259, 1103.)

JEWS. Originally laboured under many disabilities, for their religion's sake. They could not, of course, comply with the Test and Corporation Acts; and when these Acts were repealed in 1828, they were still no better off in theory, not being able to make the substituted declaration "on the true faith of a Christian" (9 Geo. 4,

JEWS—*continued*.

c. 17); but the practice was improving in their favour. These disabilities were, however, removed in 1845 (8 & 9 Vict. c. 52) as regards corporations; and in 1858 (21 & 22 Vict. c. 49), and more fully in 1866 (29 & 30 Vict. c. 19) as regards parliamentary elections, the obnoxious words, "on the true faith of a Christian," being by the latter Act omitted from the new form of oath thereby substituted for the old oath of abjuration.

See titles ABJURATION; ALLEGIANCE; NON-CONFORMISTS; CORPORATION ACT; TEST ACT.

JOBBER. Are middle men on the Stock Exchange who supply the public through the broker with money or stock to the exact amount they require, making a profit only of one-eighth per cent. on each transaction. Sir John Barnard's Act (7 Geo. 2, c. 8) endeavoured to suppress the "infamous practice of stock-jobbing," that is to say, the practice of fictitious sale of stock against a future day, when the seller had not the stock he sold nor intended to procure it by the day, and the purchaser did not intend to purchase the stock, but the agreement was merely to pay or to receive the differences, according as the stock went down or up by the day; but this Act has been repealed (23 Vict. c. 28, 38 & 39 Vict. c. 66), and stock-jobbing is now regulated by the Common Law. And by the Common Law, contracts for differences, anciently held to be void as a species of wagering (*Barry v. Croskey*, 2 Johns. & H. 1), are still held to be invalid (notwithstanding *Thacker v. Hardy*, 4 Q. B. Div. 685); but the practice is a very prevalent one. The fictitious buyer is a *bull*, and the fictitious seller is a *bear*; and either party, if unable to pay his differences, is a *lame duck*.

See titles BROKERS; TIME-BARGAINS.

JOINDER. Joining, uniting together, &c. Thus, joinder in action signifies the joining or uniting of two persons together in one action against another; and such an action is termed a joint action. Joinder of issue is where the plaintiff or plaintiffs and the defendant or defendants unite upon a statement of their respective ground of action and defence, and agree to stand or fall by that statement.

JOINDER OF ACTIONS. The plaintiff may unite in one statement of claim several causes of action, subject to the Court on the application of the defendant directing them to be separately disposed of, e.g., claims by or against husband and wife with claims by or against either of them separately; but excepting by leave

JOINDER OF ACTIONS—*continued.*

no action is to be joined with a claim for the recovery of land (Order xvii).

JOINDER IN DEMURRER. When a defendant in an action tendered an issue of law (called a demurrer), the plaintiff, if he meant to maintain his action, must have accepted it, and this acceptance of the defendant's tender, signified to the plaintiff in a set form of words, was called a joinder in demurrer. The usual words of a demurrer were,—“The defendant (or plaintiff) says that the declaration (or plea) is bad in substance;” and it was necessary to state in the margin some substantial matter of law intended to be argued. Thereupon the other side joined issue on the demurrer in these terms.—“The plaintiff (or defendant) says that the declaration (or plea) is good in substance.” But under the present practice, the demurrer would be at once set down for argument by either side without any formal joinder in demurrer.

See title DEMURRER.

JOINDER OF ISSUE. Is that one of the pleadings whereby these are closed, and the parties are at issue upon the questions raised thereon. Usually the reply (*i.e.*, 3rd pleading) ends the pleadings; and no pleading, subsequent to reply, other than a simple joinder of issue can be pleaded without leave of the Court, and then only upon terms (Order xxiv., 1, 2). This joinder of issue is appropriate only where the pleadings raise an issue or issues of fact, or partly of law and partly of fact; and it is not appropriate where the issue is one of pure law.

See title ISSUE.

JOINDER OF PARTIES. The plaintiff may join as defendants all or any of the persons severally or jointly and severally liable on any one contract (Order xvi., 5); also, all or any of the persons, some or one of whom (he believes, but is uncertain which) is or are liable, whether in contract or in tort (Order xvi., 6); and all persons may be joined as co-plaintiffs, in whom, whether jointly, severally, or alternatively, the right to the relief claimed is alleged to exist.

See titles MISJOINDER; NON-JOINDER.

JOINT AND SEPARATE ESTATES. In the case of partners, the assets of the partnership are called the joint estate, and the private estates of the individual partners are called their separate estates. Where either partnership or any individual partner is bankrupt, the rule of administration is this,—the joint or partnership debts are to be paid first out of the joint estate, and the separate or private debts are to be

JOINT AND SEPARATE ESTATES—*continued.*

paid first out of the separate estate; and then (according as the circumstances of the case require) the leavings of the joint estate or of the separate estate go to further satisfy the part-satisfied creditors, joint going to separate, and separate to joint (32 & 33 Vict. c. 71, s. 104). But a creditor holding a joint and several security has his option to rank in the first instance, either as a separate creditor or as a joint one, and to prove accordingly.

See titles DOUBLE PROOF; PROOF OF DEBTS IN BANKRUPTCY.

JOINT AND SEVERAL. A joint and several bond is a bond in which the obligors have rendered themselves both jointly and individually liable to the obligee; so that the latter, in the event of the non-performance of the conditions of the bond by the obligors, may sue them either jointly or separately as he deems the more advisable. The phrase is also frequently used with reference to contracts not under seal (*i.e.*, simple contracts).

See title JOINT-CONTRACTORS.

JOINT AND SEVERAL COVENANTS:
See title COVENANT.

JOINT AND SEVERAL LIABILITY. Covenants are usually joint and several, and the liability under them is therefore both joint and several; nevertheless, a release to one of the co-covenantors will discharge the others; but in the case of a covenant not to sue one of them, it is competent to reserve all rights against the others. The liability of partners is joint and several; and therefore the estate of a deceased partner will be liable, at the option of the creditor, and even in the first instance, to be sued for the amount of all debts contracted before his decease (*Way v. Basset*, 5 Ha. 55).

See title JOINT LIABILITY.

JOINT AND SEVERAL OWNERSHIP. Bonds or covenants, even where they purport to confer a joint and several ownership on the obligees or covenantees, cannot be joint or several at their option for one and the same cause; and whether the covenant or bond be joint or be several depends on the subject-matter, and not upon the words. If such obligee or covenantee has a separate interest, then the bond or covenant will as regards him be several; but otherwise it will be joint. And the rule is, that when all may sue on the covenant or bond, all must do so (*Wetherell v. Langston*, 1 Exch. 634); and the remedy survives, but not the right (*Lake v. Craddock*, 3 P. Wms. 158).

JOINT CONTRACTORS: Are persons jointly liable on a contract. Before the M. L. A. Act, 1856 (19 & 20 Vict. c. 97), part-payment, and before Lord Tenterden's Act (9 Geo. 4, c. 14), a written acknowledgment, made or given by one of several joint contractors had the effect of making the Statute of Limitations run afresh as against, not only that individual one of the joint contractors, but the other or others of them also (*Whitcomb v. Whiting*, Doug. 652); but the law is altered by these statutes in these respective particulars.

See title **JOINT LIABILITY**.

JOINT INDICTMENTS. When several offenders are joined in the same indictment, such an indictment is called a joint indictment; as when principals in the first and second degree, and accessories before and after the fact, are all joined in the same indictment (2 Hale, 173).

JOINT LIABILITY. In every case of joint liability, each of the co-debtors is liable for the whole; and a release to one will discharge them all, not being a release under the Bankruptcy Act, 1869, or under the Statute of Limitations. All must be sued during their joint lives; and the survivor or survivors only afterwards, the estate of the deceased co-debtor being discharged from all liability to the creditor both at Law and in Equity (*Richardson v. Horton*, 6 Beav. 185). The co-obligors on a bond are usually jointly liable, but they may be liable jointly and severally.

See title **JOINT AND SEVERAL LIABILITY**.

JOINT OWNERSHIP. The co-creditors in a bond are usually joint owners; and if so, then either or any of them may release the debtor, and in that way damnify his co-creditors, unless they should have mutually covenanted not to grant any such release. Joint ownership is, however, more usual in the case of lands than of personal estate.

See title **JOINT TENANTS**.

JOINT STOCK COMPANIES. A joint stock company established before the passing of the Acts presently mentioned, and which has not adopted their provisions, is simply a partnership, consisting of a large number of members, whose rights and liabilities are simply those of ordinary partners, subject only to the peculiar regulations contained in an instrument called a deed of settlement. The capital is divided into equal parts called shares, each member of the company has a certain number of these, and is entitled to participate in profits according to his number of shares. The management of the business is confided to some few shareholders, called directors,

JOINT STOCK COMPANIES—continued. and the general body of the shareholders have, unless on extraordinary occasions, no power to interfere in the concerns of the company.

It was not unusual for such companies to obtain a private Act of Parliament in aid of their deed of settlement; and at length certain general Acts were passed for the regulation of such companies. The result of the various legislative measures of a general character so passed may be stated as follows:—

I. Joint stock banking companies—
(1.) All such companies, if formed under 7 Geo. 4, c. 46, and not registered since, are governed by that Act and their deed of settlement. (2.) All such companies, if formed and registered under the Act of 1857 (20 & 21 Vict. c. 49), are governed by their deed of settlement, and so much of the Companies Act, 1862, as applies to companies registered but not formed under it. (3.) All such companies, if formed under the 20 & 21 Vict. c. 14, and 21 & 22 Vict. c. 91, are governed by their rules and articles of association and the Companies Act, 1862. Lastly, (4.) All such companies, if formed under the Companies Act, 1862 (25 & 26 Vict. c. 89), are governed exclusively by the provisions of that Act.

II. Joint stock companies other than banks — and hereunder the following principal classes, viz.:—

(1.) Companies incorporated by statute or charter, and companies for executing any bridge, road, railway, or other like public object, not capable of being carried out unless with the authority of Parliament, and being the companies expressly excepted from the operation of the Act 7 & 8 Vict. c. 110. Formerly, each of such companies was governed by the provisions of its own charter or special Act of Parliament; but latterly general provisions were made for the regulation thereof by the Companies Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Act, 1845, and (but only as to railways) the Railways Clauses Consolidation Act, 1845 (being respectively the Acts 8 & 9 Vict. cc. 16, 18, and 20); and these three general Acts apply also to all companies established by Act of Parliament after the 8th of May, 1845, for the execution of undertakings of a public nature.

(2.) Companies not excepted from the stat. 7 & 8 Vict. c. 110, and requiring under that statute to be registered. That statute was, however, superseded by the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), which has since been repealed by the Companies Act, 1862 (25 & 26 Vict. c. 89); and this latter statute is now in force. It consolidates the laws relating to

JOINT STOCK COMPANIES—continued.

joint stock companies, and includes in its operation all companies formed and registered under the Act of 1856 (19 & 20 Vict. c. 47), or under the Act 18 & 19 Vict. c. 133, together with certain companies not formed under the above-mentioned Acts, nor registered (s. 199). And under its provisions, with the exception of companies and partnerships formed under some other Act, or under letters-patent, or engaged in working mines within the jurisdiction of the Stannaries, every banking company or partnership consisting of more than ten persons, and every other company or partnership having for its object the acquisition of gain, and consisting of more than twenty persons, established since the 1st of November, 1862, must, and any company consisting of seven or more persons associated for any lawful purpose MAY be formed and registered under the statute. And mining companies in the Stannaries may register under it, and then become subject to its provisions. Every other company (except a railway company), whether previously existing, or formed afterwards in pursuance of an Act of Parliament or letters-patent, or otherwise duly constituted by law, and every unregistered company consisting of more than seven members, may, with the assent of the shareholders, be registered as a limited or unlimited company under its provisions.

If not thus registered, the law of companies established under private Acts of Parliament, charters, or letters-patent, is that laid down by their Acts, charters, or letters-patent. Companies thus constituted certainly differ very materially from ordinary firms; but, so far as their Acts, or their charters, or letters-patent have not provided, they are governed by the ordinary law of partnership.

The Companies Acts, 1867 (30 & 31 Vict. c. 131), 1870 (33 & 34 Vict. c. 104), 1877 (40 & 41 Vict. c. 26), and 1879 (42 & 43 Vict. c. 76), have variously amended the Companies Act, 1862.

See titles **LIMITED LIABILITY**; **PARTNERSHIP**.

JOINT TENANTS. Those who hold lands or tenements by joint tenancy (2 Cruise, 431; Litt. s. 277).

See title **SURVIVORSHIP**.

JOINTURE. Is defined by Lord Coke to be "a competent livelihood of freehold for the wife of lands or tenements, &c., to take effect presently in possession or profit, after the decease of her husband, for the life of the wife at least." The woman on whom such a settlement of lands is made is termed a jointress (1 Cruise, 199; 1 Inst. 36). A legal jointure was first authorized

JOINTURE—continued.

by the Statute of Uses, 27 Hen. 8, c. 10, by which statute, if the jointure is *before* marriage, the woman shall not have her election between jointure and dower, but if jointure is *after* marriage, then she shall have her election.

JUDGE ADVOCATE GENERAL: See title **ADVOCATE GENERAL**.

JUDGES. Were originally members of the King's Great Council or *Aula Regia*, i.e., Court of Parliament; but since the reign of Edward III., they have been reduced to the rank of mere advisers of Parliament. They have been often accused of servility in the Stuart periods, but most unjustly; for they decided in accordance with law, and it was for Parliament to amend the law, seeing that popular opinion so strongly demanded its amendment. By the Act of Settlement, they hold their offices during good behaviour (see title **SETTLEMENT, ACT OF**). The number of judges in modern times is very great, and besides the Judges of the Supreme Court (in its two divisions, Original and Appellate), there are also many inferior Judges, e.g., of county courts, &c.; and there are the Lords of Appeal (House of Lords) and the members of the Judicial Committee of the Privy Council. Nearly all judges are members of the Privy Council. They are also the Visitors of the Inns of Court.

JUDGES, IMMUNITY OF. No action lies against a judge of a superior Court (*Fray v. Blackburn*, 3 B. & D. 576), or of an inferior Court (*Scott v. Stansfield*, L. R. 3 Ex. 220), or of the visitor of a college for a judicial act, although it is alleged to have been done maliciously and corruptly, assuming that the judge has jurisdiction (*Kemp v. Neville*, 10 O. B. (N.S.) 523); *secus*, if he had no jurisdiction and knew it (*Houlden v. Smith*, 14 Q. B. 541).

JUDGE'S NOTES: See title **NOTES OF JUDGE**.

JUDGMENT. In an action, judgment may be obtained on various grounds, principally the following:—(1.) For default of appearance to writ of summons; (2.) For default of pleading; (3.) For default of appearance at trial; (4.) On admissions in the pleadings; (5.) At the trial of the action; (6.) On motion subsequent to trial; (7.) On motion without trial; (8.) On motion for new trial; and (9.) On motion for judgment, e.g., upon referee's report.

JUDGMENT, ACTION ON. Upon any judgment, the successful party may, in lieu of issuing execution on the judgment, bring an action on the judgment; and this latter is invariably the course upon a

JUDGMENT, ACTION ON—continued.

strictly foreign judgment (*Houlditch v. Marquis of Donegal*, 8 Bligh (N.S.) 301).

JUDGMENT DEBTS. These are debts, whether on simple contract or by specialty, for the recovery of which judgment has been entered up, either upon a *cognovit*, or upon a warrant of attorney, or as the result of a successful action. The old law of judgments was in many respects different from the present law.

Thus, under the old law, which rested substantially upon the following statutes, namely:—

13 Edw. 1, c. 18;

29 Car. 2, c. 3; and

4 & 5 W. & M. c. 20,

the lands affected by a judgment were the entirety of terms for years only, and one moiety of freehold lands, tithes, reversions, and trust estates whereof the trustee was seised for the debtor *at the time of execution sued*, but not copyhold lands. Estates tail were liable to the extent of one moiety thereof, but *only during the life of the tenant in tail*; and joint tenancies were in the same position. Moreover, trust terms for years, joint trust estates, and equities of redemption were altogether exempt; as were also glebe lands and advowsons in gross. Moreover, purchasers (including mortgagees) were not bound by a judgment which was either undocketed or misdocketed (*Tunstall v. Trappes*, 3 Sim. 286; *Brandling v. Plummer*, 8 De G. M. & G. 747); unless they had notice thereof, in which latter case they were bound (*Davis v. Strathmore (Earl)*, 16 Ves. 419). However, Equity assisted the judgment creditor towards enforcing his execution in respect of those equitable interests before enumerated which were not statutorily liable on an *elegit*; thus, in the case of an equity of redemption in a freehold estate, the judgment creditor, after suing out an *elegit*, might file his bill in Equity for relief (*Neate v. Marlborough (Duke)*, 3 My. & Cr. 407); and in the case of an equitable leasehold or term of years, the judgment creditor, after suing out a *fi. fa.*, might in like manner file his bill in Equity for relief (*Gore v. Bowser*, 1 Jur. (N.S.) 392; *Padwick v. Duke of Newcastle*, L. R. 8 Eq. 700).

On the other hand, under the present law, which depends substantially upon the following statutes, namely:—

1 & 2 Vict. c. 110;

2 & 3 Vict. c. 11;

3 & 4 Vict. c. 82;

23 & 24 Vict. c. 38; and

27 & 28 Vict. c. 112,

the lands affected by a judgment are the entirety of lands, tenements, and hereditaments, whether freehold, copyhold, or lease-

JUDGMENT DEBTS—continued.

hold, and whether legal or equitable, and whether possessed at the time of entering up judgment or afterwards, and whether joint or sole, and whether the interest of the debtor therein amount to an estate in or only to a general power over them. Advowsons are no longer exempt from liability; but with reference to rectories and tithes, only lay and not ecclesiastical ones are intended (*Hawkins v. Gathercole*, 6 De G. M. & G. 1). The judgment prevails against the *jus accrescendi* in the case of joint tenants (1 Dart's V. & P. 431), and also against the issue of tenant in tail, and against remaindermen in tail whom the tenant in tail could bar (*Lewis v. Duncombe*, 20 Beav. 398). And as regards the registration and re-registration of judgments and executions thereon, the short result of the last-mentioned statutes may be stated as follows:—From the 16th of August, 1838, to the 23rd of July, 1860, every judgment that was entered up against the owner of lands required to be registered in the name of the *debtor*, and to be re-registered every five years, in order to become a charge upon the land; from the 23rd of July, 1860, to the 29th of July, 1864, every like judgment required to be registered in the name of the *debtor*, and to be re-registered every five years, and execution thereon required also to be sued out, and also registered in the name of the *creditor*, and the execution must also within three months from the date of such registration have been executed, in order to become a charge upon the land; but since the 29th of July, 1864, no such judgment requires to be registered at all, but execution is to be sued out thereon, and to be also registered in the name of the *debtor*, although even then it is not a charge upon the land until such land has been actually taken under the execution.

Priority of Judgment Debts.—The date of the registration and not that of entering up the judgment, or of the registration and not that of suing out the execution, is the point of time which regulates the priorities or rights of adverse successive claimants; thus, judgment creditors, as between themselves, take rank according to the order of the dates of their several registrations, and notice of an unregistered judgment entered up at a prior date does not affect them (*Benham v. Keane*, 1 J. & H. 685), as neither does such notice affect a subsequent purchaser or mortgagee, this being the construction of the stats. 3 & 4 Vict. c. 82, s. 2, and 18 & 19 Vict. c. 15, s. 5. But notice of an unregistered judgment does affect a subsequent *cestui que trust* (*Benham v. Keane, supra*). And notice of a judgment which

JUDGMENT DEBTS—continued.

has been re-registered within five years prior to the date of the purchase or mortgage does affect a purchaser or mortgagee having notice thereof, notwithstanding an interval of more than five years may have elapsed between such re-registration and the next preceding registration (*Simpson v. Morley*, 2 K. & J. 71); but a purchaser or mortgagee who has no notice of a judgment, although the same has been registered, and, *à fortiori*, as already mentioned, if it is either unregistered or not duly re-registered, is not bound thereby, this being the construction of the stat. 2 & 3 Vict. c. 11, s. 5, for it has been held that registration is not notice (*Robinson v. Woodward*, 4 De G. & Sm. 562), unless, indeed, it can be proved that the party has made an actual search over the period covering the judgment (*Proctor v. Cooper*, 2 Drew. 1); and no such search is compulsory either upon a purchaser or upon a mortgagee (*Lane v. Jackson*, 20 Beav. 535), although it is not, therefore, wise to avoid a search (*Freer v. Hesse*, 4 De G. M. & G. 495). And in case the property is situate in a register county, the registration and re-registration must be made both in the local and in the general registries (*Johnson v. Houldsworth*, 1 Sim. N. R. 106; *Benham v. Keane*, *supra*).

What Judgment Debt charges.—In the case of a judgment which is entered up between a contract for sale and the conveyance of the land, where the judgment is duly perfected as required by the Acts, the judgment creditor could not, by the old law, proceed against the land in the hands of the purchaser (*Lodge v. Lyseley*, 4 Sim. 70), but would have been restrained by injunction from so doing (*Brunton v. Neale*, 14 L. J. (Ch.) 8); the judgment creditor might, however, have come against the unpaid purchase-money (*Forth v. Norfolk (Duke)*, 4 Madd. 505); and the present law is to the same effect (*Brown v. Perrott*, 4 Beav. 585). And by the present law, upon any sale by a mortgagee, the surplus proceeds of sale are charged by any judgments entered up against the mortgagor between the dates of the mortgage and the sale (*Robinson v. Hedger*, 13 Jur. 846). But under the old law and under the present law a judgment entered up subsequently to a voluntary conveyance, and duly perfected, does not upset the prior voluntary conveyance (*Beavan v. Oxford (Earl)*, 6 De G. M. & G. 507), a judgment creditor not being a purchaser within the meaning of the stat. 27 Eliz. c. 4. A judgment entered up against an annuitant has been held to be a charge on the land out of which the annuity issues (*Younghusband v. Gisborne*, 1 De G. & Sm.

JUDGMENT DEBTS—continued.

209); and the like decision was given regarding a judgment entered up against one entitled to a gross sum of money charged on land (*Russell v. McCulloch*, 1 K. & J. 313); but now, by the stat. 18 & 19 Vict. c. 15, s. 11, where a mortgage is paid off prior to the completion of the purchase, any judgment against the mortgagee ceases to be a charge on the lands purchased (*Greaves v. Wilson*, 25 Beav. 434).

Remedies on Judgment Debts.—The extent of the judgment creditor's remedy at Law depends on the 11th section of the 1 & 2 Vict. c. 110, and the extent of his remedy in Equity on the 13th section of that Act. And, accordingly, at Law the judgment creditor may proceed against all legal estates of his debtor, and also against all estates held simply in trust for him, but not against any equity of redemption of his debtor; and in Equity he may proceed against all and every the lands of his debtor, having first taken out an *elegit* (*Smith v. Hurst*, 10 Hare, 80), and obtained actual possession of the lands, if possible, or the nearest equivalent to actual possession (*Guest v. Cowbridge Ry. Co.*, L. R. 6 Eq. 619), and he should pray a sale of the lands (as distinguished from a foreclosure) (*Tuckley v. Thompson*, 1 J. & H. 126), an order for which he may obtain upon petition in a summary way under the 27 & 28 Vict. c. 112 (*Re Isle of Wight Ferry*, 11 Jur. (N.S.) 279). Sometimes both an action and a petition may, however, be necessary (*Re Cowbridge Ry. Co.*, L. R. 5 Eq. 413; *Beckett v. Buckley*, L. R. 17 Eq. 435; *Anglo-Italian Bank v. Davis*, 9 Ch. Div. 275). If neither an *elegit* nor a *fi. fa.* could be sued out there was no remedy (*Padwick v. Newcastle (Duke)*, L. R. 8 Eq. 700); but neither of these writs is now necessary, as a preliminary to equitable execution (*Ex parte Evans, In re Watkins*, 13 Ch. Div. 252).

JUDGMENT, ENTRY OF. All judgments are entered in a book kept by the Court. The entry is usually in the London office; and if the action is one proceeding in the District Registry, then merely an office copy of the judgment is transmitted to the registry to be filed therein. When the judge in Court pronounces judgment, the judgment as entered is dated as of the day it was pronounced, and takes effect from that date. No execution upon the judgment may issue before entry thereof (Order XLII, 9).

JUDGMENT, FOREIGN. May be enforced in this country by action on the judgment, and the judgment itself will be *prima facie* conclusive of the plaintiff's

JUDGMENT, FOREIGN—continued.

right, unless it is clearly erroneous on the face of it (*Simpson v. Fogo*, 1 Johns. & H. 18); and an Admiralty decision on a question of prize is absolutely conclusive. A foreign judgment against the plaintiff in plaintiff's own action may be pleaded as an absolute bar to his second action brought against the same defendant in the domestic forum.

See title **JUDGMENT, PLEA OF.**

JUDGMENT, PLEA OF. This plea, which is otherwise called the plea of *res judicata*, is an absolute defence by way of estoppel to any second action between the same parties for the same cause (*King v. Hoare*, 13 M. & W. 494; *Brinsmead v. Harrison*, L. R. 7 C. P. 547); and even where it is not an absolute estoppel, it is oftentimes available as evidence in a second action, e.g., when evidence of reputation is admissible. But when a judgment is *in rem* properly so called, it is conclusive against all the world (*Phosphate Sewage Co. v. Molleson*, 4 App. Ca. 801).

See title **JUDGMENT, FOREIGN.**

JUDGMENT ROLL. A parchment roll upon which all proceedings in the cause up to the issue, and the award of *venire* inclusive, together with the judgment which the Court had awarded in the cause, were entered. This roll, when thus made up, was deposited in the treasury of the Court, in order that it might be kept with safety and integrity. In practice, the making up and depositing the judgment roll was generally neglected, unless in cases where it became absolutely necessary to do so; as when, for instance, it was required to give the proceedings in the cause in evidence in some other action; for in such a case the judgment-roll, or an examined copy thereof, was the only evidence of them that could be admitted (*Smith's Action at Law*, 184). At the present day there seems to be no judgment-roll of any sort in use, just as there is now no issue-roll, unless it should be in the House of Lords.

See titles **ENTRY ON THE ROLL; ISSUE-ROLL; JUDGMENT, ENTRY OF.**

JUDGMENT, VARIETIES OF. Judgment is given either for the plaintiff or for the defendant; and occasionally the judgment may be given partly for the plaintiff and partly for the defendant. When for the plaintiff, it used to be either a judgment of (1) by *confession*, or (2) by *default*; when given for the defendant it used to be either a judgment of (3) *nonsuit*, (4) *non pros.*, (5) *retraxit*, (6) *nolle prosequi*, (7) *discontinuance*, or (8) *stet processus*; and judgment might be given for

JUDGMENT, VARIETIES OF—contd.

either party upon (9) *demurrer*, (10) *issue of nul tiel record*, or (11) *verdict*.

A judgment (1) by *confession*, or (2) by *default*, was such a judgment as was signed against the defendant when the justice of the plaintiff's claim was admitted by him, either (1) in express terms, as by giving a *cognovit*, or (2) by conduct, as by failing to take proper steps in the suit. These two varieties of judgment are still in use.

See titles **ATTORNEY, WARRANT OF; COGNOVIT ACTIONEM; DEFAULT, JUDGMENT BY.**

A judgment upon (3) *nonsuit* was a judgment given to the defendant whenever it clearly appeared that the plaintiff had failed to make out his case by evidence. This variety of judgment is also still in use, but its effect is now the same as that of any other judgment against the plaintiff.

A judgment of (4) *non pros.* was a judgment which the defendant was entitled to have against the plaintiff when he did not follow up (*non prosequitur*) his suit as he ought to do, as by delaying to take any of those steps which he ought to take beyond the time appointed by the practice of the Courts for that purpose. This variety of judgment is also still in use, but is now called Judgment dismissing the action for want of prosecution, &c.

See title **DISMISSAL OF ACTION.**

A (5) *retraxit*, or (6) *nolle prosequi*, was when the plaintiff, of his own accord, declined to follow up his action; the difference between them was, that a *retraxit* was a bar to any future action brought for the same cause, whereas a *nolle prosequi* was not, unless made after judgment (*Bowden v. Horn*, 1 Bing. 716). These two varieties of judgment are still in use, but are not now familiarly known by these names.

See titles **NOLLE PROSEQUI; RETRAXIT.**

A judgment on a (7) *discontinuance* was when the plaintiff found that he had misconceived his action and obtained leave from the Court to discontinue it, on which judgment was given against him, and he had to pay the costs. This variety of judgment is still in force.

See title **DISCONTINUANCE.**

A judgment on a (8) *stet processus* was entered when it was agreed, by leave of the Court, that all further proceedings should be stayed; though in form this was a judgment for the defendant, yet it was generally like a discontinuance, being, in point of fact, for the benefit of the plaintiff, and entered on his application; as, for instance, when the defendant had become insolvent, &c. This variety of judgment hardly exists at the present day, but something like it is found in the judgment

JUDGMENT, VARIETIES OF—contd.

or order staying all proceedings in the action.

See titles **STAY OF PROCEEDINGS**; **STET PROCESSUS**.

Judgment on (9) *demurrer* was such a judgment as was pronounced by the Court upon a question of law submitted to it, as opposed to a question of fact, which was submitted to a jury. This variety of judgment is of course still in force.

See title **DEMURRER**.

A judgment upon an (10) *issue of nul tiel record* was when a matter of record was pleaded in any action—as a fine, a judgment or the like—and the opposite party pleaded “*nul tiel record*,” i.e., that there was no such matter of record existing; upon this issue was joined; and thereupon the party pleading the record had a day given him to bring it in, and proclamation was made in Court for him to “bring forth the record by him in pleading alleged, or else he should be condemned;” and on his failure to do so his antagonist had judgment to recover. This variety of judgment still exists, but the proceedings towards it have been much simplified.

See title **NUL TIEL RECORD**.

A judgment upon (11) a *verdict*, was the judgment of the Court pronounced after the jury had given their verdict. This variety of judgment is of course still in force.

See title **VERDICT, JUDGMENT UPON**.

JUDICATURE ACTS. These Acts are the following: the Principal Act, 1873, viz., 36 & 37 Vict. c. 66; the Commencement Act, 1874 (37 & 38 Vict. c. 88); the Judicature Act, 1875 (38 & 39 Vict. c. 77); the Judicature Act, 1877 (40 Vict. c. 9); and to these may be added the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59). The modifications introduced by these various Acts in the Courts, are stated under the title **COURTS OF JUSTICE**; the modifications introduced by them in the procedure and practice of the Courts generally are stated under the appropriate titles, *passim*.

JUDICES PEDANEI. In Roman Law, were inferior or assistant judges, in the times of the *extraordinaria judicia*. They had jurisdiction in causes up to 300 solidi; but the jurisdiction was consensual. They combined the functions of judge and jury (Hunter's Roman Law, 1st ed., 804).

JUDICIAL COMMITTEE OF PRIVY COUNCIL. Is a judicial body consisting of Privy Councillors established by the stat. 8 & 4 Will. 4, c. 41. It consists of the

JUDICIAL COMMITTEE OF PRIVY COUNCIL—continued.

Lord President of the Council, the Lord Chancellor, and certain of the judges (e.g., the judges lately known as the Lords Justices) being Privy Councillors; and under the stat. 34 & 35 Vict. c. 91, and the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), there are four paid members, and in the case of ecclesiastical appeals, the archbishops and bishops, or some of them, attend either as members or as assessors, under the last-mentioned statute and an Order in Council dated the 28th of November, 1876, whereby the rotation of their attendance is prescribed together with the mode of requiring their attendance. Besides ecclesiastical cases, this Committee or Court takes cognizance of all appeals from the colonies (including India), and all appeals in lunacy matters, and generally appeals in all other matters in which the Crown's intervention is rather executive than judicial.

JUDICIAL SEPARATION. A married woman may obtain a judicial separation from her husband on the ground of his cruelty, desertion, or adultery (20 & 21 Vict. c. 85, s. 27); and upon the judicial separation, the wife becomes a *feme sole* for all purposes of property and of contract (20 & 21 Vict. c. 85, ss. 24–32); and upon the resumption of cohabitation, her property will remain separate, unless the parties should have otherwise agreed. A husband may also have a judicial separation from his wife (although a divorce is more usual); and upon any such separation, the Court may order a settlement of the wife's unsettled property upon her husband and children, if any (20 & 21 Vict. c. 85, s. 45), or upon the husband alone, if there are no children (41 Vict. c. 19).

See title **MATRIMONIAL CAUSES**.

JUDICIAL WRITS. Were writs issued under the private seal of the Courts, and not under the great seal of England; they were tested or witnessed not in the name of the king or his chancellor, but in the name of the chief judge of the Court out of which they issued. The word “judicial” was used in contradistinction to “original;” original writs signifying such as issued out of Chancery under the great seal, and were witnessed in the king's name. After the Uniformity of Process Act (2 Will. 4, c. 39, s. 31), the distinction became almost useless; and under the Judicature Acts, it is abolished so far as regards writs of summons for commencing actions, all of which are now tested in the name of the Lord Chancellor, in whatever division they are issued.

See title **WRIT OF SUMMONS**.

JUDICIS POSTULATIO: See title **LEGIS ACTIONES**.

JUDICIUM SEMPER PRO VERITATE: See titles **JUDGMENT, FOREIGN**; **JUDGMENT, PLEA OF**; **RES JUDICATA, PLEA OF**.

JUGES D'INSTRUCTION. In French Law, are officers subject to the *Procureur-Impérial* or *Général*, who receive in cases of criminal offences the complaints of the parties injured, and who summon and examine witnesses upon oath, and after communication with the procureur-imperial draw up the forms of accusation. They have also the right, subject to the approval of the same superior officer, to admit the accused to bail. They are appointed for three years, but are re-eligible for a further period of office. They are usually chosen from among the regular judges.

See title **PROCEUREUR GÉNÉRAL OR IMPÉRIAL**.

JUNTO. The junto was a popular nickname applied to the Whig ministry between 1693-96. They clung to each other for mutual protection against the attacks of the so-called Reactionist Stuart party.

JURAT (from the Lat. *juratus*, sworn by). The clause written at the foot of an affidavit, stating when, where, and before whom the affidavit was sworn, is called the jurat.

JURE MARITI: See title **MARITAL RIGHT**.

JURI PRO SE INTRODUCTO, etc.: See title **CUILIBET LICET JURI, &c.**

JURIS UTRUM. A writ that lay for the succeeding incumbent of a benefice, to recover the lands or tenements belonging to the church, which had been aliened by his predecessor (*Les Termes de la Ley*).

JURISDICTION. The right, power, or authority which an individual or a Court has to administer justice. Thus the three superior Courts of Common Law—viz., the King's Bench, Common Pleas, and Exchequer, have jurisdiction over all personal actions throughout England; that is, they have power and authority to hear and determine such actions throughout England.

JURISDICTION, APPELLATE. The Divisional Court has appellate jurisdiction from all inferior Courts; but it has also a large original jurisdiction independently of such appeals. On the other hand, the Court of Appeal has a general appellate jurisdiction in matters coming up from the High Court of Justice, but it has no original jurisdiction at all, excepting such as is incidental to the exercise of its appellate jurisdiction. And lastly, the House of Lords has a large appellate jurisdiction in

JURISDICTION, APPELLATE—contd.

matters coming up from the Court of Appeal in England, and the corresponding Court in Ireland, and the Court of Session in Scotland, and only such original jurisdiction as is incident to the due exercise of its appellate jurisdiction, or as belongs to it in the matter of peerage questions. The Privy Council is the Court of Appeal for the colonies and dependencies of the Crown, and also for matters ecclesiastical throughout the Queen's dominions.

JURISDICTION, ORIGINAL: See title **JURISDICTION, APPELLATE**.

JURORS, IMMUNITY OF. In early times juries were subject to punishment and intimidation for giving and in giving certain verdicts, the chief processes against them being two, namely:—

- (1.) By writ of attain; and
- (2.) By summary fine and imprisonment.

First. Attain was a process which lay partly by the Common Law and partly by statute. The proceeding consisted in impanelling a jury of twenty-four to try the verdict of the twelve. The verdict of the twenty-four was final, and if opposed to that of the twelve, it operated the two following effects, namely:—

- (1.) It annulled the former verdict; and
- (2.) It convicted the twelve of perjury and false verdict.

Thereupon, the convicted jurors were arrested and imprisoned and rendered infamous for ever; their lands and goods were forfeited to the king, their wives and children were turned out of their homes, their houses were thrown down, their trees were rooted up, and their meadows were ploughed. This proceeding was available only in the case of a verdict in civil causes.

Secondly, the summary process by fine and imprisonment, although it was frequently resorted to, was admitted to be illegal, as being against Magna Charta. The Star Chamber was the Court by which chiefly this summary jurisdiction was exercised; and although in certain cases there may have been good cause for the Star Chamber to intervene (it is alleged, e.g. in the case of Welsh juries), still the jurisdiction and the exercise of it were alike inexcusable. After the abolition of the Star Chamber in 1641, the practice of fining and imprisoning jurors for giving false verdicts was not altogether discontinued; for in 22 Car. 2, it was again resorted to in the case of Bushell, who was one of the jury who had (notoriously against the truth) found that Penn and Mead had not preached in Gracechurch Street, contrary to the Act of Uniformity, the Five Mile Act, or the Conventicle Act. This man Bushell, having been imprisoned

JURORS, IMMUNITY OF—*continued.*

along with his fellow jurors upon the late trial, sued out his writ of habeas corpus; and the cause of his imprisonment being stated in the return made to his writ to be that he had found a verdict in favour of Penn and Mead, *contrary to the evidence* and also *contrary to the direction of the judge in matter of law*, after argument upon the sufficiency or legality of that cause of imprisonment, Vaughan, C.J., ordered Bushell to be released, holding in effect, therefore, that jurors could not be fined or imprisoned for an alleged false verdict, and basing that opinion upon the following grounds:—

(1.) That the jury were the judges of the evidence and found the same, and their finding was the only evidence, no matter what the alleged evidence adduced might be; and

(2.) That the judge's direction, even in matter of law, was not imperative or absolute, but was hypothetical merely, for he could not direct what the law was without first knowing the fact, and the jury had not as yet found the fact at the time he gave his direction.

This sophism of the chief justice, which even a regard for liberty can scarcely palliate, was effectual in causing the abandonment of the summary procedure against jurors for the future. The other and regular proceeding, that by attain, fell gradually into disuse by reason of the extreme severity of its consequences, and it was eventually abolished altogether by the County Juries Act, 1825 (6 Geo. 4, c. 50), which substituted a motion for a new trial as the mode, and that is at the present day the only mode, of impugning or, at any rate, reviewing the verdict of a jury. This mode is available, moreover, in civil cases only.

JURY. A jury is either a grand jury or a petty jury; and a petty jury may be either a common jury or a special jury. A *grand jury* is a jury (used in criminal cases only) before whom the accused person is brought, and the witnesses for the prosecution examined, in order that a true bill or indictment may be found or not. The grand jury is composed of the most notable freeholders in the county; and in the case of boroughs having a separate sessions it is composed of the burgesses. A *petty jury* is a certain number of men (usually twelve) to whose decision the matter in dispute between a plaintiff and defendant is submitted, and who are bound upon their oaths to decide (or give their verdict) according to the evidence which is laid before them on the trial of the cause. Such men, individually, are called

JURY—*continued.*

jurors. A jury is either a common jury or a special jury. A *common jury* consists of persons between the ages of twenty-one and sixty, who have £10 a year, beyond reprises, in lands and tenements of freehold, copyhold, or customary tenure, or held in ancient demesne, or in rents issuing out of such tenements, in fee simple, fee tail, or for life, or £20 a year in leaseholds held for twenty-one years or any longer term, or any term determinable on a life or lives; or being householders are rated to the poor rate, or in Middlesex to the house duty, in a value of not less than £30; or who occupy a house containing not less than fifteen windows. These qualifications, however, do not extend to jurors of any liberties, franchises, cities, or boroughs possessing civil or criminal jurisdiction. This jury is called a common jury, because the matter to be tried by it is only of a common or ordinary nature. A *special jury* consists of persons of the degree of squire or upwards, or of the quality of banker, or merchant, &c. It is called special, because the matter to be tried by it is usually of a special and important nature, and is supposed to require men of education and intelligence to understand it (Jury Act, 1870, 33 & 34 Vict. c. 77).

See titles **GRAND JURY**; **PETTY JURY**.

JURY, TRIAL BY, HISTORY OF. It is a disputed point whether trial by jury existed in Anglo-Saxon times, but the following may be considered as traces of that mode of trial in those times in its rudest aspect:—

(1.) A law of Alfred, requiring a king's thane accused of homicide to purge himself of the charge with twelve king's thanes, and a lesser thane under like accusation to purge himself with eleven of his equals and one king's thane;

(2.) One of the canons of the Northumbrian clergy, requiring a king's thane to purge himself before twelve king's thanes of his own choice, twelve others appointed for him, and twelve British strangers, being thirty-six men altogether, with similar provisions for lesser thanes and ceorls;

(3.) A law of Ethelred II., whereby the sheriff and twelve thanes in every wapentake were constituted a tribunal of justice; and

(4.) The case of the monastery of Ramsey, in which a controversy between the monastery and a certain private individual having arisen regarding certain lands, and a suit having been instituted about it in the County Court, the matter was referred to a committee of thirty-six thanes for its determination.

Now, it may be said that these bodies

JURY, TRIAL BY, HISTORY OF—continued.

were not jurors, but compurgators; but to this it is replied that compurgation was, in Anglo-Saxon times (as in all early ages), a natural mode of evidence, being the oath or oaths of the collective bodies to the effect that they disbelieved the truth of the accusation (*see* title **COMPURGATION**), and it being, moreover, a more peculiar characteristic of the Anglo-Saxons that they gave great weight to credit or general character,—a species of evidence but little regarded in civilised times, *e.g.*, in the present day.

This rude mode of taking evidence having been discontinued in Anglo-Norman times, there was introduced in those later times, in lieu of compurgation, an *inquest*, or inquisition, *i.e.*, inquiry into the particular circumstances or the details of the case, but evidence of character was not even then (as it is not even yet) altogether laid aside.

This inquest was made by sworn *recognitors*, being twelve or twenty-four in number, as well in civil as in criminal proceedings. In the reign of Henry II., the assize of *novel disseisin*, called also the *magna assize*, or *grand assize*, was introduced, whereby, in a civil suit, the plaintiff or defendant had his choice either to try the dispute by *combat*, or to put himself on this assize, which was composed of sixteen sworn recognitors, and in the same reign the ancient privilege of compurgation, pure and simple, was abolished.

In the reign of Henry III. trial by ordeal was abolished, and trial by a petty jury in criminal causes was introduced; and with that reign trial by jury, both in civil and in criminal matters, may be regarded as having been for the first time completely established, subject, however, to the following qualification, namely,—

The jurymen were originally themselves the witnesses, and their verdict or finding was the result of their own knowledge, unassisted by other testimony; but it was impossible that twelve men should always be acquainted with the circumstances of the matter before them, and the distinction of jurors from witnesses was early felt to be a necessity, and the distinction itself was, in fact, made at some early but unassignable date. It is probable that as the law of evidence became gradually better understood, and the weakness of character-evidence became gradually more apparent, so the distinction referred to became gradually more and more perceived to be necessary and to be taken, until, at the present day, the distinction is become marked and essential. And yet, even at the present day, the jury may and do assist themselves

JURY, TRIAL BY, HISTORY OF—continued.

by their own knowledge as well as by the testimony of the witnesses.

JURY, TRIAL BY, PRACTICE OF: *See* title **TRIAL BY JURY**.

JUS. Right, law, authority, &c.

JUS ACCRESCENDI is used by our old law writers to signify the right of survivorship amongst joint tenants, &c.; and that was also the meaning of the phrase in Roman Law (Justinian's Inst. ii. 7. 4).

See title **SURVIVORSHIP**.

JUS ACCRESCENDI PRÆFERTUR ONE-RIBUS. The right of survivorship is preferred to charges (not being alienations) made by either of the joint tenants; but, *nota bene*, not to leases, mortgages, or any other alienations *in toto* or *pro tanto*. In fact the maxim must be carefully guarded even in its application to charges; *e.g.*, if lands are delivered on a judgment, or charge, the right of survivorship is subject to such judgment or charge.

JUS AD REM signifies the inchoate or imperfect right to a thing, in contradistinction to *jus in re*, which signifies the complete and perfect right in the thing. The phrase is equivalent to the phrase *jus in personam*, the full expression of which is *jus in personam ad jus in rem acquirendum*.

JUS AELIANUM. A body of laws drawn up by Sextus Aelius, and consisting of three parts, wherein were explained respectively,—(1.) The laws of the xii. Tab.; (2.) The interpretation of and decisions upon such laws; and (3.) The forms of procedure. In date, it was subsequent to the *Jus Flavianum*.

JUS CIVILE. In Roman Law, was the law peculiar to any particular state (*jus proprium ipsius civitatis*).

JUS DUPLICATUM, or DROIT DROIT. Signifies the right of possession joined with the right of property.

See title **DROIT**.

JUS FLAVIANUM. A body of laws drawn up by Cneius Flavius, a clerk of Appius Claudius, from the materials to which he had access. It was a popularization of the laws.

JUS GENTIUM. In Roman Law, was the law common to two or more states (*quasi quo jure omnes gentes utuntur*).

JUS IN PERSONAM. Is a right against any individual in particular, and having for its object the acquisition of a *jus in rem* (*jus in personam ad jus in rem acquirendum*).

JUS IN RE. Is a right of enjoyment (either limited or unlimited) in or over a thing, whether that thing be a *res aliena* or a *res propria*.

JUS IN RE ALIENÂ. Is the right of enjoyment which is incident not to full ownership or property, but to certain limited ownerships in or rights over or in respect of the thing.

See titles EASEMENTS; SERVITUDES.

JUS IN REM. Is a right availing against no individual in particular, but all the world in general.

See title JUS IN PERSONAM.

JUS IN RE PROPRIÂ. Is the right of enjoyment which is incident to full ownership or property, and is often used to denote the full ownership or property itself. It is distinguished from *jus in re alienâ*, which is a mere easement or right in or over the property of another.

JUS LATIUM. In Roman Law, was a rule of law applicable to magistrates in Latium; it was either *majus Latium* or *minus Latium*,—the *majus Latium* raising to the dignity of Roman citizen not only the magistrate himself but also his wife and children; the *minus Latium* raising to that dignity only the magistrate himself.

JUS NATURALE. In Roman Law, was often used interchangeably with the *jus gentium*; but in its stricter sense it was that law which nature has taught all the animals (*quod natura omnia animalia docuit*).

JUS NON SCRIPTUM: See title JUS SCRIPTUM, &c.

JUS PAPIRIANUM. In Roman Law, was a body or collection made by Sextus Papirius of all the extant *leges regie*, or laws enacted by the early kings of Rome, and which were prior to the laws of the Twelve Tables.

JUS POSTLIMINII is the right of restitution after re-capture as applied in maritime law,—a use of the phrase which is derived from the Roman *jus postliminii*, which restored the citizen of Rome who had been made a slave to his threshold, i.e., to his franchise, upon his return home, and feigned or assumed that he had never in fact been in captivity at all. The term is therefore metaphorically used in Admiralty Law to signify the resumption by Law of an original inherent right to a re-captured British ship in the legal owners. But the phrase is also frequently used with an analogous meaning in other branches of the law.

See titles POSTLIMINY; RE-CAPTURE.

JUS QUIRITUM. The old law of Rome, that was applicable originally to Patricians only, and under the xii. Tab. to the entire Roman people was so called, in contradistinction to the *jus prætorium* or equity.

JUS RECUPERANDI, INTRANDI, &c., is the right of recovering and entering lands (Tomlins; Cowel).

JUS RESPICIT ÆQUITATEM. The law has always regard (more or less) to natural justice or equity, and may qualify or withhold its own process accordingly. And now the law is obliged to observe all that portion of natural equity which was enforceable in the Court of Chancery.

See title LAW AND EQUITY.

JUS SCRIPTUM VEL NON SCRIPTUM. The *jus scriptum* is "enacted" law, from the word *scribere* (Gr. *γραφειν*) to enact; it therefore comprises the English statute law; and in Roman Law, it comprised statutes and statute-like enactments only. The *jus non scriptum* is all the remaining or unenacted portion of the law—to wit, the common law or general customary law of England, and the *jus moribus constitutum* of the Roman Law (*Nam quid interest utrum suffragio populus voluntatem suam declaret, an rebus ipsis et factis?*). The difference between the two kinds of laws is well brought out in the following extract from the judgment of Pollock, C.B., in the case of *Chappel v. Purday*, 14 Mea. & W. 316:—

"Two questions of importance were raised in the course of the argument. The first is, whether at Common Law a foreigner residing abroad, and composing a work, has a copyright in England. The second is, whether such foreign author, or his assignee, has such a right by virtue of the English statutes. . . . We are all of opinion that no such right exists in a foreigner at the Common Law; but that it is the creature of the municipal law of each country, and that in England it is altogether governed by the statutes which have been passed to create and regulate it. A foreign author having, therefore, by the Common Law, no exclusive right in this country, the only remaining question is, whether he has such a right by the Statute Law; and this depends on the construction of the statutes relating to literary copyright which were in force at the time of the transaction in question."

JUS TERTII. This phrase, which signifies literally the right of some third person, is commonly applied in the following manner: a tenant, it is true, cannot dispute the title of his landlord, but he may plead that such title has determined by convey-

JUS TERTII—*continued*.

ance or otherwise; and so also a bailee when sued to re-deliver the goods bailed to him, cannot as a rule deny the right of the bailor (who delivered them to him) to recover the goods; nevertheless he may shew that by transfer, assignment or otherwise, the bailor's right to have the goods re-delivered to him has determined.

JUSTICES. Officers appointed by the Crown to administer justice. The various sorts of justices will be found under their proper heads in the following titles.

JUSTICES OF ASSIZE, or, as they are sometimes called, justices of *nisi prius*. The judges of the superior Courts, who go circuit into the various counties of England and Wales for the purpose of disposing of such causes as are ready for trial at the assizes, are termed justices of assize.

See title **CIRCUITS**.

JUSTICES IN EYRE. So called from the old French word *eire*, i.e., a journey, were those justices who in ancient times were sent by commission into various counties to hear more especially such causes as were termed pleas of the Crown; they differed from justices of *oyer and terminer*, inasmuch as the latter were sent to one place, and for the purpose of trying only a limited number of special causes; whereas the justices in eyre were sent through the various counties with a more indefinite and general commission; in some respects they resembled our present justices of assize, although their authority and manner of proceeding differed much from them.

See title **EYRE**.

JUSTICES OF THE FOREST. Were officers who had jurisdiction over all offences committed within the forest against vert or venison. The Court wherein these justices sat and determined such causes was called the justice seat of the forest. They were also sometimes called the justices in eyre of the forest.

See title **VERT AND VENISON**.

JUSTICES OF GAOL DELIVERY. Those justices who are sent with a commission to hear and determine all causes appertaining to persons who for any offence have been cast into gaol. Part of their authority was to punish those who let to mainprise those prisoners who were not bailable by law; and they seem formerly to have been sent into the country upon this exclusive occasion, but afterwards had the same authority given them as the justices of assize.

JUSTICES OF THE HUNDRED were hundredors, lords of the hundreds, they who had the jurisdiction of hundreds and held the Hundred Courts.

JUSTICES OF THE JEWS. Justices appointed by Richard I. to carry into effect the laws and orders which he had made for regulating the money contracts of the Jews.

JUSTICES OF LABOURERS. Justices who were formerly appointed to try questions relating to the wages of labouring men, who sometimes would not work without having wages granted them, beyond the amount prescribed by the Statute of Labourers (23 Edw. 3).

See title **LABOURERS, STATUTE OF**.

JUSTICES OF NISI PRIUS: See title **JUSTICES OF ASSIZE**.

JUSTICES OF OYER AND TERMINER. Were certain persons appointed by the king's commission, among whom were usually two judges of the Courts at Westminster, and who went twice in every year to every county of the kingdom (except London and Middlesex), and at what was usually called the assizes heard and determined all treasons, felonies, and misdemeanors.

JUSTICES OF THE PEACE. Certain justices appointed by the king's special commission under the great seal, jointly and separately to keep the peace of the county where they dwell. Any two or more of them are empowered by this commission to inquire of and determine felonies and other misdemeanors, in which number some particular justices, or one of them, are directed to be always included, and no business is to be done without their presence, the words of the commission running thus: "*quorum aliquem vestrum*," A. B. C. D., &c., "*unum esse volumus*;" whence the persons so named are usually called *justices of the quorum*.

JUSTICES OF THE PEACE, ORIGIN OF. The origin of these magistrates is to be found in the reign of Edward I., who by the stat. 8 Edw. 1 (Statute of Westminster the First) c. 9, and by the statute of Coroners (4 Edw. 1, stat. 2), but chiefly by the statute of Winton, otherwise Winchester (13 Edw. 1), directs that every county and town should be well kept, and that upon any robbery or felony committed therein, *hue and cry* should be raised upon the felon, and they that kept the town were to follow him with hue and cry from town to town with all the town and the towns near; and failing capture, the hundred was made liable for the damage. In the reign of Edward III., conservators of the peace were appointed, whose duty it was to assist the sheriff, coroner, and constable, and they were empowered to imprison and punish rioters and offenders. These conservators were afterwards desig-

JUSTICES OF THE PEACE, ORIGIN OF
—continued.

nated justices of the peace. By a more recent statute, 27 Eliz. c. 13, the sheriff or constable was required to make the pursuit both with horse and foot; and to the present day, hue and cry in that manner may still be made under that and the previous statutes, but is seldom if ever in fact made, owing to the equally effective, if not so speedy, remedy which is provided in the ordinary police and criminal processes for the apprehension and punishment of offenders.

JUSTICES OF THE QUORUM: See title **JUSTICES OF THE PEACE**; **QUORUM**.

JUSTICIAR: See title **LORD CHIEF JUSTICE**.

JUSTICES, WRIT OF. A writ which used to be directed to the sheriff, empowering him for the sake of dispatch to try an action in his County Court for a larger amount than he had the ordinary power to do. It was so called because it was a commission to the sheriff to do the party justice (4 Inst. 266).

See title **COUNTY COURTS**.

JUSTIFIABLE HOMICIDE: See title **HOMICIDE**.

JUSTIFICATION. Pleas in justification or excuse are such as shew some justification or excuse of the matter charged in the declaration, the effect of which is to shew that the plaintiff never had any right of action because the act charged was lawful; a plea of *son assault demesne* is one of this kind of pleas (Stephen on Plead. 224). And so in actions of libel, the defendant justifies on the score either of privilege, or of truth, or such like.

JUSTIFYING BAIL. Is the act of proving to the satisfaction of the Court that the persons put in as bail for the defendant in prosecution are competent and sufficient persons for the purpose. No persons are justified in becoming bail for a defendant unless they are householders and possess certain other qualifications with reference to property, &c.; but it frequently happens that persons become, or endeavour to become, bail for an accused person, who are not so qualified, or whom the prosecuting plaintiff suspects not to be so qualified: in this case the plaintiff objects to such bail (or, as it is termed, excepts to them); and they are then called on to justify themselves, and this they do by swearing themselves to be householders, and to possess the other qualifications required of them; and this is termed justifying bail. They frequently justify voluntarily, without being required to do so by

JUSTIFYING BAIL—continued.

the plaintiff (1 Arch. Prac. 847-57; Tidd. 149).

JUVENILE OFFENDERS: See title **REFORMATORY**.

K.

KEEPER OF THE GREAT SEAL. A high officer of state, through whose hands pass all charters, grants, and commissions of the king under the great seal. He is styled Lord Keeper of the Great Seal, and this office and that of Lord Chancellor are usually united in one person; for the authority of the Lord Keeper and that of the Lord Chancellor were, by stat. 5 Eliz. c. 18, declared to be exactly the same; and like the Lord Chancellor, the Lord Keeper at the present day is created by the mere delivery of the king's great seal into his custody (Comyns' Dig. tit. Chancery).

KEEPER OF THE PRIVY SEAL. An officer through whose hands pass all charters signed by the king before they come to the great seal. He is a privy councillor, and was anciently called clerk of the privy seal, but is now generally called the Lord Privy Seal (Rot. Parl. 11 H. 4).

KIN, NEXT OF: See titles **COLLATERAL CONSANGUINITY**; **LINEAL CONSANGUINITY**; **NEXT OF KIN**.

KING: See titles **PREROGATIVE**; **SUCCESSION TO CROWN**, **LAW OF**; **CIVIL LIST**, **SETTLEMENT OF**.

KING, PREROGATIVE OF: See title **PREROGATIVE**.

KING'S BENCH. Was the supreme Court of Common Law in the kingdom, consisting of a chief justice and four puisné justices, who, by their office, were the sovereign conservators of the peace and supreme coroners of the land. The Court of King's Bench was so called because the king used formerly to sit there in person, the style of the Court being *coram ipso rege*. This Court was a remnant of the *Aula Regis*, and was formerly not stationary in any particular spot, but attended the king's person wherever he went, process issuing out of that Court in the king's name being returnable, "*ubicunque fuerimus in Angliâ*," (4 Inst. 13).

See title **COURTS OF JUSTICE**.

KING'S CHAMBERS. Are the bays, gulfs, &c., forming portion of the maritime territory.

KING'S COUNSEL. Barristers selected on account of their superior learning and talent to be his majesty's counsel; the

KING'S COUNSEL—*continued.*

only outward distinction between these and other barristers is, that they wear silk gowns and take precedence in Court. The two principal of the king's counsel are called the Attorney and Solicitor-General, and none of these counsel can plead publicly in Court for a prisoner or a defendant in a criminal prosecution without a licence obtained for that purpose from the Crown. (Fortescue, *de Legibus*, c. 50).

KING'S PEACE. Means the peace of the people of the country generally; e.g., criminal offences are contrary to the king's peace, i.e., to the peace of the people of the country generally.

See title CRIME.

KNIGHT SERVICE. A species of feudal tenure, which differed very slightly from a pure and perfect feud, being entirely of a military nature; and it was the first, most universal, and most honourable of the feudal tenures. To make a tenure by knight service, a determinate quantity of land was necessary, which was called a knight's fee, the measure of which was estimated at twelve plough-lands (Spelman, 219; 2 Inst. 506). This tenure was commuted into free and common socage by the stat. 12 Car. 2, c. 24, but some remnants of it still remain in the tenures of grand serjeanty and petit serjeanty.

See titles FEUDAL SYSTEM; GRAND SERJEANTY; PETIT SERJEANTY.

KNIGHT'S FEE: See title KNIGHT SERVICE.

KNIGHTS OF THE SHIRE. Knights of the shire, otherwise called knights of Parliament, are two knights or gentlemen of property who are elected by the freeholders of a county to represent them in Parliament. In old times they were required to be real knights girt with the sword, but now notable esquires may be chosen, and in fact any one, no matter what his station in life or his degree in society. They required to possess, as a qualification to be chosen, not less than £600 per annum of freehold estate. But, at the present day, all property qualifications in members of Parliament have been removed.

See title MEMBER OF PARLIAMENT.

L.

LABOURERS, STATUTE OF. An Act of 1340 (28 Edw. III.), whereby and by other statutes between that year and 1368, attempts were made to regulate wages, and to enforce compulsory labour.

See titles WAGES; WORKMEN.

LACHES (from the Fr. *lâchesse*, indolence). Negligence, delay, &c. Thus, in Littleton, "laches of entry," signifies a neglect in the heir to enter (Litt. 136; *Les Termes de la Ley*). Laches is a ground for refusing relief in Courts of Equity, upon the maxim of these Courts, "*Vigilantibus non dormientibus æquitas subvenit*"; and so strong is the aversion to bringing forward stale demands, that the Courts of Equity, at any rate in the matters which are subject to their exclusive jurisdiction, refuse to relieve even within the statutory periods of limitation; although, of course, in matters which are subject to their concurrent jurisdiction, they must allow the plaintiff his full legal period.

LADING, BILL OF: See title BILL OF LADING.

LESE MAJESTY. An old term of law, designating the crime of attempting anything against the king's life, or to raise sedition against him, or to create disaffection in the army (see 2 Reeve's Eng. Law, 5, 6). The modern equivalent is HIGH TREASON.

See title TREASON.

LESIONE FIDEL, SUITS PRO. Suits or actions for breach of faith in civil contracts, which the clergy, in the reign of Stephen, introduced into the spiritual Courts, were so termed. By means of these suits they took cognizance of many matters of contract which in strictness belonged to the temporal Courts. It is conjectured that the pretence on which they founded this claim to an extended jurisdiction was that, oaths and faith solemnly plighted being of a religious nature, the breach of them belonged more properly to the spiritual than to the lay tribunals (1 Reeves, 74). These suits, along with the jurisdiction assumed over express and implied or resulting uses, open or secret, contributed to the development of certain branches of the equitable jurisdiction of the Court of Chancery.

See title LAW AND EQUITY.

LAKE. If inland and non-tidal, the soil and the water of the lake and the fishery therein belong to the owner or owners of the land or lands by which it is surrounded; and if inland and tidal, or if exposed on one side to the sea, a lake together with the fishery therein belongs to the Crown (*Bristol v. Cormican*, 3 App. Cas. 641).

See title RIVERS.

LAMMAS LANDS. Are a species of common-lands, but the right of pasture over which is only during the interval between the removal of the crops grown thereon in each year and the time for pro-

LAMMAS LANDS—*continued*.

paring the land for the next sowing. In order to make a right of common over lammas lands appurtenant to particular lands, there must be some relation between the enjoyment of the particular lands and the enjoyment of the right of pasture, e.g., where the right claimed is for the beasts which plough the particular lands, or for the beasts used on such lands not exceeding a certain number (*Baylis v. Tyson-Amhurst*, 6 Ch. Div. 500).

LANCASTER CHANCERY COURT: See title LANCASTER, DUCHY OF.

LANCASTER, DUCHY OF. The lands of this duchy are by stat. 1 Hen. 7, vested in the sovereign of England and his or her heirs for ever, but as a separate inheritance of the Crown. The Court of the Duchy is a Court held before the Chancellor or his deputy, and the proceedings have always been like those in the High Court of Chancery, which latter Court has also concurrent jurisdiction with the Lancaster Chancery Court. The stats. 13 & 14 Vict. c. 43, and 17 & 18 Vict. c. 82, largely regulate the jurisdiction.

LAND. This word has a very comprehensive signification in law; for it comprehends not only land or ground, but also anything that may stand thereon, as a house, a castle, or a barn. It has also an indefinite extent upwards as well as downwards, "*Cujus est solum ejus est usque ad cælum, et deinde usque ad inferos*," being the maxim of the law; and therefore no man may erect any building or the like to overhang another's lands, and whatever is in a direct line between the surface of any land and the centre of the earth belongs *primâ facie* to the owner of the surface, so that the word "lands" comprehends not only the face of the earth, but everything under it or over it (Co. Litt. 4 a). When, however, the word "land" was used in a declaration of ejectment without any qualifying adjunct, it obtained a very restricted sense, and meant arable land (Salk. 256); in such cases, therefore, the particular kind of land was usually stated (Cowp. 346; 11 Rep. 55; Adam's Eject. 31; 2 Ch. Pl. 626, n. (o). 6th ed).

See titles ALIENATION; ESTATE; REAL; &c. &c.

LAND CERTIFICATE. Upon the registration of freehold land under the Land Transfer Act, 1875, a certificate is given to the registered proprietor; and similarly upon every transfer of registered land. This registration supersedes the necessity of any further registration in the register counties.

LAND, REGISTRATION OF: See title REGISTRY OF DEEDS.

LAND, SALE OF. Contracts for the sale of land if entered into after the 31st December, 1874, are now regulated as to their conditions and partly as to their incidents by the Vendors and Purchasers Act, 1874 (37 & 38 Vict. c. 78). At a sale of land by auction, the vendor may reserve a price (if he do so expressly in his conditions of sale); and he may in like manner employ one person to bid. In a sale by the Court, the biddings are not now opened (30 & 31 Vict. c. 48).

See titles AUCTION; CONDITIONS OF SALE.

LAND-TAX. An annual charge levied by the Government upon the subjects of this realm in respect of their real estates, and also in respect of offices and pensions, but not (since 4 & 5 Will. 4, c. 11) in respect of their personal estates. The method of raising it is by charging a particular sum upon each county according to a certain valuation, and this sum used to be assessed and raised upon individuals by commissioners duly appointed for that purpose (2 Burn's Justice, 61). It was first introduced by the stat. 4 Will. 3, c. 1, and was analogous to the old scutage and hidage of lands. The tax was made perpetual by 38 Geo. 3, c. 60, and was fixed at 4s. in the pound, and was made redeemable by the landowner. Under the stat. 16 & 17 Vict. c. 74, further facilities are afforded for the redemption of this tax, which is now generally redeemed. It is usually by express agreement thrown on the occupying tenant.

See titles TAXATION, HISTORY OF; TAXATION, VARIETIES OF.

LAND TRANSFER ACT, 1875. This is the statute 38 & 39 Vict. c. 87, whereby provision is made for registering the title to land whether of freehold or of leasehold tenure, but not of copyhold or customary tenure. Freehold lands may be registered under the Act with either an absolute title or a possessory title,—with an absolute title, when the title produced is approved by the registrar, and with a merely possessory title when such evidence of title is produced and such notices are given as are in that behalf required by the Registry Office; and where the title would be absolute but for some specified estate, right, or interest, the title may be registered as a qualified title, that is as a title registered subject to the exception of such specified estate, right, or interest. A certificate of registration is given, and specifies whether the title is absolute, possessory, or qualified. Leasehold lands (being for a life or lives, or for twenty-one years unex-

LAND TRANSFER ACT, 1875—*contd.*

pired) may be registered, and either with or without a declaration of the title of the lessor to grant the lease, and such declaration may be either absolute or qualified. An office copy of the registered lease is given, with an indorsement thereon regarding the lessor's title according to its nature. And, as regards both freehold and leasehold lands, mines and minerals are to be separately registered, even where they belong to the surface owner. The registration is subject to all incumbrances (if any), and likewise to all easements (if any). After land is once registered, no title by adverse possession can be acquired as against the registered owner. Incumbrances are to be registered, and the registration thereof implies all the usual covenants, powers, and provisos contained in mortgage deeds. Subsequent transfers of and dealings with the land, are effected by simple entries thereof on the register; and a new land certificate, or office copy lease, is given. Trusts are not to be entered on the register.

See title **REGISTRY OF DEEDS**.

LANDLORD. He of whom lands or tenements are held (Co. Litt.). When the absolute property in, or fee-simple of, the land belongs to a landlord he is then sometimes denominated the ground landlord in contradistinction to such an one as is possessed only of a limited or particular interest in land, and who himself holds under a superior landlord.

See titles **GROUND RENT; LANDLORD AND TENANT**.

LANDLORD AND TENANT. This phrase expresses a familiar legal relation, involving many peculiar rights, duties, and liabilities. The relation is contractual, and is constituted by a letting or agreement to let (see title **LEASE**). The landlord is entitled to be paid a stated rent, and may enforce payment thereof either by action, or by distress, or by entry (see titles **DISTRESS; EJECTMENT**). The tenant is entitled to the possession and quiet enjoyment of the premises so long as he pays his rent and duly observes and performs the other stipulations contained in his contract (see title **COVENANTS**). A failure in the performance of any covenant works a forfeiture (see title **FORFEITURE**), unless the landlord chooses to waive the breach (see title **WAIVER**). The tenant is also bound to keep and leave the premises in good repair, and will be liable for Dilapidations (see titles **DILAPIDATIONS; REPAIR, COVENANT TO**); but he is permitted during the term of his lease, but not afterwards, to unfasten and remove all tenant's fixtures so-called which have been affixed

LANDLORD AND TENANT—*continued.*

to the premises by himself (see title **FIXTURES**). He is estopped from disputing his landlord's title (see title **ESTOPPEL**), but he may shew that that title has determined (see title **JUS TERTII**). The relation of landlord and tenant may usually be determined by notice to quit given in accordance with the terms (express or implied) of the agreement of tenancy.

See title **NOTICE TO QUIT**.

LANDS CLAUSES CONSOLIDATION ACT, 1845. This is the stat. 8 & 9 Vict. c. 18, and is in general incorporated (or some specified portions thereof) are incorporated in every Act (called special Act), passed to authorize some undertaking of a public character, and for the effectuating of whose objects lands must be acquired. The Act provides for the purchase of lands by agreement between the promoters of the undertaking and the owners of the lands required to be taken; and also for the acquisition of the necessary lands by means other than agreement, in which latter case the amount of the compensation for the lands taken is to be settled either by the verdict of a jury or by arbitration. In the case of persons under disability or absent from the kingdom, valuation is the mode of ascertaining their proportion of the purchase or compensation money. Usually, the costs are borne by the promoters. The Act provides forms of conveyance to the promoters, and the execution of such conveyances has the effect of vesting in the promoters the fee simple of the lands purporting to be thereby conveyed, free of all terms of years, and of all tails, and other qualifications whatsoever; but conveyances of copyhold lands must (like other conveyances of such lands), be enrolled on the Court rolls, and must be thereafter enfranchised. The promoters may also redeem mortgages on the lands purchased or taken, and may procure the release of rentcharges and the surrender of leases, upon such terms as they can agree upon or (failing agreement), as can be settled by the verdict of a jury or by arbitration in the usual way. Superfluous lands may be sold by the promoters, the original owner thereof having the option of re-purchase, and after him the nearest adjoining owners, unless the land is situate within a town, or is building land, or land built upon.

LAPSE. (1.) As applied to *church livings*, it denotes a species of forfeiture by which the right of presentation to a church accrues to the ordinary by the neglect of the patron to present; to the metropolitan by the neglect of the ordinary; and to the king by the neglect of the metropolitan.

LAPSE—continued.

(2.) As applied to *legacies* and *devisees*, it denotes the failure of a testamentary gift through the devisee or legatee dying in the testator's lifetime. The mere addition of the words "heirs and assigns," or "executors, administrators, and assigns," or other words of limitation to the name of the predeceasing devisee or legatee in the gift to him will not prevent a lapse of the interest given; and the rule is the same where the devisee or legatee is already dead at the date of the will (*Maybank v. Brooks*, 1 Bro. C. C. 84). And although the legacy be of a debt, it is liable to lapse in the same manner (*Elliott v. Davenport*, 1 P. Wms. 83); and although the legacy or devise be contained in a will made in exercise of a power the creation of which was by an instrument (whether deed or will) taking effect before the death of the legatee or devisee, still even in this case the legacy or devise will lapse in case the legatee or devisee predecease the testator who exercises the power (*Duke of Marlborough v. Lord Godolphin*, 2 Ves. 78; *Culsha v. Cheese*, 7 Hare, 236). A mere declaration that the devise or bequest shall not lapse is ineffectual to prevent a lapse in case of the devisee or legatee predeceasing the testator (*Pickering v. Stamford*, 3 Ves. 493); but such a declaration, if accompanied with the designation of a substitute for the devisee or legatee in case he predeceases the testator, would be valid to prevent a lapse (*Toplis v. Baker*, 2 Cox, 121); and from the desire of the Courts to effectuate the intentions of testators, such designation of a substitute, where not expressly made, has been in a manner implied from trifling circumstances, e.g., in *Gittings v. M'Dermott* (2 My. & K. 69), Lord Brougham, C., in the case of a gift to the children of A., or to their heirs, held that the representatives of predeceasing children were entitled by way of substitution for their parents, the word *heirs*, although ordinarily a word of limitation, and not of purchase, being in that particular decision, and by reason chiefly of the two words *or to* which are italicised, construed as a word of purchase and not of limitation. Again, if the testator makes a gift to two or more persons jointly, there is, of course, no lapse if one or more of the joint tenants survive, as the survivors will take by survivorship; and similarly, if the testator makes a gift to two or more persons in common, and limits over to the survivor or survivors the share of any predeceasing tenant, there is, of course, again no lapse if one or more of the tenants in common survive, as the survivor will take under the limitation over. But it is the rule of law in this latter case that there is no survivorship upon survivorship; and there-

LAPSE—continued.

fore, unless the limitation over is made (as it commonly is made) to extend "as well to the accruing as to the original shares," there will be a lapse as to any accrued share of a predeceasing legatee or devisee (*Pain v. Benson*, 3 Atk. 80). Again, if a devise or bequest is made to persons of a class in common tenancy, and the class is to be, i.e., can only be, ascertained at the date of the testator's death, the members of the class who are surviving at that date will take the whole among them, notwithstanding that other persons who but for their prior death would have formed members of the class may have predeceased the testator (*Viner v. Francis*, 2 Bro. C. C. 658). As to whether lapse shall take place or not, the cases of *Willing v. Baine* (3 P. Wms. 113), and *Humberstone v. Stanton*, (1 V. & B. 385) should be contrasted. Where a devise or bequest is made to one person in trust for another, the legal estate will lapse in case the devisee or legatee in trust, i.e., the trustee, should predecease the testator, but the beneficial interest, or interest of the *cestui que trust*, will not therefore also lapse (*Elliott v. Davenport*, 2 Vern. 520); and conversely, in the case of a like devise or bequest, the beneficial estate will lapse, and the legal estate will not lapse, in case the *cestui que trust* predecease the testator and the trustee survives him (*Doe d. Shelley v. Edlin*, 4 Ad. & E. 582). It has even been held (*Oke v. Heath*, 1 Ves. 135), that an annuity bequeathed to C. and charged on a bequest to B. did not lapse by reason merely that B. predeceased the testator, whereby the bequest to him lapsed. Some provisions have been made by the stat. 7 Will. 4 & 1 Vict. c. 26, against lapse in certain cases, that is to say:—

(1.) By s. 25 of that Act devises and bequests which would otherwise lapse are given to the residuary devisee or legatee (if there is one);

(2.) By s. 32 of the same Act the devise of an estate tail to any one (whether child or stranger) does not lapse by reason merely of the devisee in tail predeceasing the testator, but takes effect in him if there is any person who is his heir in tail at the testator's death; and

(3.) By s. 33 devises or bequests made to a child or children of the testator who predecease the testator, but leave issue surviving the testator, do not lapse, but take effect in the predeceasing child or children, and devolve in case of the intestacy of the latter upon their heirs or next of kin; and in case they have made a will, then according to the disposition or dispositions thereof contained in that will (*Winter v. Winter*, 5 Hare, 306; *Johnson v. Johnson*, 3 Hare, 157). It has been held, however,

LAPSE—continued.

that the 33rd section of the Act does not apply to gifts under a *limited, i.e., special*, power of appointment, where there is a gift over in default of appointment (*Griffiths v. Gale*, 12 Sim. 327); but it does apply to a *general* power of appointment, even although there is a gift over in default of appointment (*Eccles v. Cheyne*, 2 K. & J. 676).

LARCENY. Larceny is the felonious taking and carrying away of the personal goods of any one from his possession with intent to convert them to the use of the offender without the consent of the true owner. Larceny was formerly divided into grand and petty larceny; grand larceny including the stealing of goods above the value of 12*d.*; petty larceny was when the value was 12*d.* or under. This distinction was abolished by stat. 7 & 8 Geo. 4, c. 29, and now all larcenies are subject to the same incidents as grand larceny. Larceny is sometimes distinguished into simple and compound; simple larceny being larceny of goods only, compound larceny being larceny from the person or habitation of the owner (1 Hale, 510). The law regarding this offence is now consolidated by the stat. 24 & 25 Vict. c. 96, which renders also many things (both animate and inanimate) the subjects of larceny which for various reasons were not so by the Common Law. And under the stat. 18 & 19 Vict. c. 126, the offence of larceny may (with the consent of the accused) be summarily tried before justices.

LATENT AMBIGUITY. This is an ambiguity which arises not upon the words of the will, deed, or other instrument, as looked at in themselves, but upon those words when applied to the object or to the subject which they describe. The term is opposed to the phrase Patent Ambiguity. The rule of law is, that extrinsic or parol evidence is admissible in all cases to remove a latent ambiguity, but in no case to remove a patent one.

See titles EXTRINSIC EVIDENCE; PATENT AMBIGUITY.

LATHE, LATH, or LETH. Was a portion of a county containing three or more hundreds or wapentakes (*Les Termes de la Ley*).

LATINI JUNIANI. In Roman Law, were a class of freedmen (*libertini*) intermediate between the two other classes of freedmen called respectively *Cives Romani* and *Dediticii*. Slaves under thirty years of age at the date of their manumission, or manumitted otherwise than by *vindicta*, *census*, or *testamentum*, or not the quiritary property of their manumissors at the time

LATINI JUNIANI—continued.

of manumission, were called *Latini*. By reason of one or other of these three defects, they remained slaves by strict law even after their manumission, but were protected in their liberties first by equity, and eventually by the *Lex Junia Norbana* A.D. 19, from which law they took the name of *Juniani* in addition to that of *Latini*.

LATITAT, WRIT OF. A writ, which before the Uniformity of Process Act, was used for commencing personal actions in the King's Bench against a defendant seeking to evade the service of the writ. It recited the bill of Middlesex, and the proceedings thereon, and that the defendant "*latitat et discurrit*," lurks and wanders about, and therefore commanded the sheriff to take him, and have his body in Court on the day of the return.

See titles SERVICE; SUBSTITUTED SERVICE.

LAUDEMNIUM. In Roman Law, was a fine payable to the *dominus* upon any alienation of his emphyteusis by the emphyteuta to a purchaser, such purchaser not being the *dominus* himself. It is very similar to the fine paid by a copyholder to his lord upon an alienation of the copyhold tenement.

LAW. This word has various significations. (1.) In the most enlarged sense in which the word can be used, it applies not only to those rules, or systems of rules, which different governments lay down for the internal regulation of their respective communities, but also to those fixed and invariable principles in conformity with which nature carries on her operations. (2.) When, however, we wish to restrict the sense, or to limit the application of the word, we use it ordinarily in conjunction with some other phrase; thus, when we apply it to the principles of morality, we call it not unfrequently the law of morals or of morality; and when the same principles are applied to the regulation of the conduct of nations in their intercourse with each other, it is then termed the Law of Nations or International Law. (3.) The word "Law," however, in a still more limited sense, signifies that body, or system, of rules, which the government of a country has established for its internal regulation, and for ascertaining and defining the rights and duties of the governed, and it is then commonly called Municipal, *i.e.*, Civil Law, and, in popular language, "the law of the land."

The various significations in which the term "Law" has been used in jurisprudence, are thus given by Locke and Austin:

LAW—continued.**I. Locke's divisions of Laws,—**

- (1.) Divine Law,—being the Law of God natural and revealed ;
- (2.) Civil Law—being the Municipal Law ; and
- (3.) Law of Reputation, being the Law of Morality.

II. Austin's divisions of Laws,—

- (1.) Divine Law,—being the revealed Law of God ;
- (2.) Positive Human Law, being Municipal Law ;
- (3.) Positive Morality, being the Law of Morality ; and
- (4.) Laws metaphorically (*i.e.* abusively) so called, being the laws of animate and inanimate nature, which (in Austin's opinion) are not laws at all ; but therein he differs from all English jurists of eminence.

LAW AND EQUITY. The distinction between Law and Equity is one which has existed in many systems of jurisprudence, notably in the Roman and in the English systems ; and the distinction invariably comes to be abolished (more or less) in course of time, the principles of Equity coming to prevail over without destroying the principles of Law, until by positive legislation there is effected a complete fusion between the two sets of principles, Justinian effected this fusion for Roman Law ; and Queen Victoria by her two Lords Chancellors (Selborne and Cairns) has effected it for English Law.

LAW AND FACT. In litigation, it is customary to find the conjunction of law and fact ; but occasionally there is no dispute about the facts, the question being entirely one of law ; and again there is frequently no dispute about the law, but a dispute purely about the facts. Matters of law are for the judge, and matters of fact are for the jury ; mixed matters of law and fact are for the jury, but properly dealt with they would be distinguished.

LAW, EQUITY FOLLOWS: See title EQUITY FOLLOWS THE LAW.

LAW OF CITATIONS. In Roman Law, was an Act of Valentinian passed 426 A.D. providing that the writings of only five jurists, viz. Papinian, Paul, Gaius, Ulpian, and Modestinus, should be quoted as authorities. The majority was binding on the judge ; if they were equally divided, the opinion of Papinian was to prevail, and in such a case if Papinian was silent upon the matter, then the judge was free to follow his own view of the matter.

LAW OF EVIDENCE: See title EVIDENCE.

LAW OF MARQUE: See title MARQUE AND REPRISAL, LETTERS OF.

LAW, MARTIAL: See title MARTIAL LAW.

LAW MERCHANT. One of the branches of the unwritten or Common Law, consisting of a particular system of customs used only among one set of the king's subjects, which, however different from the general rules of the Common Law, is yet engrafted into it, and made a part of it, being allowed for the benefit of trade to be of the utmost validity in all commercial transactions, upon the maxim "*cuilibet in sua arte credendum est.*" This law of merchants comprehends the laws relating to bills of exchange, mercantile contracts, sale, purchase and barter of goods, freight, insurance, &c.

LAW OF NATIONS. The Law of Nations consists of a system of rules or principles deduced from the law of nature, intended for the regulation of the mutual intercourse of nations. The law is founded on the principle, that the different nations ought to do to each other in time of peace as much good, and in time of war as little harm, as may be possible without injuring their own proper interests ; and it comprehends the principles of national independence, the intercourse of nations in peace, the privileges of ambassadors, consuls, and inferior ministers ; the commerce of the subjects of each state with those of the others in times of war and of peace, or of neutrality ; the grounds of just war, and the mode of conducting it ; the mutual duties of belligerent and neutral powers ; the limits of lawful hostility ; the rights of conquest ; the faith to be observed in warfare ; the force and effect of armistices, of safe conducts and passports ; the nature and obligation of alliances ; the means of negotiation, and the authority and interpretation of treaties.

See title INTERNATIONAL LAW.

LAW OF NATURE: See title LAW.

LAW PREVAILS: See title EQUITIES EQUAL, LAW PREVAILS.

LAW OF TREASON: See title TREASON.

LAW-WORTHY. Being entitled to, or having the benefit and protection of the law.

LAY-DAYS. Otherwise called "running-days" are the days allowed for loading and unloading vessels, without any payment as for demurrage. The contract of affreightment should fix the number of such days ; and if it is silent, the law fixes them at what is reasonable.

See title DEMURRAGE.

LAYING THE VENUE. Signified stating in the margin of a declaration the county in which the plaintiff proposed that the trial of the action should take place.

See title **VENUE**.

LAY, TO. Signifies to allege, to state, &c., e.g.: "No inconvenience can arise to the defendant from either mode of laying the assault" (*Per Curiam*, 2 Bos. & Pul. 427; 6 Mod. 38).

See title **LAYING THE VENUE**.

LEACH v. MONEY. A decision in 1765, bearing upon the law of general warrants, and declaring their illegality.

See title **SEARCH-WARRANTS**.

LEADING A USE. When lands were conveyed by fine or recovery, the legal seisin and estate became thereby vested in the cognizee or demandant. But if the owner of the estate declared his intention that such fine or recovery should enure or operate to the use of a third person, a use immediately arose to such third person out of the seisin of the cognizee or demandant, and the Statute of Uses transferred the actual possession to such use, without any entry on the part of such third person. The deed by which the owner of the estate so declared his intention with regard to the lands thus conveyed was termed either a deed to lead the uses, or a deed to declare the uses; when executed prior to levying the fine, or suffering the recovery, it bore the former appellation; when executed subsequent'y thereto, it bore the latter (1 Cru. Dig. 396).

See also title **CONVEYANCES**, sub-title **DEEDS LEADING OR DECLARING USES**.

LEADING CASE. Amongst the various cases that are argued and determined in the Courts, some, from their important character, have demanded more than usual attention from the judges, and from this circumstance are frequently looked upon as having settled or determined the law upon all points involved in such cases, and from the importance they thus acquire are familiarly termed "leading cases." Such, for instance, are those cases so well known to the profession under the title of "Smith's Leading Cases;" and similar collections have been made of the leading cases in Conveyancing Law (Tudor's), and in Equity Law (White & Tudor's), and in Mercantile Law (Tudor's); and of these voluminous collections Mr. Indermaur has made several very handy epitomes for the use and convenience of students; and there is also the collection of leading cases for students by Mr. Haynes.

LEADING QUESTION. A question put or framed in such a form as to suggest the answer sought to be obtained by the person

LEADING QUESTION—continued.

interrogating. A counsel is said to put a leading question to a witness, when, instead of putting a simple interrogation, he states a proposition as though he believed it to be true, with a view of leading the witness into the admission of it. Such questions may be asked upon cross-examination, but not upon examination in chief. They may also be asked with a view to discrediting one's own witness where he unexpectedly proves adverse.

See title **EXAMINATION OF WITNESSES**.

LEASE. A lease is a conveyance of lands or tenements to a person for life, for a term of years or at will, in consideration usually of a return of rent or some other recompense. The person who so conveys such lands or tenements is termed the lessor; and the person to whom they are conveyed the lessee; and when a lessor so conveys lands or tenements to a lessee, he is said to lease, demise, or let them. (4 Cruise, 58.) The lessor may grant the lease either by virtue of his estate, or by virtue of a power of leasing, and which power of leasing may be vested in him either by the deed of settlement or will, or by some enabling statute. For example, a tenant for life is given a large ministerial power of leasing (see titles **MINISTERIAL POWERS**; **SETTLED ESTATES ACT**). And other tenants for limited interests enjoy the like powers. The Crown also has a limited power of leasing Crown lands.

See titles **CROWN LEASES**; **ASSIGNMENT**; **CONVEYANCES**; **FORFEITURE**; **FRAUDS, STATUTE OF**; **LANDLORD AND TENANT**; **TENANCIES**; **UNDERLEASE**; &c., &c.

LEASE AND RELEASE. A species of conveyance commonly in use for conveying the fee simple or absolute property in lands or tenements from one person to another. In the reigns of Henry VI. and Edward IV. it was not unusual to transfer freehold estates in the following manner: A deed of lease was made to the intended purchaser for three or four years; and after he had entered into possession, a deed of release of the inheritance was executed to him, which operated by enlarging his estate into a fee simple. When it was found that the Statute of Uses transferred the actual possession without entry, the idea of a lease and release was adopted. This kind of conveyance was thus contrived:—A lease, or rather bargain and sale, upon some pecuniary consideration for one year was made by the tenant of the freehold to the lessee or bargainee, i.e., to the person to whom the lands were to be conveyed; now this made the vendor stand seised to the use of the lessee or bargainee.

LEASE AND RELEASE—continued.

and vested in the latter the use of the term for a year, to which the Statute of Uses immediately transferred the possession. Thus the bargainee, by being in possession, became immediately capable of accepting a release of the freehold and reversion (which must be made to a tenant in possession), and accordingly a release was made to him, dated the day next after the day of the date of the lease for a year, which at once transferred to him the freehold.

See title **CONVEYANCES**, sub-title **LEASE AND RELEASE**.

LEASEHOLDS. Are personal estate and not real estate, this character having attached to them in early times when the tenant or leaseholder was merely a bailiff for his landlord. But under modern and some ancient statutes they are assimilated in many important respects to real estate, *e.g.* :—

- (1.) They are lands within the New Wills Act (1 Vict. c. 26);
- (2.) They are chargeable with succession duty like land (16 & 17 Vict. c. 51);
- (3.) They are hereditaments within the meaning of the 7th sect. of the Statute of Frauds;
- (4.) They are hereditaments within the meaning of the 27 Eliz. c. 4;
- (5.) They are hereditaments within Locke King's Amendment Act, 1877; and
- (6.) They may be registered as regards title under the Land Transfer Act, 1875.

LEAVE. The leave of the Court is often required for the doing of some legal act; and when such leave is necessary, it is usually obtained upon motion (by counsel) in Court, but it may also (at least occasionally) be obtained upon summons at chambers. Under the Judicature Acts, 1873-75, leave is required in the following cases:—

- (1.) To issue writ of summons for service out of the jurisdiction (Order II., 4);
- (2.) To make substituted service of writ of summons, or to give notice in lieu of service thereof (Orders IX., X.);
- (3.) To serve writ of summons out of the jurisdiction (Order XI.);
- (4.) To amend writ of summons (Orders III., XXVII.);
- (5.) To appear (in the case of landlords) where action is against tenant for recovery of land (Order XII., 18, 19, 20);
- (6.) To appear to an action under Bills of Exchange Act, 1855;

LEAVE—continued.

- (7.) To issue third-party notice, where a remedy over is claimed and generally (Order XVI.);
- (8.) To join with an action for the recovery of land any other cause of action (Order XVII., 2);
- (9.) To join with claims by trustee in bankruptcy claims by him personally (Order XVII., 3);
- (10.) To defend an action when writ is specially indorsed (Order XVI., 1, May 1877);
- (11.) To plead and demur together to the whole of a previous pleading (Order XXVIII., 5);
- (12.) To plead, after demurrer is disposed of (Order XXVIII., 12);
- (13.) To plead a further defence or further reply (Order XX., 1, 2);
- (14.) To discontinue entire action at certain stages of it (Order XXIII., 1);
- (15.) To withdraw entire defence or counter-claim (Order XXIII., 1);
- (16.) To amend the pleadings in certain cases and at certain steps of the action (Order XXVII., 1);
- (17.) To set down a special case, where married women, infants, or lunatics are concerned (Order XXXIV., 3, 4, 5);
- (18.) To countermand notice of trial (Order XXXVI., 13);
- (19.) To issue execution in certain cases (Order XLII.);
- (20.) To issue a writ of attachment in all cases (Order XLIV., 2);
- (21.) To renew writ of execution (Order XLII., 16);
- (22.) To appeal in certain cases;
- (23.) To amend notice of appeal (Order LVIII., 8); and
- (24.) To adduce further evidence in certain cases upon appeals (Order LVIII., 5).

See title **ORDER**.

LEET: See titles **COURT-LEET**; **SHERIFF'S TOWN**.

LEGACIES. These are bequests (*i.e.*, gifts by will) of personal property; they are of three kinds, namely:—

- (1.) *General*, called also pecuniary, legacies, being a gift of money or other fungible substance in quantity;
- (2.) *Specific* legacies, being a gift of ear-marked money, or of other ear-marked fungible substance, in mass, or of any non-fungible substance by description;
- (3.) *Demonstrative* legacies, being a gift of money or other fungible substance in quantity, expressed to be made payable out of a specified sum of money or other specified fungible substance; but such legacies become, upon any destruction of

LEGACIES—continued.

the specified source of payment, merely general legacies.

The following are examples of these three kinds of legacies, namely:—

(1.) General legacies: £500 in cash (*Richards v. Richards*, 9 Price, 226); £50 annuity payable out of, or charged upon, the personal estate (*Alton v. Medlicott*, 2 Ves. 417); £20 to buy a ring (*Apreece v. Apreece*, 1 V. & B. 364); my stock (*Goodlad v. Burnett*, 1 K. & J. 341); and, ordinarily, residuary gifts.

(2.) Specific legacies: sum of money in such a bag (*Lawson v. Stitch*, 1 Atk. 508); sum of money in the hands of A. (*Hinton v. Pinke*, 1 P. Wms. 540); A.'s debt (*Fryer v. Morris*, 9 Ves. 300); A.'s bond (*Davies v. Morgan*, 1 Beav. 405); my East India Bonds (*Sleece v. Thorington*, 2 Ves. 562); gift of one specified part of debt to A., and of residue thereof to B. (*Ford v. Fleming*, 2 P. Wms. 469); gift of debt to A. for life, remainder to B. (*Ashburner v. Macquire*, 2 Bro. C. C. 108); gift of a lease of lands (*Long v. Short*, 1 P. Wms. 403); and occasionally residuary gifts. (*Page v. Leapingwell*, 18 Ves. 463).

(3.) Demonstrative legacies: £1000 out of my Reduced Stock (*Kirby v. Potter*, 4 Ves. 748); £12,000 out of my funded property (*Lambert v. Lambert*, 11 Ves. 607); £500 annuity or legacy payable out of, or charged on, lands (*Savile v. Blacket*, 1 P. Wms. 778).

These distinctions between legacies lead to the following consequences:—

I. With reference to the *Ademption* of legacies:

(1.) General legacies are not, as a general rule, liable to ademption; so that although locally described, the alteration of locality by removal does not adeem the legacy (*Norris v. Norris*, 2 Coll. 719); but a general legacy to a child would be adeemed, *i. e.* satisfied in whole, or *pro tanto*, by a subsequent portion given to that child (*see title SATISFACTION IN EQUITY*).

(2.) Specific legacies are invariably liable to ademption, *e. g.*, by the specific thing ceasing to belong to the testator and not becoming his again at or before his death (*Stanley v. Potter*, 2 Cox, 182), and without reference to the *animus adimendi* of the testator (*Ashburner v. Macquire*, 2 Bro. C. C. 108); or even, in case of the specific thing being specific by local description merely, by the alteration of that description through the removal of the goods in the testator's lifetime (*Green v. Symonds*, 1 Bro. C. C. 127, n.; *Heseltine v. Heseltine*, 3 Mad. 276), unless the local description is again in existence at the testator's death (*Land v. Devaynes*, 4 Bro. C. C. 537); or unless the original removal was due to fire

LEGACIES—continued.

or other inevitable cause (*Chapman v. Hart*, 1 Ves. 271), or to fraud (*Shaftesbury v. Shaftesbury*, 2 Vern. 747); or by the destruction of the specific thing, although it is insured and the insurance is recovered after the testator's death, and although the destruction occurred contemporaneously with his death (*Durrant v. Friend*, 5 De G. & Sm. 343); or in the case of a debt, by the discharge of the debt in the testator's lifetime (*Rider v. Wager*, 2 P. Wms. 329); (*Barker v. Raynor*, 5 Madd. 208), although the debt should have been a mortgage debt, and part of it is outstanding at the testator's death on a new security (*Gardner v. Hatton*, 6 Sim. 93); but, in general, the partial receipt of a debt is only an *ademption pro tanto* (*Jones v. Southall*, 32 Beav. 31); and a destruction by Act of Parliament of stock of one kind followed by a substitution for it of stock of another kind is no ademption (*Partridge v. Partridge*, Cas. t. Talb. 226; *Oakes v. Oakes*, 9 Hare, 666); as neither is the unauthorized although provident alteration during lunacy of a specific thing bequeathed by the lunatic when sane (*Taylor v. Taylor*, 10 Hare, 475). A specific legacy is also adeemed by an assignment of the specific thing, *e. g.*, leaseholds (*Cowper v. Maintell*, 22 Beav. 223); but not by a pawn or pledge thereof (*Knight v. Davis*, 3 My. & K. 361), and the executors must redeem same at the cost of the general estate, although the executors need not in the case of a bequest of fully paid-up shares, or of other like choses already perfected in the testator's lifetime, pay the calls which are made thereon subsequently to the testator's death (*Armstrong v. Barnet*, 20 Beav. 424).

(3.) Demonstrative legacies, like general legacies, are not liable to ademption, the fund specified as that out of which they are to be paid being the primary fund only, and the general personal estate being liable *in subsidium* (*Savile v. Blacket*, 1 P. Wms. 777); but such a legacy would be adeemed if the specified fund were declared to be the only fund for payment (*Coard v. Holderness*, 22 Beav. 391); and, *semble*, it would be adeemed, *i. e.*, satisfied, in the case of a child by a subsequent portion to that child. (*See title SATISFACTION IN EQUITY*.)

II. With reference to the *Abatement* of legacies:—

(1.) General legacies are liable to abate as between themselves in case the general personal estate, and other the property (if any) available for their payment is insufficient (after payments thereout which are of prior right) to pay them all in full, the payments of prior right being debts, specific legacies, and demonstrative legacies which have remained demonstrative. A resi-

LEGACIES—continued.

duary bequest, if general, abates with general legacies (*Petre v. Petre*, 14 Beav. 197); but a general legacy which is given for value, *e.g.*, for the relinquishment of dower (*Burridge v. Bradyl*, 1 P. Wms. 126; 3 & 4 Will. 4, c. 105, s. 12), or for the release of a debt actually due (*Davies v. Bush*, 1 Younge, 341), is preferred to other general legacies; and similarly any legacy, although general, which the testator expresses a clear intention should be preferred (*Lewin v. Lewin*, 2 Ves. 415).

(2.) Specific legacies are liable to abate as between themselves, and *pari passu* with demonstrative legacies which have remained demonstrative, but are preferred to general legacies.

(3.) Demonstrative legacies which have remained demonstrative are liable to abate as between themselves, and *pari passu* with specific legacies, but are preferred to general legacies (*Roberts v. Pocock*, 4 Ves. 150); but demonstrative legacies which have become general are not so preferred (*Mullins v. Smith*, 1 Dr. & Sm. 210).

III. With reference to the *Repetition* of legacies,

See title SATISFACTION IN EQUITY.

IV. With reference to the *Satisfaction* of legacies,

See title SATISFACTION IN EQUITY.

V. With reference to the *Marshalling* of legacies,

See title MARSHALLING OF ASSETS.

VI. With reference to legacies being *Annuities*,

See title ANNUITY.

VII. With reference to the *Lapse* of legacies,

See title LAPSE.

VIII. With reference to *Interest* on legacies:—

(A.) General legacies carry interest from the time they are payable. Therefore,

(a.) Where the testator has fixed no time of payment, they are not payable until one year after his decease, and therefore only carry interest as from that date (*Child v. Elsworth*, 2 De G. M. & G. 679), unless they are charged on land, in which case they are payable, and therefore carry interest, as from the testator's death (*Maxwell v. Wettenhall*, 2 P. Wms. 26); and from whichever of these two dates they are payable, they will carry interest, although the actual payment of the legacies themselves should be then impracticable (*Wood v. Penoyre*, 13 Ves. 333), and whether the assets are productive or not (*Pearson v. Pearson*, 1 S. & L. 10); and

(b.) Where the testator has fixed a time for payment;

(aa.) If that time is fixed for the convenience of the estate merely, they will

LEGACIES—continued.

be payable, and will therefore carry interest, as from the testator's death or as from one year after the testator's death, according as they are or are not charged on land (*Varley v. Winn*, 2 K. & J. 700); but

(bb.) If that time is not fixed for the convenience of the estate merely, then it must be observed; and if it exceed the year, the interest will be proportionately delayed (*Heath v. Perry*, 3 Atk. 101); but if it fall within the year, the interest will be proportionately accelerated (*Lord Lonsborough v. Somerville*, 19 Beav. 295); and

(c.) Whether the testator has fixed a time of payment or not, the following other legacies are payable, and therefore also carry interest, as from the testator's death.

(1.) A legacy which is in satisfaction of a debt, whether the testator's own (*Clark v. Sewell*, 3 Atk. 99) or another man's (*Shirt v. Westby*, 16 Ves. 393).

(2.) A legacy by a parent (*Beckford v. Tobin*, 1 Ves. 310), or person *in loco parentis* (*Wilson v. Maddison*, 2 Y. & C. C. C. 372) to a legitimate child being an infant, but not to a legitimate child being an adult (*Raven v. Waite*, 1 Sw. 553), nor to a legitimate child although an infant, being otherwise provided with maintenance (*In re Rouse's Estate*, 9 Hare, 649), nor to an illegitimate child (*Beckford v. Tobin*, 1 Ves. 310), in the absence of an express direction as to maintenance (*Newman v. Bateson*, 3 Sw. 689).

(3.) A legacy which is settled upon several takers in succession (*Angerstein v. Martin*, T. & R. 232; *Howe v. Dartmouth (Earl)*, 7 Ves. 137), and which is not a legacy of consumable articles (*Andrew v. Andrew*, 1 Coll. 690), other than stock in trade (*Philips v. Beal*, 32 Beav. 25), or other than farming stock (*Groves v. Wright*, 2 K. & J. 347), being an absolute gift.

(B.) Specific legacies carry interest from the time they are payable, and being considered as severed from the bulk of the estate and appropriated for the benefit of the specific legatee as from the death of the testator, they carry interest as from the death (*Barrington v. Tristram*, 6 Ves. 345); and for that matter it makes no difference that the testator has directed them to be paid within twelve calendar months after his decease (*Bristow v. Bristow*, 5 Beav. 289), or has otherwise postponed the enjoyment of the principal (2 Rep. Leg. 1250, 4th ed.).

(C) Demonstrative legacies which have remained demonstrative, carry interest, *semble*, from the testator's death in like manner as specific legacies; but where they are payable out of reversionary property, they carry interest, *semble*, only as from the date at which the reversion falls in (*Earle v.*

LEGACIES—continued.

Bellingham, 24 Beav. 448); and if they have ceased to be demonstrative, and are become general legacies, they are subject, *semble*, to the rules above stated regarding the payment of interest on general legacies (*Mullins v. Smith*, 1 Dr. & Sm. 210).

Where interest is payable, it is usually at the rate of 4 per cent. (*Wood v. Bryant*, 2 Atk. 523), free of all deductions on account of cost of remittance or otherwise (*Cockerell v. Barber*, 16 Ves. 461). And

IX. With reference to the *Transmissibility* of legacies:—

In general, a legacy which is vested is, in case of the death of the legatee subsequently to the vesting and previously to the commencement of the actual enjoyment of the legacy, transmissible to the personal representatives of the legatee, and the Courts, both of Law and Equity, favour in all cases the vesting of legacies. Thus, even at Law, all legacies are considered as vested unless where there is a condition precedent to the vesting; and a legacy once vested will not be divested by any condition subsequent either at Law or in Equity unless the latter condition is exactly fulfilled (*Harrison v. Foreman*, 5 Ves. 207; *Doe d. Blakiston v. Haslewood*, 10 C. B. 544). Also, words of apparent contingency are construed as words of futurity, and as having reference to the period of enjoyment only and not of the vesting (*Maddison v. Chapman*, 4 K. & J. 709).—this latter principle being so strong in the case as well of *personal* as of *real* estate, that a bequest or devise to the children of A. as a class vests in the existing children of A. at the death of the testator, although A. is then living, and opens up to admit after-born children of A. (if any) successively as they are born (*McLachlan v. Taitt*, 2 De G. F. & J. 449). And words of apparent conditionality are in like manner construed as words of futurity, having reference to the enjoyment only and not to the vesting (*Manfield v. Dugard*, 1 Eq. Ca. Abr. 194; *Doe d. Wheedon v. Lea*, 3 T. R. 41; *Pearsall v. Simpson*, 15 Ves. 29); and conditions apparently precedent will, if possible, be construed as conditions subsequent, so as rather to vest the estate meanwhile and leave it liable to be divested afterwards, than prevent it from vesting at all in the meantime (*Edwards v. Hammond*, 1 Bos. & Pul. N. R. 324, n.); but, of course, this cannot always be done (*Bull v. Pritchard*, 5 Hare, 567); and where the postponement of enjoyment is merely for the convenience of the estate, the future interest will be held a vested interest (*Blamire v. Geldart*, 16 Ves. 314); and although the gift is residuary, the Courts strongly incline to construing it as vested, so as to

LEGACIES—continued.

avoid an intestacy (*Booth v. Booth*, 4 Vcs. 399).

All the foregoing statement applies equally to real and to personal estate; but the Common Law, from the favour it shews to the *heir*, who is always an ascertained or ascertainable person, holds that a legacy payable out of lands (not being also a devise of the very lands themselves or part thereof), *although it be vested, yet sinks for the benefit of the inheritance in case the legatee dies before the period of actual enjoyment*, no matter whether the legacy be to a child as a provision or portion for that child (*Pawlett v. Pawlett*, 1 Vern. 321), or be to a stranger (*Smith v. Smith*, 2 Vern. 92), unless where the postponement of the enjoyment is for the convenience of the estate merely (*King v. Withers*, 3 P. Wms. 414), or unless the testator expressly directs the contrary (*Watkins v. Cheek*, 2 S. & S. 199). The like rules apply *mutatis mutandis* to legacies payable out of a mixed fund of real and personal estate (*Chandos (Duke) v. Talbot*, 2 P. Wms. 601). And as to what amounts to an *implied* charge of legacies on land, where there are no words of *express* charge, see *Greville v. Broune*, 7 H. L. C. 789; and for the extent of such a charge, see *Gainsford v. Dunn*, L. R. 17 Eq. 405.

LEGACIES CHARGED ON LAND: See title LEGACIES.

LEGACY DUTY. This is a duty imposed upon personal property (other than leaseholds) devolving under any will or upon any intestacy. It was imposed for the first time in 1780, and became payable upon the receipt of the property (*Green v. Croft*, 2 H. Bl. 30); but under the stat. 36 Geo. 3, c. 52, which regulates the duty at the present day, it is payable on the property itself, irrespectively of the receipt thereof, and generally under the last-mentioned Act and the two subsequent stats., 45 Geo. 3, c. 28, and 55 Geo. 3, c. 184, which are supplementary to the prior Act, the duty is payable upon all legacies "paid, delivered, retained, satisfied, or discharged."

According to Hanson (Probate, Legacy, and Succession Duty Acts), p. 14,—The legacy duties now in force are those imposed by the 55 Geo. 3, c. 184, and the duty is payable,—

(a.) For every legacy of the amount or value of £20 and upwards given by will either

(aa.) Out of personal estate, or

(bb.) [Where testator has died since 5th April, 1805] out of real estate, or out of the proceeds of the sale or mortgage of real

LEGACY DUTY—continued.

estate; and also (whether there is a will or not),—

- (b.) For the clear residue when devolving on one person, and
(c.) For every share of the clear residue when devolving on two or more persons,
- either
(aa.) Of the personal estate; or
(bb.) [Where testator or intestate has died since 5th April, 1805],
- of the proceeds of the sale or mortgage of real estate;

being a legacy, residue, or share of residue paid, delivered, retained, satisfied, or discharged after the 31st August, 1815.

With reference to powers of appointment over property,—

- (1.) Where the power is *general*, an appointment by will in exercise of a power created either by deed (*In re Cholmondeley*, 1 Cr. & Mee. 149), or by will, is a legacy under the will of the person exercising the power; and it matters not whether the gift under the appointment be out of real or out of personal estate, or whether it be the gift of an annuity or a specified sum of money; and by the joint effect of the stats. 36 Geo. 3, c. 52, s. 18, and 16 & 17 Vict. c. 51, s. 4, the donee of the general power (*i.e.*, the appointor), is chargeable with legacy or (at any rate) succession duty, when he makes an appointment; so that, in fact, two duties, *semble*, are payable.
- (2.) Where the power is *limited*,—an appointment by will (*Att.-Gen. v. Henniker*, 7 Ex. 331), or by deed (*Sweeting v. Sweeting*, 1 Dr. 331), in exercise of a power,—
- (a.) Which is created by *will*,—is a legacy under the will creating the power; and
- (b.) Which is created by *deed*,—is a succession under the deed creating the power.

In the case of a conflict of laws,—

- (1.) As regards personal property (not being chattels real), the law of the domicile determines the liability to, or exemption from, legacy and also succession duty (*Thomson v. Adv.-Gen.*, 12 Cl. & F. 1; *Wallace v. Att.-Gen.*, L. R. 1 Ch. 1);
- (2.) As regards chattels real, and real property generally, the *lex loci rei sitæ* determines;
- (3.) As regards powers of appointment over property,—

LEGACY DUTY—continued.

(a.) If the property is pure personal estate, and

- (aa.) The appointment is made by *will*, the *lex loci situs* subjects the same to succession duty, although the domicile of the testator should be different from the *situs* of the property; and this is so, whether the power be created by deed (*In re Lovelace*, 4 De G. & J. 340), or by will (*In re Wallop's Trusts*, 1 De G. J. & S. 656); and for this purpose the *situs* may be constructive merely; but if
- (bb.) The appointment is made by *deed*, then only the actual *situs*, and not the constructive, determines; and

(b.) If the property is chattels real, or real property generally, the *lex loci rei sitæ* governs exclusively.

Legacy Duty is to be paid at the time when the property chargeable with it is transferred to, or retained for, the person entitled (36 Geo. 3, c. 52, s. 6), and therefore in the case of reversionary property not until the same falls into possession, naturally or by acceleration. (Contrast *SUCCESSION DUTY*.) In case the reversionary property should devolve under several wills or intestacies before it falls into possession, a cumulative duty is payable in respect of every such will and intestacy (*Att.-Gen. v. Malkin*, 2 Ph. 64). Contrast *SUCCESSION DUTY*.) If any legacy or residue is not wholly satisfied or distributed at once, the duty may be paid on the value of the part from time to time satisfied or distributed, such value to be estimated as the property exists at the time of satisfaction or distribution, and not at the time of the testator's death (*Att.-Gen. v. Cavendish*, Wightw. 82). (Compare *SUCCESSION DUTY*.) If the legacy is a gross sum vesting at once in the legatee, then whether the same be or not given over on a contingency, duty on the whole amount is payable all at once, with an apparent right to be recouped any overpayment in case the gift over takes effect; in which case the legatee-over becomes apparently chargeable with the same, and becomes certainly chargeable at the higher rate, if his rate should be higher than that of the first legatee (36 Geo. 3, c. 52, ss. 17, 34) Compare *SUCCESSION DUTY*); but if the legacy is not a gross sum, but *an annuity for life or for years*, then, whether the same be or not charged upon some other legacy, and whether the same be or not given over on a contingency, duty is pay-

LEGACY DUTY—continued.

able on the value only of the annuitant's interest, calculated according to the tables of the Act 16 & 17 Vict. c. 51, and is to be paid by *four* successive annual instalments, such instalments being payable with the four first successive payments of the annuity itself, with a right to be recouped any over-payment in case the gift over takes effect; but in the case of a direction to purchase an annuity, or of a perpetual annuity, the duty is to be paid all at once on the value of the annuitant's interest, calculated as aforesaid (16 & 17 Vict. c. 51, s. 32). (Compare **SUCCESSION DUTY**.) In the case of a legacy producing income to several persons in succession,—

(a.) If all the successive legatees are chargeable with the same rate of duty, the whole duty is payable at once *for the capital* of the fund; and

(b.) If the successive legatees are chargeable with different rates of duty, the duty is to be calculated and paid upon each successive partial interest, in the same manner as if the same were an annuity, and, last of all, upon the ultimate interest (being the absolute interest), in the same manner as if the same were an immediate bequest of the capital (36 Geo 3, c. 52, s. 12). (Compare **SUCCESSION DUTY**.) In the case of legatees in joint tenancy, each is chargeable at his own rate of duty in the first instance upon his *then* share, and afterwards (if it should so happen) upon his accrued share. (Compare **SUCCESSION DUTY**.) In the case of a legacy of money directed to be converted into land;

(a.) If the bequest is in fee, the gross amount is chargeable with duty as an absolute bequest; and

(b.) If the bequest is to several successive persons, the interest of each successor until the money is actually invested in real estate is chargeable with duty as for an annuity (36 Geo. 3, c. 52, s. 19), and any person becoming absolutely entitled is chargeable with duty as upon an absolute bequest; and after the money is actually invested in real estate, each such person is chargeable as for succession duty (16 & 17 Vict. c. 51, s. 30). No legacy duty is payable upon a fund which is specially provided for the payment of duty,—“no duty upon duty,”—(36 Geo. 3, c. 52, s. 21.) (Compare **SUCCESSION DUTY**.)

LEGAL ASSETS. As opposed to equitable assets, were such assets as the executor was chargeable with at law in an action brought there by a creditor of the deceased against him. In an administration of these assets, unlike equitable assets in the Court of Chancery, creditors were paid in priority one over another according to their several

LEGAL ASSETS—continued.

degrees. At the present day, however, no practical distinction exists between legal and equitable assets, excepting as regards the definitions of each, all distinctions of effect having been gradually abolished by statute.

See titles **ADMINISTRATION OF ASSETS**; **EQUITABLE ASSETS**.

LEGAL ESTATE: See title **USES**.

LEGAL MEMORY. This, as distinguished from living memory, extends as far back as the year of our Lord 1189, being the year in which King Richard I. returned from Palestine. (Co. Litt. 114 b; 2 Inst. 238; 2 Ves. Sen. 511; 2 & 3 Will. 4, c. 71, s. 1.)

See titles **MEMORY OF MAN**; **TIME**; **TIME OUT OF MIND**.

LEGAL WASTE: See title **WASTE**.

LEGATORUM GENERA QUATUOR. In Roman Law there were four classes of legacies, viz.:—

- (1.) *Per vindicationem*, — carrying a direct property into the legatee;
- (2.) *Per damnationem*, — obliging the executor (*hæres*) to make the property over to the legatee;
- (3.) *Sinendi modo*, — obliging the executor to permit or suffer the legatee to take the property bequeathed; and
- (4.) *Per præceptionem*, — being a preferential legacy.

The legacy *per damnationem* was frequently said to be *optimi juris*, as being most efficacious in law; however, the *Sctm. Neronianum* made all the four classes equally efficacious; and Justinian abolished altogether the distinctions between them.

LEGATUM OPTIONIS. In Roman Law, was a legacy to A. B. of any article or articles that A. B. liked to choose or select out of the testator's estate. If A. B. died after the testator, but before making the choice or selection, his representative (*hæres*) could not prior to Justinian make the selection for him, but the legacy failed altogether; Justinian, however, made the legacy good and enabled the representative to choose.

LEGIS ACTIONES. In Roman Law, were the earliest forms of actions, and were five in number, viz.,—

- (1.) *Actio Sacramenti*, which was the form most generally used;
 - (2.) *Judicis Postulatio*,
 - (3.) *Diei Condictio*,
 - (4.) *Manus Injectio*, and
 - (5.) *Pignoris Catio*,
- } all which were simplifications, and (in effect) truncated forms of the *actio sacra-*

LEGIS ACTIONES—*continued.*

menti, and were only applicable in certain cases.

These actions were in their nature very formal and archaic; and the *actio sacramenti* involved a deal of what to later ages appeared a sort of pantomime of quarrelling. They were therefore cumbrous and also (in the event of the slightest technical irregularity) fatal to litigants; and for these reasons, they went gradually into disuse, and were eventually abolished (with only a very few exceptions) by the *Lex Aebutia*, B.C. 177.

See title **FORMULÆ**.

LEGITIMA QUARTA: See title **INOFFICIOSUM TESTAMENTUM**.

LEGITIMACY, DECLARATION OF.

Under the stat. 21 & 22 Vict. c. 93, upon application by petition supported with an affidavit in the High Court of Justice, Probate, Divorce, and Admiralty Division, any one being either domiciled in England or claiming any real or personal estate situate in England may obtain from the Court a decree that he is the legitimate child of his parents, or that the marriage of his father and mother or grandfather and grandmother was a valid marriage, or that his own marriage is a valid marriage. A copy of the petition and of the affidavit in support must be delivered to the Attorney-General one month before the petition is filed or presented.

LEGITIMATION. The making legitimate or lawful, as where children are born bastards, the act by which they are made legitimate is called legitimation, which in Scotland may be effected by the subsequent marriage of the parents (Cowel; Tomlins). But when an attempt was made in the Parliament of Merton to introduce the like law into England, the barons of Parliament replied, "*NOLUMUS mutare leges Angliæ huc usque usitatas atque approbatas*," and thus frustrated the attempt. It is the rule of the English Law, that legitimation depends on the *status* of the mother when she gives birth to the child, and has no reference (as in Roman Law) to the date of the child's conception: "*Puter est quem nuptiæ demonstrant*."

LEGITIMUM JUDICIUM. In Roman Law, was a court of justice presenting the three following characteristics, viz.:—

- (1.) There was only one *judex*;
- (2.) The *judicium* was held in or within one mile of Rome; and
- (4.) The *judex* and the litigants were all Romans.

A *judicium* which was wanting in any one of these three characteristics was called a *judicium imperio continens*, that

LEGITIMUM JUDICIUM—*continued.*

phrase expressing that these Courts were not dependent upon the strict law, but upon the authority of the *prætor* or some other magistrate.

LEONINA SOCIETAS. An attempted partnership, in which one party was to bear all the losses, and have no share in the profits; this was a void partnership in Roman Law; and apparently it would also be void as a partnership in English Law, as being inherently inconsistent with the notion of partnership (Dig. xvii. 2, 29, s. 2; Code Civil, iii. ix. 3, 1855).

See titles **PARTNERSHIP**; **SOCIETAS**; **SOCIÉTÉ**.

LEPROSO AMOVENDO, WRIT OF. A writ that lay for the removal of a leper, or leper, who obtruded himself upon the company of his neighbours, either in the church or other public place of meeting in a parish (H. N. B. 423; *Les Termes de la Ley*).

LE ROY LE VEUT. The Royal assent to public bills used to be given in these words; and to private bills the words used to be *soit fait comme il est désiré*, i.e., let it be done as it is desired; but when the Royal denial was given to a bill, the words were *le roy s'avisera*, i.e., the king will advise upon it.

LE ROY S'AVISERA: See title **LE ROY LE VEUT**.

LÉSION. In French Law, upon a sale, it is competent for the purchaser to rescind the contract on account of *lésion*, i.e., the worsened value of the thing sold, when it exceeds seven-twelfths of the price given. A purchaser cannot bargain away his right in this respect, but he must exercise it within two years. In the contract of exchange, there is no right of rescission, *pour cause de lésion* (Code Civil, 1706).

LESSOR OF THE PLAINTIFF. The lessor of the plaintiff in an action of ejectment was the party who really and in effect was interested in its result. He must at the time of bringing the action have had the legal estate, and the right to the possession of the premises sought to be recovered (7 T. R. 47; 2 Burr. 668; 8 T. R. 2, n.; 1 Ch. Pl. 187). The reason of his having been called the lessor of the plaintiff, arose from the circumstance of the action having been carried on in the name of a nominal plaintiff (called John Doe), to whom he (the real plaintiff) had granted a fictitious lease, and thus had become his lessor.

See title **EJECTMENT**.

LETTER, CONTRACTS BY. The offer continues open until it is accepted; and

LETTER, CONTRACTS BY—*continued.*

the acceptance is complete, and the offer non-withdrawable, when the letter of acceptance is posted, whether or not it reaches its destination.

See title OFFER.

LETTER OF LICENCE. A letter or written instrument which used sometimes to be given by creditors to their debtor who had failed in trade, &c., allowing him longer time for the payment of his debts, and protecting him from arrest in the meantime (Tomlins).

See titles IMPRISONMENT FOR DEBT; INSOLVENCY.

LETTERS OF ADMINISTRATION: See title ADMINISTRATION, GRANT OF.

LETTERS CLOSE: See title LETTERS PATENT.

LETTERS OF CREDIT: See title CREDIT, LETTERS OF.

LETTERS MISSIVE. A letter missive, for electing a bishop, is a letter which the king sends to the dean and chapter, together with his usual licence to proceed to elect a bishop on the avoidance of a bishopric, which letter contains the name of the person whom he would have them elect. A letter missive in Chancery was a letter from the Lord Chancellor to the defendant in a suit in Equity, informing him that a bill had been filed against him, and requesting him to appear to it. Such a letter was the step taken in a Chancery suit to compel a defendant's appearance to a bill when such defendant was a peer or a peeress, the letter missive being a milder and more complimentary mode of procedure than the subpoena (1 Dan. Ch. Pr. 366-9).

LETTERS PATENT. Letters by which the king makes his grants, whether of lands, honours, franchises, or anything else. They are so called because they are not sealed up or closed, but are exposed to open view, with the great seal pendant at the bottom, and they are usually directed or addressed by the king to all his subjects at large; and herein they differ from certain other letters of the king, sealed also with his great seal, but directed to particular persons and for particular purposes, which therefore not being proper for public inspection are closed or sealed up on the outside, and are therefore called *letters close* (*litteræ clausæ*), and are recorded in the close rolls in the same manner as the others are in the patent rolls.

See title PATENTS.

LETTERS OF REQUEST. Are the formal instrument by which an inferior judge of ecclesiastical jurisdiction requests the judge of a superior Court to take and

LETTERS OF REQUEST—*continued.*

determine any matter which has come before him. And this he is permitted to do in certain cases by the authority of an exception to the stat. 23 Hen. 8, c. 9, which exception is to the effect, that a person may be cited in a Court out of his own diocese, when any bishop or other inferior judge, having jurisdiction in his own right, or by commission, makes request or instance to the archbishop or bishop, or other superior, to take, hear, examine, or determine the matter before him; but this is to be done in cases only where the law, civil or canon, doth affirm execution of such request of jurisdiction to be lawful and tolerable. Upon this exception it has been held that the Dean of the Arches is bound, *ex debito justitiæ*, to receive letters of request without the consent of the party proceeded against (Roger's Ecc. Law, 789; 2 Lee, 312, 319; Hob. 185).

See title COURTS, ECCLESIASTICAL.

LEVANT AND COUCHANT. If lands were not sufficiently fenced to keep out cattle, they would occasionally stray thereon; but the landlord could not distrain them as *damage feasant* till they had been *levant* and *couchant* on the land, that is, had been long enough there to have lain down and risen up to feed, which in general is held to be one night at least (Gilb. Dist. 47). Common for cattle *levant and couchant* upon inclosed land cannot be claimed by prescription as appurtenant to a house without land (*Bunn v. Channen*, 5 Taunt. 244); the right when it exists without stint is for such cattle as the winter eatage of the land together with the produce of it during the summer is capable of maintaining (*Whitelock v. Hutchinson*, 2 M. & Rob. 205).

See titles COMMON, RIGHT OF; DAMAGE FEASANT.

LEVARI FACIAS. A writ of execution directed to the sheriff, commanding him to levy or make of the lands and chattels of the defendants the sum recovered by the judgment. Excepting in the case of outlawry, however, this writ has been completely superseded in practice by the other writs of execution, chiefly *fi. fa.* and *elegit* (1 Arch. Prac. 693; Tidd).

LEVY. To exact, to raise, to collect, &c. Thus a sheriff is commanded by the writ of *fi. fa.* to levy a certain sum upon the goods and chattels of the debtor, i.e., to collect a certain sum by appropriating and selling the goods and chattels for that purpose.

LEX. In Roman Law, was (properly speaking) an enactment of the *Comitia Centuriata* passed by that assembly upon

LEX—continued.

the proposition of a Roman senator; and in this strict signification, it was distinguished from a *senatus consultum* (which was an enactment of the senate) and from a *plebiscitum* (which was an enactment of the *Comitia Tributa*). The more important of the *leges* of a general character were the following:—

- (1.) *Lex Hortensia*—B.C. 287—whereby the *plebiscita* were placed upon the same level as *leges* in respect of the persons they applied to;
- (2.) *Lex Aebutia*—B.C. 177 or 164—whereby the *legis actiones* were abolished, and the formulary procedure finally established;
- (3.) *Lex Cornelia*—B.C. 81—whereby the existing law appears to have been amended and codified to a considerable extent.

But by far the larger proportion of the *leges* related to particular subject-matters, e.g., (1.) As regards freedmen,—the *Lex Aelia Sentia* (A.D. 4) and *Lex Junia Norbana* (A.D. 19); and the *Lex Furia Caninia* (A.D. 8);

(2.) As regards sureties,—the *Lex Apuleia* (B.C. 164), the *Lex Furia* (B.C. 95), and the *Lex Publilia* (B.C. 60?); and

(3.) As regards testamentary bequest,—the *Lex Furia* (B.C. 183), the *Lex Voconia* (B.C. 169), and the *Lex Fulcidia* (B.C. 40).

The *leges duodecim tabularum* were the most important of all the *leges*, dating about B.C. 450, and forming not only the Magna Charta of the people, but also the first codified arrangement of the private and criminal law of Rome.

LEX ET CONSUETUDO PARLIAMENTI.

The law and customs or usages of Parliament are so called. The Houses of Parliament constitute a Court not only of legislation but also of justice, and have their own rules by which the Court itself and the suitors therein are governed (May's Parl. Pract. 6th ed. pp. 38–61).

LEX CONTRACTUS: See titles **LEX LOCI CONTRACTUS**.

LEX DOMICILII: See title **DOMICILE**.

LEX FORI. This phrase denotes the law of the forum or court in which an action or suit is proceeding. It regulates everything pertaining to procedure and evidence, including the forms of practice, the times for commencing and proceeding with actions, the requisites of pleading, and such like. It sometimes overrides or excludes the *Lex loci actus seu contractus*, whence there arises a **CONFLICT OF LAWS** (*Lerous v. Brown*, 12 C. B. 801). But of necessity it agrees in all cases with the *Lex*

LEX FORI—continued.

loci rei sitæ (Story on Conflict of Laws and Foote's Priv. Internat. Law).

LEX LOCI ACTUS: See title **LEX LOCI CONTRACTUS**.

LEX LOCI CELEBRATIONIS: See title **LEX LOCI CONTRACTUS**.

LEX LOCI CONTRACTUS. This is an ambiguous phrase, denoting either

(1.) The law of the place in which the contract is to be performed (*in eo loco unusquisque contraxisse videtur, in quo ut solvetur se obligavit*); or

(2.) The law of the place in which the contract is entered into.

According to the former of these two senses, it is the *Lex loci solutionis*, according to the latter of them it is the *lex loci actus*, and it is desirable that these two phrases should be used for distinction's sake, when anything is to turn on the distinction. The former phrase, namely, the *Lex loci solutionis*, regulates the mode of recovery upon the contract, and the latter phrase, viz., the *Lex loci actus*, regulates the formalities or ceremonies requiring to be observed upon entering into a contract. In each case the law of the place denoted by the phrase is to be singly regarded, unless, indeed, both laws should *pro majori cautela* be observed.

LEX LOCI REI SITÆ. This phrase denotes the law of the place of the situation of the property, as does also the phrase *Lex loci situs*: but the former phrase is exclusively applicable (and ought to be confined) to real property, including leaseholds, and the latter to personal property exclusive of leaseholds. There are also certain differences between the two laws expressed by the two respective phrases; thus, the *Lex loci rei sitæ* is a paramount law, and regulates the devolution of lands whether upon a testacy or an intestacy; it also determines what shall be the forum, so that it is never in conflict with the *Lex fori*; and lastly, it completely disregards the *Lex domicilii*. The *Lex loci situs*, on the other hand, is different in all these three respects, being subsidiary to the *Lex domicilii*, being frequently in conflict with the *Lex fori*, and having absolutely no influence upon the devolution of property, although it may render it liable to certain duties (e.g., legacy duty) before removal, and have other such like limited effects.

LEX LOCI SITUS: See title **LEX LOCI REI SITÆ**.

LEX LOCI SOLUTIONIS: See title **LEX LOCI CONTRACTUS**.

LEX NEMINEM COGIT AD IMPOSSIBILIA. This maxim, which literally means that the Law obliges no one to do what is impossible (or frivolous or useless), is exemplified in the case of legacies that are subject to impossible conditions, and which legacies are permitted to be good, and the conditions annexed thereto are void. But the Courts will not readily assume an impossibility, at least where the impossibility is one resting on physical as opposed to moral or legal grounds. Another exemplification of the maxim is the refusal of Equity to specifically enforce a partnership agreement, where the partnership is at will only. On the other hand, the Court of Equity has directed the execution of the indenture of lease, even after the expiration of the term for which the lease was to have been granted; but, *semble*, upon very special or particular grounds.

LEX NON CURAT DE MINIMIS: See title DE MINIMIS NON CURAT LEX.

LEX MERCATORIA: See title LAW MERCHANT.

LEX REGIA. One of the leges supposed to have been enacted in the times of the early kings (reges) of Rome, and to which more especially was attributed the constitutional theory, that all power civil (*potestas*) and military (*imperium*) was vested in the emperor.

LEX SITUS: See title LEX LOCI REI SITÆ.

LIABILITY, LANDOWNER'S: See titles LANDLORD AND TENANT; SUB-CONTRACTOR.

LIABILITY, LIMITATION OF: See title LIMITATION OF LIABILITY.

LIABILITY, LIMITED: See title LIMITED LIABILITY.

LIBEL. This word is commonly used in two senses, 1st, in the Court of Arches, and some few other Courts, as meaning a formal allegation in the nature of a pleading, containing the substance of the plaintiff's complaint. But, 2ndly, and more commonly, it signifies some malicious defamation of any person expressed otherwise than by mere words, as by writing, print, figures, signs, or any other symbols. The publication of the alleged libellous matter must be proved (see title PUBLICATION). Moreover, malice is an essential requisite to constitute any writing a libel, and the truth of defamatory writings is not at Common Law any justification of them, but under the Act 6 & 7 Vict. c. 96, it is competent for the defendant in the case of a criminal information to plead the truth of the libel, and that it was published for the public good,—a provision which does not extend to the defendant in an ordinary

LIBEL—continued.

action for libel; however, even in that action, if the truth be proved, the plaintiff is not entitled to recover any damages, as he has sustained none (in contemplation of law) from the discovery of his true character; and the verdict would be at the most for one farthing damages, and the judge would take care to refuse the plaintiff his costs.

Previously to the year 1792, the functions of the jury in actions or prosecutions for libel were confined to finding the fact of publication merely, or the absence of that fact (*Dean of St. Asaph's Case*, 21 St. Tr. 847); but since that year, and in virtue of Fox's Libel Act, 1792 (32 Geo. 3, c. 60), the jury now find a mixed verdict of libel or no libel, returning generally the verdict of guilty or not guilty, in which both law and fact are blended. The functions of the judge, which were formerly very large, have been correspondingly diminished, and are now confined to points arising incidentally in the trial, and which require to be summarily disposed of, but including amidst such matters a rather important defence in actions of this sort, namely, PRIVILEGE.

See titles PRIVILEGED COMMUNICATION; SLANDER.

LIBERATE. (1.) A warrant which used formerly to issue out of Chancery under the great seal to the Treasurer, Chamberlain, and Barons of the Exchequer, &c., for the payment of any yearly pension or other sum of money granted under the great seal. (2.) Sometimes a writ directed to the sheriff for the delivery of land or goods taken upon forfeiture of a recognizance; it was most in use for the delivery of goods on an extent; for until the liberate no property in the goods passed to the conusee in the recognizance (*Tomlin's*).

LIBERTINUS SEU LIBERTUS: See title INGENUUS.

LIBERTY: See title FRANCHISE.

LIBERTY OF THE SUBJECT: See titles DARNELL'S CASE; HABEAS CORPUS.

LIBERTY TO HOLD PLEAS. The liberty of having a Court of one's own; thus, certain lords had the privilege of holding pleas within their own manors.

LIBRARIES. Free or public libraries may be established in boroughs, &c., under various modern statutes, and may be afterwards supported under powers conferred by the Acts by means of a public rate upon the borough, &c., but which rate may be strictly limited by stipulation of the rate-payers (40 & 41 Vict. c. 54). The principal statutes bearing upon the subject

LIBRARIES—continued.

are,—18 & 19 Vict. c. 70, 29 & 30 Vict. c. 114, and 34 & 35 Vict. c. 71. The Public Works Loan Commissioners may make advances to boroughs, &c., for the foundation of such libraries, the advances to be secured upon the library rates.

See titles CHARITABLE USES; PUBLIC WORKS LOANS.

LICENCE. A licence is a mere permission to do an act, which if done without that permission would (a.), with respect to land, be a trespass *quare clausum fregit*; and (b.), with respect to goods, be a tort in respect of the goods, whether a conversion or detainer of them from the true owner, or a trespass to them.

As a general rule, licences in respect of land are revocable at the will of the grantor; for they confer no interest in the land; but where the licence is something more than a licence, in other words, where it is accompanied with a grant, it is irrevocable while the grant continues (*Wood v. Leadbitter*, 13 M. & W. 844), no matter whether it is made by deed or parol. Moreover, a licence is irrevocable when the licensee, acting upon it, has executed works of a permanent and expensive character (*Winter v. Brockwell*, 8 East, 308); *Bankart v. Tenant*, L. R. 10 Eq. 141).

Where a licence is revocable, it may be revoked in various ways, namely, either (1.) by an express withdrawal of it; or, (2.), by any other act adverse to its continuance (*Wallis v. Harrison*, 4 M. & W. 538).

Similarly, where the licence is in respect of goods.

By the C. L. P. Act, 1852, Sched. B. 44, the defendant licensee might plead that he did the act complained of by the leave and licence of the plaintiff; and the plaintiff had then either to take issue on that plea (*Barnes v. Hunt*, 11 East, 451), or (in a fit case) to new assign (*Kavanagh v. Gudge*, 7 M. & G. 316), or to reply specially (*Price v. Peek*, Bing. N. C. 380); and under the present practice, he would either amend (see title TRESPASS QUARE CLAUSUM FREGIT), or reply to the plea either generally or specially.

LICENCE, PRINTING: See title PRESS, LIBERTY OF.

LICENSING ACTS. So far as this phrase denotes the Acts intended to secure a revenue to the Crown by imposing a tax upon the grant of licences to sell beer and intoxicating liquors, see titles CUSTOMS and EXCISE. But the phrase more commonly denotes the Acts regulating the grant of licences by magistrates or other the proper licensing authority to publicans and others

LICENSING ACTS—continued.

to sell beer, &c., by retail, and the grant of this latter class of licences rests upon and is limited by a regard to public convenience and to public morality. The two principal licensing Acts at present in force are the Licensing Act, 1872 (35 & 36 Vict. c. 54) and the Licensing Act, 1874 (37 & 38 Vict. c. 49).

LIE. To subsist, to exist, to be sustainable, &c. Thus, the phrase, "an action will not lie," signifies that an action cannot be sustained, or that there is no ground upon which to found the action.

See title LAY.

LIEGE HOMAGE: See title HOMAGE.

LIEN. A qualified right of property which a person has in or over a thing, arising from such person's having a claim upon the owner of such thing. Thus, the right which an attorney has to keep possession of the deeds and papers of his client until such client has paid his attorney's bill is termed the attorney's lien upon those deeds, papers, &c. There are two sorts of lien, viz., particular and general. A *particular* lien is the right which a person has to retain the specific thing itself in respect of which the claim arises; a *general* lien is the right which a person has to retain a thing not only in respect of demands arising out of the thing itself so retained, but also for a general balance of account arising out of dealings of a similar nature. A lien may exist over real and personal property equally; but there is this difference in the two cases, namely, (1.), that the lien on personal property is dependent on possession, and ceases when the possession ceases; whereas, (2.), the lien on real property is independent of possession, and indeed implies that the person claiming the lien is out of the possession, e.g., in the case of a vendor's lien for unpaid purchase-money, or of a purchaser for his deposit. The lien is, however, in all cases commensurate only with the interest of the person through whom it arises.

See titles STOPPAGE IN TRANSITU; SOLICITOR'S LIEN; VENDOR'S LIEN; MARITIME LIEN.

LIEN ON FUND: See title SOLICITOR'S LIEN.

LIFE, DURATION OF. The English Law knows no presumption regarding the duration of human life; the matter is one of evidence, and is for the jury; nevertheless there is a presumption of death after seven years' absence unaccounted for (*Doe v. Nepean*, 2 M. & W. 894). Similarly, there is no presumption of law with regard to the survivor of persons all of whom

LIFE, DURATION OF—*continued*.
perish in a common calamity (*Wing v. Angrave*, 8 H. L. C. 183).

LIFE ESTATE: See title ESTATE.

LIFE INSURANCE: See title INSURANCE OR ASSURANCE.

LIFE-PEERAGES. Of these there are several apparent precedents, in the reigns of Richard II. and Henry VI. in particular; and of course all the spiritual peers were, and still are, peers for life only at the most. In 1856, an unsuccessful attempt was made to introduce life-peerages in the case of Lord Wensleydale. However, now under the stat. 39 & 40 Vict. c. 59 (Appellate Jurisdiction Act, 1876), the Lords of Appeal in Ordinary, if not otherwise peers, are peers for life, or at least during office.

LIFE RENT. A rent payable to, or receivable by, a person for the term of his or her life, *e.g.*, a jointure rent-charge, a life annuity issuing out of lands, and such like.

LIGEANCE: See title ALLEGIANCE.

LIGHTS. The general law as regards the easement of lights, or ancient lights as they are more commonly called, will be found stated under title EASEMENTS, subtitle LIGHT. As to what is meant by the access of light to ancient windows, the recent case of *National Provincial Plate Glass Insurance Co. v. Prudential Assurance Co.*, 6 Ch. Div. 757, may be usefully consulted; it was there stated (*per* Jessel, M.R.) that any substantial alteration in the plane of the windows destroys the right, and (*per* Fry, J.) that the right remains when any portion of the light which would have passed over the servient tenement through the old windows passes also through the new windows.

LIMIT. To mark out, to define, to fix the extent of. Thus, to limit an estate means to mark out or to define the period of its duration, and the words employed in deeds for this purpose are thence termed the words of limitation. Sometimes very great importance attaches to the words of limitation that are used; for example, the Rule in *Shelley's Case* is entirely a rule of words; and again, in every conveyance (except by will) of an estate of inheritance, whether in fee tail or fee simple, the word "heirs" is necessary to be used as a word of limitation to mark out the estate: for if a grant be made to a man and his seed, or to a man and his offspring, or to a man and the issue of his body, all these are insufficient to confer an estate tail, and only convey an estate for life for want of the word "heirs."

See title SHELLEY'S CASE, RULE IN.

LIMITATION OF ACTIONS. The word "limitation," as applied to actions, signifies the period of time which the law gives a man to bring his action for the recovery of any thing; and this period of time within which a man must bring his action in order to recover the thing sought is limited by the legislature in some cases to two years, in some to six years, and so on. The Acts of Parliament which prescribe these limits within which actions must be commenced are thence called the Statutes of Limitation, and the subject generally is termed the limitation of actions. These statutes are principally the following:—

- (1.) 21 Jac. 1, c. 16, for actions on torts and on simple contracts;
- (2.) 3 & 4 Will. 4, c. 42, for actions on specialties;
- (3.) 9 Geo. 3, c. 16, for suits by the Crown;
- (4.) 3 & 4 Will. 4, c. 27, for actions of ejectment and such like; and
- (5.) 37 & 38 Vict. c. 57 (Real Property Limitation Act, 1874), which came into operation on the 1st of January, 1879, reducing the periods prescribed by the stat. 3 & 4 Will. 4, c. 27.

Under these statutes the periods prescribed for bringing actions at the present day are:—

- (1.) Twelve years for recovery of land, with six years for disability, the whole period never to exceed thirty years;
- (2.) Twelve years for recovery of legacy, even where trust term to secure its payment;
- (3.) Twenty years on a specialty contract (*e.g.*, covenant);
- (4.) Six years on a simple contract (*e.g.*, work and labour);
- (5.) Six years for a libel;
- (6.) Four years for an assault;
- (7.) Four years for a false imprisonment;
- (8.) Two years for a slander.

LIMITATION OF ESTATES. The word "limitation," as applied to estates, signifies the limits of duration beyond which an estate cannot last, as when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail; as when land is granted to a man so long as he is lord of the manor of Dale, or while he continues unmarried, or until out of the rents and profits he shall have made £500, and so on. In such cases the estate determines as soon as the contingency happens (*i.e.*, when he ceases to be lord of the manor, marries a wife, or has received the £500), and the next subsequent estate

LIMITATION OF ESTATES—continued.

which depends upon such determination becomes immediately vested in possession without any act to be done by him who is next in expectancy (1 Inst. 234; Litt. 347).

See title LIMIT.

LIMITATION OF LIABILITY. In the case of damage to passengers or goods carried in a vessel, where the proceeding is *in personam*, the shipowner and master were at the common law liable to the full extent of the damage done; but by the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63) s. 54, such liability is now limited as follows:—

(1.) For damage to passengers, an amount not exceeding in the aggregate fifteen pounds per ton of the ship's tonnage; and,

(2.) For damage to goods, an amount not exceeding in the aggregate eight pounds per ton of the ship's tonnage. The tonnage in the case of sailing vessels, is their registered tonnage; in the case of steam-vessels, is their gross tonnage, without deduction on account of engine room. Kay's Shipmasters, 919-920.

LIMITATION, STATUTES OF: See title LIMITATION OF ACTIONS.

LIMITATION, WORDS OF: See titles LIMIT; LIMITATION OF ESTATES.

LIMITED ADMINISTRATION. An administration of a temporary character, granted for a particular period, or for a special or particular purpose, as distinguished from an ordinary administration which is not granted subject to such limitations or conditions. Such, for instance, is an administration *durante minore etate*, which becomes necessary when an infant has been appointed sole executor, or the person upon whom the right to administration devolves is an infant, in which case administration is granted to some other proper person for a limited period, viz., until the infant attains the full age of twenty-one years, and is capable of taking the burden of the administration upon himself.

See title ADMINISTRATION, GRANT OF.

LIMITED EXECUTOR. The appointment of an executor may be either absolute or qualified. It is absolute when there is no restriction, condition, or limitation imposed upon him in regard to the testator's effects, or no limitation in point of time. It may be qualified by limitations as to the time or place wherein, or the subject matter whereon, the office is to be exercised, and when so qualified the executor is frequently, in reference to his limited or qualified powers, termed a limited executor. Thus, if one appoint a man to be his executor at a certain time,

LIMITED EXECUTOR—continued.

as at the expiration of five years after his death, or at an uncertain time, as upon the death or marriage of his son, such an executor with reference to the time he should begin to execute his office would be a limited executor. So also an executor may be a limited executor, with reference to the place in which he is empowered to execute his trust; as if a testator should make A. his executor for his goods in Cornwall, B. for those in Devon, and C. for those in Somerset (Went. off. Ex. 291, 4th ed.; Bro. Executors, 2, 155 cited in 1 Wms. Ex. 181).

LIMITED LIABILITY. The liability of the members of a Joint Stock Company may be either unlimited (which it seldom is) or limited; and if the latter, then the limitation of liability is either the amount, if any, unpaid on the shares (in which case the limit is said to be *by shares*), or such an amount as the members guarantee in the event of the company's being wound up (in which case the limit is said to be *by guarantee*). Where the limit is by shares the memorandum of association must contain a declaration that the liability is limited, and the amount of the capital must be divided into shares of a fixed amount; and each original member must take one share at least, and write the number he takes opposite to his name in the memorandum of association. On the other hand, when the liability is limited by guarantee, the memorandum must contain a declaration that in the event of the company being wound up each member will contribute towards the liabilities what may be required, not exceeding a specified amount. The unpaid-up capital is called up when wanted, or at certain agreed periods; the successive demands for it are thence technically described as *calls*.

See titles CALLS; JOINT STOCK COMPANIES.

LINEAL CONSANGUINITY. That relationship which subsists between persons each of whom is descended in a direct line from another, as between son, father, grandfather, great-grandfather, and so upwards in the direct ascending line, or downwards in the direct descending line.

See title COLLATERAL CONSANGUINITY.

LINEAL DESCENT. Descent in a right line, as where an estate descends from ancestor to heir in one line of succession, as opposed to collateral descent, which is descent in a transverse or zigzag line, namely, up through the common ancestor and then down from him.

See titles COLLATERAL DESCENT; DESCENTS.

LINEAL WARRANTY: See titles COL-LATERAL WARRANTY; WARRANTY.

LIQUIDATED DAMAGES are damages, the amount of which is fixed or ascertained, as opposed to unascertained or uncertain, i.e., unliquidated, damages. It is frequently mutually agreed between the parties to a contract that the one shall pay to the other some specified sum of money in the event of a breach of the contract; and in such a case, it frequently becomes a nice question whether such sum is to be considered in the nature of a penalty merely for the purpose of covering the damages which one party may sustain in the event of a breach committed by the other, or whether the full sum specified is to be actually paid to the injured party as liquidated or settled damages, without reference to the extent of the injury sustained. (See *Kemble v. Farren*, 6 Bing. 141; *Reilly v. Jones*, 1 Bing. 202; Ch. on Contr. 863, 864).

See title DAMAGES.

LIQUIDATION. Under the Bankruptcy Act, 1869, a person in embarrassment, instead of suffering himself to be made a bankrupt, may (under s. 125) summon a meeting of his creditors and prevail with them by special resolution to declare that his affairs shall be liquidated by arrangement; the proposed liquidating debtor must at this meeting produce a statement of his affairs; and the special resolution and the statement of affairs are then registered with the Registrar in Bankruptcy. A trustee is thereupon appointed, with or without a committee of inspection; and when that is done the general provisions of the Act applicable to the proof of debts, &c., in the case of bankruptcy are made applicable to the proof of debts, &c., in the liquidation. The property of the liquidating debtor vests in his trustee, who has the like powers as a trustee in bankruptcy. The close of the liquidation and the discharge of the liquidating debtor depend upon the creditors, who may make a special resolution to that effect in general meeting; and upon the trustee reporting such special resolution to the Registrar in Bankruptcy, he will grant to the liquidating debtor a certificate of discharge.

See titles BANKRUPTCY; COMPOSITION.

LIQUIDATOR. Is an officer of the Court appointed in and for the winding up of insolvent companies. He has large powers, some of which he may exercise without, but others only with, the sanction of the Court.

See title WINDING-UP.

LIS MOTA: See title ANTE LITEM MOTAM.

LIS PENDENS. This phrase denotes a suit or action depending, i.e., in course. Inasmuch as every such suit or action would, when decided, naturally affect the land according to its result in whose hands soever the land might be at the date of the decision, it was enacted by the 2 & 3 Vict. c. 11, s. 7, that no *lis pendens*, unless or until the same was registered, and duly re-registered, should bind a purchaser or mortgagee not having express notice thereof. By the stat. 13 & 14 Vict. c. 35, s. 17, a special case to which appearances have been entered is made a *lis pendens*. Lastly, by 30 & 31 Vict. c. 47, s. 2, if a suit or action is not prosecuted in a *bonâ fide* manner, the Court may order the registration of it as a *lis pendens* to be vacated, and that even without the consent of the person registering the same.

LIS PENDENS, VACATION OF: See title LIS PENDENS.

LITERIS OBLIGATIO. In Roman Law, was the contract of *nomen*, which was constituted by writing (*scripturâ*). It was of two kinds, viz. (1.) *A re in personam*, when a transaction was transferred from the day-book (*adversaria*) into the ledger (*codex*) in the form of a debt under the name or heading of the purchaser or debtor (*nomen*); and (2.) *A persônâ in personam*, where a debt already standing under one *nomen* or heading was transferred in the usual course of *Novatio* from that *nomen* to another and substituted *nomen*. By reason of this transferring, these obligations were called *nomina transcriptitia*; no money was in fact paid to constitute the contract; if ever money was paid, then the *nomen* was *arcarium* (i.e., a real contract, *re contractus*) and not a *nomen proprium*.

LITIS CONTESTATIO: See title CONTESTATIO LITIS.

LIVERY. During the existence of the feudal tenures and customs, the male heir when he arrived at the age of twenty-one years, or the heir female at the age of sixteen, might sue out a writ of livery or *ouster le main*; that is, the delivery of their lands out of their guardian's hands; for in the feudal times the lord was entitled to the wardship of the heir, and was called the guardian in chivalry,—this wardship consisting in the lord's having the custody of the body and lands of such heir till he or she attained the age of twenty-one if a male, or sixteen if a female (2 Inst. 203), without being subject to account.

See title WARDSHIP.

LIVERY OF SEISIN. This simply means delivery of the land (*traditio*). At

LIVERY OF SEISIN—*continued.*

is of two kinds, being either in deed or in law.

(1.) *Livery in deed*, i.e., in fact or act, was performed by delivery of a part of the actual thing in lieu, and as a symbol, of the whole, e.g., by delivery of the ring of a door, or of a branch of a tree, or a turf of the ground, accompanied with these or the like words spoken by the feoffor: "Here I deliver you seisin of this house or land" [*as the case might be*], "in the name of the tenements contained in this deed, and according to the form and effect thereof." And thereupon the feoffee entered upon or took possession of the house or land. A separate livery was wanted for lands in several counties. Livery in deed might be made either to the feoffee personally, or to his attorney.

(2.) *Livery in law*, i.e., constructive or implied delivery of the actual thing. This was done off the land but in sight of it, the feoffor saying these or the like words: "I give you yonder land, enter and take possession;" and if the feoffee thereupon or at any time thereafter during the life of the feoffor entered upon the land, the livery was good, but otherwise it was void. One such livery sufficed for various counties. Livery in law could be made only to the feoffee personally, but not to his attorney (Wms. R. P. 138-9).

LIVING, LAPSE OF: See title LAPSE.

LIVING MEMORY. When a right (e.g., by prescription), is said to have been enjoyed within all the time of living memory, the phrase means that there is absolutely no evidence of its not having been enjoyed at any assignable period, either prior or subsequent to 1 Ric. 1.; but *legal* memory is bounded by 1 Ric. 1.

See title MEMORY OF MAN.

LLOYD'S BONDS. These are acknowledgments by a railway company under its seal of a debt incurred and actually due by the company to a contractor or other person for work done or for goods supplied, with a covenant for payment of the principal and interest at a future time. They are valid securities, if issued *bonâ fide*; but if employed as a mere device to borrow money, or otherwise, in fraud of the Acts regulating the company's power of borrowing, they are void (*Chambers v. Manchester and Milford Ry. Co.*, 5 Best & Smith, 588). In case the bond is void, the directors who caused the company's seal to be affixed thereto are not personally liable (*Rashdall v. Ford*, 14 W. R. 950; 14 L. T. Rep. 790).

LOAN. Is a contract, and may be either a simple contract or a specialty one, and in either case either with or without security.

LOAN—*continued.*

It is usually at interest. In loans for consumption (*mutuum*), the property passes into the borrower; but in loans for use (*commodatum, locatio rei*), the property remains in the lender.

LOAN CAPITAL. Public and joint stock companies may create a loan capital, i.e., may borrow money on mortgage or bond or debenture stock; e.g., railway companies under the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 21. Such loan-capital takes precedence usually of all other the general debts (but not liens) of the company.

LOAN-NOTES: See title LLOYD'S BONDS.

LOCAL ACT OF PARLIAMENT. Such an Act as has for its object the interest of some particular locality; as the formation of a road, the alteration of the course of a river, the formation of a public market in a particular district, &c.

See titles GENERAL ISSUE, PLEA OF;
PRIVATE ACT OF PARLIAMENT.

LOCAL ACTION. An action was termed local when all the principal facts on which it was founded were of a local nature, as where possession of land was to be recovered, or damages for an actual trespass, or for waste affecting land, or for any other kind of injury affecting real property, because in such a case the cause of action related to some particular locality, which usually also constituted the venue of the action. But under the Judicature Act, 1873, there is no local venue for the trial of any action (Sch. r. 28).

See titles TRANSITORY ACTION; VENUE.

LOCAL BOARD. The Local Government Board constituted by the Acts 34 & 35 Vict. c. 70, and 38 & 39 Vict. c. 55, and by which Acts all the powers and duties of the Poor Law Board and of the Privy Council as regards local government were transferred to it, exercises a general control over all local boards throughout England. There is a local board for every local government district; and the local board is usually the sanitary authority and also the burial board for the district, with power to regulate labourers' dwellings, burials, baths and wash-houses, gas, water, tramways, &c., and having power to make rates to defray its expenses, and to borrow money upon the security of the rates and the property of the board. Most local boards have been established by provisional orders made under the two repealed Acts 11 & 12 Vict. c. 63, and 21 & 22 Vict. c. 98, and duly confirmed by special Act; but they would now be formed under the Public Health Act, 1875.

See title LOCAL GOVERNMENT ACTS.

LOCAL GOVERNMENT ACTS. The Local Government Act, 1858 (21 & 22 Vict. c. 98), which was declared to form part of the Public Health Act, 1848 (11 & 12 Vict. c. 63), used to be the principal Act, but both Acts have been repealed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), in which latter Act (and Sch. v. thereto), and the Act 34 & 35 Vict. c. 70, the provisions now in force are to be found.

See title LOCAL BOARD.

LOCATIO CONDUCTIO. In Roman Law, is the contract of hiring and letting. It may be either *locatio rei* (e.g., the hire of a waggon or beast of burden), or *locatio operis* (e.g., a contract to build a church or theatre), or *locatio operarum* (i.e., the hire of services generally). This contract always involved remuneration; the like if gratuitous was either *commodatum* (if of a thing), or *mandatum* (if of services).

LOCKE KING'S ACTS. The principal Act is 17 & 18 Vict. c. 113, whereby (in effect) lands (being freehold or copyhold) were made liable to the mortgage (if any) upon them, in exoneration of the personal estate of the deceased testator or intestate, which personal estate was theretofore primarily liable. By the two subsequent Amendment Acts, 30 & 31 Vict. c. 69, and 40 & 41 Vict. c. 34, the principal Act has been extended to include mortgages on leasehold hereditaments, and the word mortgage has been extended to include liens for unpaid purchase-money, whether the testator dies intestate or testate. But the deceased may by express words or by necessary implication exclude the operation of the Acts.

LOCO PARENTIS: See title IN LOCO PARENTIS.

LOCOMOTIVES ON ROADS. Their use is regulated by the stats. 24 & 25 Vict. c. 70, and 28 & 29 Vict. c. 83, by which provision is made for the safety of the road, and of persons using it, and for the repair and preservation of bridges damaged or likely to be damaged by their use.

See title TRAMWAYS.

LOCUS IN QUO. The place in which the cause of action arose, or where anything is alleged to have been done, in pleadings is so called (1 Salk. 94). The phrase is almost peculiar to actions of trespass *quare clausum fregit*.

LOCUS POENITENTIAE. Is a phrase which signifies in law, that the parties are not yet completely bound by their intended contract or other the contemplated obligation.

LOCUS STANDI. Is the position of any person or corporation relatively to some

LOCUS STANDI—continued.

pending matter, entitling him or it to appear in the matter, and shew cause for or against same. The phrase is most commonly used with reference to the various persons and bodies who seek to oppose a bill in Parliament (as to which see Smet-hurst on *Locus Standi*); but the phrase is of frequent occurrence also in ordinary actions: e.g., a solicitor after incurring costs, or after becoming entitled to costs, in an action has a *locus standi* in same to use his client's name to prosecute the action so as to realize his costs (*Fisher v. Baldwin*, 11 Ha. 372).

LODGER: See titles ELECTORAL FRANCHISE; LODGING-HOUSES; LODGINGS.

LODGING-HOUSES. The keeper of a lodging-house is not liable (as an inn-keeper) for the loss of the goods brought by a lodger to her house, provided she be not guilty of a positive misfeasance (*Holder v. Soulby*, 8 C. B. (N.S.) 254). As regards common lodging-houses, these are under sanitary inspection, and various provisions have been made by statute to prevent their overcrowding, especially in the metropolis (37 & 38 Vict. c. 89), but also elsewhere in England.

See title HEALTH, PUBLIC.

LODGINGS. A person who lets lodgings impliedly warrants that they are reasonably fit for habitation (*Smith v. Marable*, 11 M. & W. 5). A contract for mere lodgings is always determinable upon notice by either party to the other, a week's notice being that usually given in the absence of any special agreement; and this rule is not altered although the rent should not be paid by the week, but by longer periods (*Right v. Darby*, 1 T. R. 159). Since the stat. 34 & 35 Vict. c. 79, a lodger's goods cannot be distrained for the rent owing from his landlady to the superior landlord.

LOLLARDS. A body of primitive Wesleyans, who assumed importance about the time of John Wycliffe (1360), and were very successful in disseminating evangelical truth; but being implicated (apparently against their will) in the insurrection of the Villeins in 1381, the stat. *De Hæretico Comburendo* (2 Hen. 4, c. 15) was passed against them, for their suppression. However, they were not suppressed; and their representatives survive to the present day under various names and disguises.

See titles CHURCH AND STATE; DISSENTERS; &c.

LONDON, CITY OF: See title CITY OF LONDON.

LONG PARLIAMENT, ACTS OF. This Parliament assembled in 1640-41, and was

LONG PARLIAMENT, ACTS OF—*contd.*
 never formally dissolved. The stat. 4 Edw. 3, c. 14, had enacted that Parliament should meet every year or oftener if need were; but this Act, which had been little regarded by any sovereign, was most egregiously disregarded by Charles I. Accordingly, the Long Parliament now enacted its famous Triennial Bill, providing that Parliament, if not actually then sitting, should be *ipso facto* dissolved at the expiration of three years from the first day of its session, and the chancellor was to issue new writs within three years from the dissolution; and in case no such writs were issued within that time, the peers were to assemble of themselves at Westminster and to issue writs to the sheriffs requiring them to summon representatives of the Commons; and in case the Peers failed to do so, the sheriffs of their own accord, or (in their default) the electors themselves were to proceed to the new elections. This Triennial Act was repealed upon the restoration of Charles II., and is to be distinguished from the Triennial Act so called *par éminence* (6 W. & M. c. 2).

The other legislative Acts of the Long Parliament were the following:—

(1.) They annulled the judgment against Hampden in the case of *Ship Money*, and declared ship-money and also the taxes of Charles I. on foreign merchandise illegal;

(2.) They abolished the Court of Star Chamber; also, the Court of High Commission; also, the Court of the President and Council of the North; also, the Court of the President and Council of Wales; also, the Courts of the Duchy of Lancaster and of the County Palatine of Chester;

(3.) They declared it illegal to *impress* his majesty's subjects, or to compel them to go out of the country to serve in foreign wars;

(4.) They passed an Act declaring that they could not be dissolved without their own consent;

(5.) They abolished Episcopacy and established Presbyterianism;

(6.) They deprived the king of the control of the militia and forces, and assumed that control to themselves, and eventually they laid *nineteen propositions* before the king, of which the principal were the following:—

(a.) That privy councillors and officers of state should be approved in Parliament;

(b.) That the education and marriage of the king's children should be under the control of Parliament;

(c.) That the militia and forces and all fortresses and magazines should be given up to the nominees of Parliament;

LONG PARLIAMENT, ACTS OF—*contd.*

(d.) That all judges should hold office during good behaviour; and,

(e.) That all popish lords should be deprived of their votes.

LONGI TEMPORIS POSSESSIO: *See* title USUCAPIO.

LORD CAMPBELL'S ACT: *See* title CAMPBELL (LORD'S) ACT.

LORD CHANCELLOR: *See* titles CHANCELLOR; LORD CHIEF JUSTICE.

LORD CHIEF JUSTICE. The Lord Chief Justice of England (being the Chief Justice of the Queen's Bench Division) was originally the Justiciar of the kingdom, and as such was a higher officer than the Lord Chancellor. The Justiciar was regent of the kingdom during the king's absence. The office was invented by Will. I. and abolished (in its executive part) by Edw. I.; but the clerks in the chancellor's office, in issuing the original writs by which actions were commenced at common law, were subject to the Chief Justice, and not exclusively to the Chancellor. The gradual rise of the Lord Chancellor to his present admitted judicial and executive superiority over the Lord Chief Justice is not distinctly traceable in history, but it is involved in the struggles of Equity to assert its control of the Common Law.

See title LAW AND EQUITY.

LORD HIGH CONSTABLE: *See* title CONSTABLE.

LORD LIEUTENANT. This office was created by Philip and Mary, as a revival of the old English earl, i.e., chief military officer of the Crown for the county, and the sheriff became thenceforth a purely civil officer. By the Army Regulation Act, 1871 (34 & 35 Vict. c. 86), s. 6, the jurisdiction of the Lord Lieutenant over the militia and other the auxiliary forces has been re-vested in the Crown, and is exercised through the Secretary of State for War and his officers.

LORD OF MANOR: *See* titles COPYHOLDS; ENFRANCHISEMENT; MANOR; WASTE-LANDS.

LORD MAYOR. The chief officer of the Corporation of the City of London is so called. The origin of the appellation of "Lord" which the Mayor of London enjoys, is attributed to the fourth charter of Edward III., which conferred on that officer the honour of having maces, the same as royal, carried before him by the serjeants. He is annually nominated and elected by the livery from amongst such of the aldermen as have served the office of sheriff. In his character of chief magis-

LORD MAYOR—continued.

trate of the city, the Lord Mayor presides in the Inner Chamber of the Court of Aldermen in the Court of Common Council, and in the Court of Common Hall; and as such issues his precept for the holding of any of these courts. He is also nominally President of the Court of Aldermen in the Outer Chamber (or Lord Mayor's Court). The corporation provide the Lord Mayor with the Mansion House, which they keep in repair at their own expense, and annually grant him a sum of money amounting to £10,000, and also provide him with various officers at their own expense to support the dignity of the office (Pulling's Laws and Customs of the City and Port of London).

LORD MAYOR'S COURT. This is a Court of Record, of Law and Equity, and is the chief court of justice within the corporation of London. Its legal style is "The Court of our Lady the Queen, holden before the Lord Mayor and Aldermen in the Chamber of the Guildhall of the City of London." In legal consideration and in conformity with the style of the Court, the Lord Mayor and Aldermen are supposed to preside; but the recorder is in fact the acting judge. All persons, as well freemen as non-freemen, not being under any general incapacity which would disable them from suing in the superior Courts at Westminster, may sue in this Court. As a Court of Common Law it has cognizance of all personal and mixed actions arising within the City and liberties, without regard to the amount of the debt or damages sought to be recovered; and if the gist of the action arise within the City, the residence of the plaintiff or defendant therein is immaterial (Pulling's Laws and Customs of the City and Port of London, 177, 2nd ed.; Brandon on Foreign Attachments, and Notes of Practice). An appeal from the Lord Mayor's Court used to lie to the Exchequer Chamber, but it now lies (as from an inferior Court) to a Divisional Court of the High Court (*Appleford v. Judkins*, 3 C. P. Div. 489). As to whether and when a prohibition issues or not to restrain an action in the Lord Mayor's Court, see title PROHIBITION, and as to attachments issuing out of the Lord Mayor's Court, see title ATTACHMENT, FOREIGN.

LORD PARAMOUNT: See titles FEUDAL SYSTEM; LORD AND VASSAL.

LORD AND VASSAL. The fundamental maxim of all feudal tenure is this: that all lands were originally granted out by the sovereign, and are therefore holden either mediately or immediately from the Crown. The grantor was called the pro-

LORD AND VASSAL—continued.

prietor or lord, being he who retained the dominion or ultimate property of the feod or fee; and the grantee, who only had the use and possession, according to the terms of the grant, was styled the feudatory or vassal, which was only another name for the tenant or holder of the lands.

See titles ESTATE; FEUDAL SYSTEM; TENURE.

LORDS OF APPEAL IN ORDINARY.

Are life peers appointed under the statute 39 & 40 Vict. c. 59 (Appellate Jurisdiction Act, 1876), for strengthening the judicial body of the House of Lords.

LORDS APPELLANTS. Five peers who for a time superseded Richard II. in his Government; and whom, after a brief control of the Government, he in turn superseded in 1397, and put the survivors of them to death. Richard II.'s eighteen commissioners (twelve peers and six commoners) took their place, as an embryo Privy Council acting with full powers, during the Parliamentary recess.

LORD'S DAY: See title SUNDAY.

LORDS, HOUSE OF: See titles HOUSE OF LORDS, JURISDICTION OF; PEERS.

LORDS ORDAINERS. Appointed in 1312, in reign of Edw. II., for the control of the sovereign and the court party, and for the general reform and better government of the country.

LORDS SPIRITUAL AND TEMPORAL. The *lords spiritual* compose one of the constituent parts of Parliament, and consist of two archbishops and twenty-four bishops; and by the Act of Union with Ireland (39 & 40 Geo. 3, c. 67) four Irish lords spiritual, taken from the whole body by rotation of sessions, were added, who ranked next after the spiritual lords of Great Britain; but under the stat. 32 & 33 Vict. c. 42, these Irish lords spiritual have ceased. The *lords temporal* consist of all the peers of the realm, by whatever title of nobility distinguished, and form another constituent part of Parliament.

See title PEERS.

LOSS: See title PROFIT AND LOSS.

LOSS, TOTAL: See title UNDERWRITERS.

LOST DOCUMENT, PROOF OF. This proof consists in (1.) Proof of the loss, whereby secondary evidence of the contents of the document becomes forthwith admissible; and

(2.) Proof of an office, or examined, or other copy thereof or draft thereof, or even by a witness's recollection of its contents (*Sugden v. Lord St. Leonards*, 1 Prob. Div. 154).

LOST PROPERTY: See title FINDER OF LOST PROPERTY.

LOST WILL: See titles LOST DOCUMENT, PROOF OF; WILLS.

LOT. Certain duties, tolls, assessments, or impositions are frequently so termed.

See title LOT AND SCOT.

LOT AND SCOT (Sax. *llot*, a chance or lot, and *sceat*, a part or portion). Certain duties which must have been paid by those who claimed to exercise the elective franchise within certain cities and boroughs before they were entitled to vote. It is said that the practice became uniform to refer to the poor-rate as a register of "scot and lot" voters, so that the term, when employed to define a right of election, meant only the payment by a parishioner of the sum to which he was assessed for poor rates (Reg. on Eccl. 198, 6th ed.; 1 Dougl. 129).

See title ELECTORAL FRANCHISE.

LOTTERY. Lotteries have been frequently resorted to both by states and by individuals for the purpose of raising money, but they are proscribed by the morality and industry of England. They were declared a nuisance and prohibited by 10 & 11 Will. 3, c. 17; and even foreign lotteries are forbidden by the 6 & 7 Will. 4, c. 66, to be advertised in England. For an instance in which these laws have been put in force see *Allport v. Nutt*, 1 C. B. 974; and see title WAGERING.

LOUAGE. This is the contract of hiring and letting in French Law, and may be either (1.) of things, or (2.) of labour. The varieties of each are the following:—

(1.) Letting of things,—

(a.) *Bail à loyer*, being the letting of houses;

(b.) *Bail à ferme*, being the letting of lands;

(2.) Letting of labour,—

(a.) *Loyer*, being the letting of personal service;

(b.) *Bail à cheptel*, being the letting of animals.

See titles HIRING; LOCATIO CONDUCTIO.

LOYER: See title LOUAGE.

LUCRATIVA CAUSA. Means a consideration which is voluntary, that is to say, a gratuitous gift or such like. It was opposed to *onerosa causa*, which denoted a valuable consideration. It was a principle of the Roman Law that two lucrative causes could not concur in the same person as regarded the same thing, that is to say, that when the same thing was bequeathed to a person by two different testators, he could not have the thing (or its value) twice over.

LUCRATIVA USUCAPIO. This species of *usucapio* was permitted in Roman Law only in the case of persons taking possession of property upon the decease of its late owner, and in exclusion or defeasance of the heir—whence it was called *usucapio pro hærede*. The adjective *lucrative* denoted that the property was acquired by this *usucapio* without any consideration or payment for it by way of purchase: and as the possessor who so acquired the property was a *malâ fide* possessor, his acquisition or *usucapio* was called also *improba* (i.e., dishonest); but this dishonesty was tolerated (until abolished by Hadrian), as an incentive to force the *hæres* to take possession, in order that the debts might be paid and the sacrifices performed; and as a further incentive to the *hæres*, this *usucapio* was complete in one year.

LUGGAGE: See title PASSENGER'S LUGGAGE.

LUNACY is the common legal designation of insanity, or the state of being *non compos mentis*. The law takes notice of three degrees of lunacy: (1.) Lunacy which exempteth in crime; (2.) Lunacy which exonereth in contract; and (3.) Lunacy which placeth the party and his property under the protection of the Crown.

(1.) Criminal lunacy may be either total or partial. And if total, then either natural (*dementia naturalis*), in which case it is termed *idiocy*, or accidental (*dementia accidentalis*), which may be either permanent or intermittent (i.e., accompanied with "lucid intervals") or wilfully brought on by the party himself (*dementia affectata*), e.g., in the case of drunkenness. If the lunacy be partial, then the criminal definition of it is that given in *R. v. M'Naghten* (10 Cl. & F. 200), where the judges advised the House of Lords to this effect, that notwithstanding the party did the Act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he was nevertheless punishable according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law.

(2.) With reference to contract law, the rule is, that a lunatic is liable for necessities, and generally also on contracts executed of which he has had the advantage, notwithstanding they may not be for necessities at all (*Molton v. Camroux*, 4 Ex. 17); but that on all executory contracts he is not liable at all, not even although at the time of contracting he betrayed no signs of lunacy, and the other contracting party was ignorant thereof.

(3.) With reference to the Chancellor and

LUNACY—continued.

Lords Justices' jurisdiction in lunacy, this jurisdiction extends generally to persons not capable of managing their own affairs, and therefore are properly deemed of unsound mind, *non compos mentis*; although in this case the lunacy is mostly of a very slight degree. This jurisdiction is now most commonly exercised under the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), or where the property is of small amount, under the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86).

LUNACY JURISDICTION. Was originally vested in the Court of Exchequer, as being incident to the Crown's prerogative in the matter of revenue; but became transferred to the Lord Chancellor, not however as being head of the Court of Chancery but as being an official of the Crown, and portion of the executive. Shortly after the appointment in 1851 of the Lords Justices of Appeal in Chancery, they were intrusted by virtue of the Queen's sign manual with the care and custody of lunatics; and the same Lords Justices or their successors under the Judicature Acts, 1873-75, continue to exercise (concurrently with the Lord Chancellor) the same jurisdiction (*Re Lanotte*, 4 Ch. Div. 325). The jurisdiction was defined by the Statute of Prerogatives (17 Edw. 2, cc. 9 & 10), and is regulated by the Lunacy Regulation Act, 1853. See the cases of *Beall v. Smith*, 9 Ch. App. 85; and *In re Edwards*, 10 Ch. Div. 605.

LUNATIC, COMMITTEE OF. One or more persons (being usually near kin of the lunatic) are appointed to be the guardians of his person and of his property, or of either. These guardians exercise all the powers which the lunatic himself (if sane) might have done, but in some cases they require the sanction of the Lord Chancellor in Lunacy before doing the act.

M.

MAGISTRATES. The jurisdiction of justices of the peace and of magistrates generally is limited to the district for which they are appointed, and is local rather than personal; but acts purely ministerial, *e.g.*, receiving informations, taking recognizances, &c., may be done elsewhere, but not acts of a judicial character. The powers and duties of justices, and the proceedings before them, are regulated principally by the stat. 11 & 12 Vict. c. 42 (as regards indictable offences), and by the stats. 11 & 12 Vict. c. 43, and 42 & 43 Vict. c. 49 (as

MAGISTRATES—continued.

regards matters which are subjects for the summary jurisdiction).

See generally GREENWOOD AND MARTIN'S **MAGISTERIAL AND POLICE GUIDE**.

MAGNA CHARTA. The great charter of English liberty granted by or rather extorted from King John, and afterwards, with some alterations, confirmed in Parliament repeatedly by Henry III. and Edward I. It was called Magna Charta on account of its great importance, and partly in contradistinction to another charter (*Carta de Foresta*), which was granted about the same time. The provisions of this charter extended not only to the administration of justice (regulating the various jurisdictions, temporal and ecclesiastical), but also to the personal liberty of the subject, the limits of taxation of his property, the rights of foreign merchants within the realm, as well during peace as in times of war, and also the liberties and privileges of the church. It contains also numerous provisions of a purely temporary nature, intended to remedy the prevailing abuses of the times.

This statute, although constantly appealed to as the Palladium of English liberties, is vague and general in its language, not providing for all the difficulties of the subsequent centuries; and, as a consequence, its provisions have been from time to time variously enlarged by judicial interpretation and by resolutions in Parliament and even by express legislation.

See titles **BATES'S CASE**; **BANKERS' CASE**; **DARNEL'S CASE**; **SHIP MONEY**; &c.

MAGNUM CONCILIUM. Was the King's Court of Parliament (or *Aula Regis*), sitting without the Commons, and exercising judicial functions.

See title **HOUSE OF LORDS, JURISDICTION OF**.

MAIDEN ASSIZE. When, at the assizes, no person has been condemned to die, it is termed a "maiden assize."

MAIDEN RENTS. A fine paid by the tenants of some manors to the lord for a licence to marry a daughter (Cowel).

MAIHEM, or MAYHEM. The violently depriving another of the use of such of his members as are available in fighting, and the depriving him of his virile parts, the loss of which in him (as in all animals) abates his courage, are considered mayhems; hence, to do a person such an external injury as merely detracts from his personal appearance is not considered a mayhem, because it does not weaken him, but only disfigures him (1 Hawk. c. 44).

MAINPERNORS : See title **MAINPRISE**.

MAINPRISE, WRIT OF. Means literally a taking by the hand (*main*, the hand; *prise*, from *prendre*, to take), in the sense of helping out of prison. One of the means of remedying the injury of false imprisonment was by a writ called a writ of mainprise, directed to the sheriff (either *generally*, when any man was imprisoned for a bailable offence, and bail had been refused; or *specially*, when the offence or cause of commitment was not properly bailable below), commanding him to take sureties for the prisoner's appearance, usually called mainpernors, and to set him at large. *Mainpernors* differed from bail, in that a man's bail might imprison or surrender him up before the stipulated day of appearance, whereas mainpernors could do neither, but were simply sureties for his appearance at the day; again, bail were only sureties that the parties should be answerable for the special matter for which they stipulated, mainpernors were bound to produce him to answer all charges whatsoever. Where an offence was not bailable at all, the justices were frequently directed "to commit such offender or offenders to the common goal of the county, there to remain without bail or mainprise" (43 Eliz. c. 2, s. 4; Dyer, 272 (31); 4 Inst. 179).

See title **BAIL**.

MAINTENANCE. This word has various senses.

(1.) It designates an offence bearing a near relation to barratry, and which consists in officiously intermeddling in a suit that in no way belongs to one, as by maintaining or assisting either party with money, or otherwise taking great pains to assist the plaintiff or defendant in the suit, although having nothing to do with it (*Les Termes de la Ley*; *Findon v. Parker*, 11 M. & W. 675).

(2.) In another sense, it denotes the provision made, either by deed or will, or by order of the Court of Chancery, for the support and bringing up of children during their minorities. The Court is now able, in a proper case, to make the requisite order on summons, without action.

See title **INFANTS, JURISDICTION OVER**.

MALA FIDES : See titles **BONA FIDES**; **FRAUD**.

MALA IN SE. All things which are evil in themselves are so termed, in contradistinction to those things which are not evil in themselves, but are only forbidden by the laws, and which are therefore called *mala prohibita*, or forbidden evils, and sometimes *mala quia prohibita*, to indicate that they are evils by reason only of the prohibition.

MALA PROHIBITA : See title **MALA IN SE**.

MALFEASANCE. Is the same as a misfeasance, and is opposed to a *bienfaisance*, which is the regular and proper conduct of a matter.

See title **MISFEASANCE**.

MALICE. In its legal sense, this word does not simply mean ill-will against a person; but signifies a wrongful act, done intentionally, without just cause or excuse. Thus, if I intentionally and without just cause or excuse struck a perfect stranger, I should, in legal contemplation, do it of malice, because I did it intentionally, and without just cause or excuse. So, if I maim cattle, even without knowing whose they are, I should, in legal construction, do it of malice, because it would be a wrongful act, and be done intentionally, without cause or excuse. Malice is of the following varieties:—

(1.) Malice in Law, being that species of it which is implied without proof; and

(2.) Malice in Fact, which again presents two sub-varieties, viz. :—

(a.) Personal malice, *i.e.*, spite, against some particular individual; and

(b.) Malice, against the world generally, without reference to any particular individual, *e.g.*, where a person throws a bottle of vitriol over a wall into the public street or highway, not knowing or caring who or whether any one is passing in the street or on the highway at the time.

MALICE PREPENSE (from the Latin *malitia*, malice, and the Fr. *penser*, to think, and *pre* beforehand.) Malice aforethought, *i.e.*, deliberate, predetermined malice (2 Roll. Rep. 461). Homicide unless shewn to be unaccompanied with this malice is murder; but otherwise it is only manslaughter. The malice to commit a felonious act, where another is committed although not intended, is referrible to the act committed (*R. v. Crispe*, 16 How. St. Tri. 80); but this inferential reference being an extreme application of malice is not made in new crimes created by statute (*Reg. v. Pembliton*, L. R. 2 C. C. R. 119).

MALICIOUS ARREST : See title **FALSE IMPRISONMENT**.

MALICIOUS INJURY TO PROPERTY. The stat. 24 & 25 Vict. c. 97, is the Malicious Injuries to Property Act, such injuries comprising arson, demolition of or damage to machinery, obstruction of railway carriages, injuring telegraphs, damaging ships, removing buoys, and the like. A suspected person loitering by night may be summarily apprehended. Principals in

MALICIOUS INJURY TO PROPERTY—
continued.

the second degree and accessories before the fact may be punished like the principal felon. The offence is summarily triable before justices.

MALICIOUS PROSECUTION. A person who has been unjustly prosecuted for any crime, or who has causelessly been made a bankrupt, may bring an action for a malicious prosecution against the prosecutor or the petitioner as the case may be; but for the success of his action, he must prove two things:—(1.) The fact of malice; and, (2.) The absence of all reasonable or probable cause for the defendant's conduct; and also of course that the accused was acquitted. Upon proving the acquittal and the absence of probable cause, the malice will be implied.

See titles FALSE IMPRISONMENT; MALICIOUS ARREST.

MALINS'S ACT: See titles REVERSIONARY INTEREST; SURVIVORSHIP, WIFE'S RIGHT OF.

MALITIA SUPPLET ETATEM. In the case of infants between the ages of seven and fourteen years committing crimes (other than the crime of rape, which with them is a legal impossibility), the child's criminal capacity, i.e., intelligence, may be proved by shewing that, notwithstanding his tender years, he was fully aware of the character of the criminal act, his wicked (or prematurely developed) intelligence supplying the lack of age, upon this maxim, Malice supplies the defect of years. It is doubtful if the maxim applies to children under the age of seven years; but the corresponding maxim of evidence, *sapientia supplet etatem*, does undoubtedly apply even to them.

See title SAPIENTIA SUPPLET ETATEM.

MALPRACTICE. Bad workmanship on the part of the higher classes of skilled professionals is so called, e.g., by a surgeon or physician in his treatment of a patient. Such ill-treatment is a tort, for which damages may be recovered.

MALUS IN UNO MALUS IN OMNIBUS. This maxim which means, being translated literally, "Bad in one respect bad in all," is like that other maxim, *falsus in uno falsus in omnibus*, and both maxims are most dangerous maxims in their indiscriminate application. As applied to witnesses, it means that where their testimony is discredited or falsified in one thing, it is discredited and falsified in whole,—whereas, in point of fact, the utmost effect of the partial discredit should be to render one's judgment of the rest more severely careful. The maxim expresses a small truth in a very exaggerated form.

MANCIPATIO. In Roman Law, was a process of conveyance applicable to *res mancipi* only. It was effected by means of a balance and scales with a piece of bronze to represent the purchase money or price (*per aes et librum*); and the ceremony of the *mancipatio* took place in the presence of five witnesses and of the *libripens* (balance-holder) and of the *familias emptor* (purchaser), making in all seven persons who were witnesses of the act of the vendor. In case the vendor was the true owner, the *mancipatio* at once transferred the *dominium* to the purchaser; but otherwise the process of *usucapio* was required to complete the conveyance of the *dominium*. Where *traditio* of a *res mancipi* was made, then *traditio* plus *usucapio* equalled (in effect) *mancipatio*. There could be no *mancipatio* of *res nec mancipi*; and in Justinian's time, there being no *res mancipi*, it followed that there was no *mancipatio*, but only delivery (*traditio*), and which delivery (when made by the true owner) had the same effect as the old *mancipatio* in transferring the *dominium*; but *traditio* (when made otherwise) required *usucapio* or *longi temporis possessio* to complete that transfer.

MANCIPI VEL NEC MANCIPI. In Roman Law, was a division of *res* (i.e., things). It corresponded as nearly as may be to the early distinction of English Law into real and personal property,—*res mancipi* being objects of a military or agricultural character, and *res nec mancipi* being all other subjects of property. Like personal estate, *res nec mancipi* were not originally either valuable in *se* or valued. The distinction was completely obsolete in Justinian's time, both classes having then the same level.

MANCIPIMUM. In Roman Law, was the momentary condition in which a *filius*, &c., might be when in course of emancipation from the *potestas*, and before that emancipation was absolutely complete. The condition was not like the *dominica potestas* over slaves; but slaves are frequently called *mancipia* in the non-legal Roman authors.

MANDAMUS. This is either (1.) the prerogative writ so called, or (2.) the ordinary writ of injunction.

(1.) The prerogative *mandamus* is a writ which issues in the king's name out of the Court of King's Bench, commanding the effective execution or restitution of some right, and in general belongs exclusively to that Court. It is used principally for public purposes, and to enforce the performance of public rights or duties, affording also specific relief, and enforcing private rights when they are withheld by a public officer, e.g., it issues to compel a removed clerk to deliver up books of a public corpo-

MANDAMUS—continued.

rate company: to compel overseers to deliver up parish books to their successors; to compel a lord and steward of a copyhold manor to admit the tenant; it also issues to inferior Courts and to judges thereof, and justices of the peace and other public functionaries, to compel them to proceed according to their respective duties. A *mandamus* is not generally granted by the Court, excepting when the party applying for it has no other specific remedy (*Les Termes de la Ley*: C. L. P. Act, 1854, ss. 75-77).

(2.) The ordinary *mandamus* is to all intents and purposes an injunction, and issues under the provisions of the C. L. P. Act, 1854 (ss. 68-74), and of the Judicature Act, 1873 (s. 25, sub-s. 8) and Order LII, to compel the defendant in an action to perform any duty, being or not of a public character, in which the plaintiff has an interest.

MANDAT. In French Law is the *mandatum* of Roman, and the *gratuitous bailment* of English Law.

See titles BAILMENT; MANDATUM.

MANDATORY INJUNCTION. Is an injunction ordering some positive act, whether or not it be expressed in a negative form, e.g., the pulling down of a house, erected after plaintiff had given notice of his right of way and after he had commenced his action for an injunction (*Krech v. Burrell*, 7 Ch. Div. 551); damages would be no equivalent in such a case.

MANDATUM. A contract by which one employs another to act for him in the management of his affairs, or in some particular department of them, which employment the person accepts and agrees to act therein. He who so gives the employment is called the *mandator*, and he who accepts it the *mandatarius*. It is one of the four consensual contracts mentioned by Justinian, and is distinguished by him from the *quasi contract Negotiorum Gestorum*, in which the employment was voluntarily accepted without request. The agency in both cases is *gratuitous*, and is determinable by death or renunciation. The *mandator* has an action of account against the *mandatarius*, but the *mandatarius* is only liable for *dolus* and *culpa lata*.

MANNER AND FORM (*Modo et formâ*.) Formal words introduced at the conclusion of a traverse; and their object was to put the party whose pleading was traversed, not only to the proof that the matter of fact denied was in its general effect true as alleged, but also that the manner and form in which the fact or facts were set forth were also true. But when a traverse was pointed to one amongst several independent

MANNER AND FORM—continued.

allegations, it simply put in issue the substance of that allegation notwithstanding the words *modo et formâ*. Under the present rules of pleading denials *modo et formâ*, if standing alone, are deemed evasive and are insufficient (Order XIX, 22), and every traverse is to be express and so large and general (if the facts admit of it) that the substance of the contrary allegation is denied, as well in the particular circumstances of time, place, &c., therein mentioned, as also in all other circumstances of time, place, &c., whatsoever.

MANOR. A manor seems to have been a district of ground held by great personages, with jurisdictional rights over the people of the district. Such rights were the Norman equivalent for the Anglo-Saxon *Sce* and *Sac*. A manor (regarded as a hereditament) is compounded of various things, as of a mansion-house, arable land, pasture, meadow, wood, rent, a tyowson, court baron, and such like. A manor, to be such, must have continued from time immemorial; for at the present day, and ever since the stat. *Quia Emptores* (18 Edw. I, c. 1), a manor cannot be created, because the process of subinfeudation has been abolished, and a Court Baron cannot now be made, and a manor cannot exist without a Court Baron, and suitors and freeholders to the amount of two at the least; for if all the freeholds except one escheat to the lord, or if he purchase all except one, his manor is at once gone and dead. A manor by reputation, however, but which has ceased to be a legal manor, by defect of suitors of the Court, may yet retain some of its privileges, as a preserve for game, and the lord may in that case still appoint a gamekeeper thereto.

With reference to the strict legal content of the word manor, it seems that even without the addition of the word "appurtenances," it will pass the following properties, viz:—

- (1.) The demesnes, i.e., the lands of which the lord is seised within the manor;*
- (2.) The freehold of all the lands held by copyhold or other customary tenants;
- (3.) The wastes;
- (4.) Fealty, suit of Court, rents, and generally all the services;
- (5.) Courts Baron with fines and perquisites annexed thereto;
- (6.) Courts Leet, with the like fines and perquisites;

* But demesnes previously granted in fee do not, on a repurchase of them by the lord, become part of the manor again, as they would do upon an escheat (*Delacherols v. Delucherois*, 11 H. L. C. 62).

MANOR—continued.

(7.) Franchises; and

(8.) Advowsons Appendant.

Many manors which have been destroyed are still reputed manors, and will pass in a deed by the description of manor.

See title REPUTED MANOR.

MANSLAUGHTER. Is a criminal offence; it is defined as homicide felonious, but without premeditation; and it may be either (a.) involuntary, as where a man doing an *unlawful* act not amounting to felony by accident kills another, or where by culpable neglect of duty he occasions another's death; or (b.) voluntary, as when upon a sudden quarrel, two persons fight, and one of them kills the other, or where a man greatly provokes another by some personal violence and the other immediately kills him.

MANUMISSION. The making of a bondman free, which in the feudal ages was a frequent occurrence. Manumission was either express or implied. Manumission *express* was done by the lord granting to his villein a deed of enfranchisement. Manumission *implied*, was done by the lord entering into an obligation with his villein to pay him money at a certain day, or granting him an annuity, or leasing lands to him by deed for a term of years, or doing any other similar act which would imply that he treated with his villein upon the footing of a freeman (*Les Termes de la Ley*). Similar modes of dealing with a *servus* had in Roman Law the like effect of an implied manumission; and in particular the mere circumstance of the master describing his slave in a written document as his son (*filius*) had the effect of rendering him a freeman, although not a son (Just. Inst. i. 11, 12). The modes of express manumission in Roman Law were anciently three only, that is to say, by the rod (*vindicta*), by the census (*censu*), and by will (*testamento*); but in later times, many new and simpler modes were introduced (*favore libertatis*), so much so that any declaration of intention to manumit, if made in presence of a magistrate (e.g., even at a street-crossing), would suffice.

MANUS. A condition of subjection into which females might come in Roman Law, either by *co-emptio* (to their husband or a stranger), or by *usus* or *confarreatio* (to their husband). It became obsolete with the establishment of the new subjection of women that was introduced by Christianity.

See title POTESTAS.

MANUS INJECTIO: See title LEGIS ACTIONES.

MARINE INSURANCE: See title INSURANCE OR ASSURANCE.

MARITAGIUM. Was the wife's portion in English Law and the *dos* of Roman Law, and was distinguished from *matri-monium*, which was land inherited from one's mother. It also signified the power which the lord or guardian in chivalry had of disposing of his infant ward in matrimony, or that profit which might accrue to the lord by the marriage of one under age who held his lands of him by knight service.

MARITAL RIGHT. The properties of the wife which the husband takes or is entitled to take simply as husband are said to belong to him by his marital right (*jure mariti*), to distinguish them from those other properties of the wife which he only takes by right of administering to the wife.

See title HUSBAND AND WIFE.

MARITIME INTEREST. The interest payable on hypothecations and bottomry and respondentia bonds is so called; and on account of the extraordinary risk attaching to such loans, the rate of interest is usually very high, and there was never any restriction upon its amount (Smith's Merc. Law, 8th ed., p. 410). The phrase is sometimes applied loosely to the interest payable by ordinary agreement upon money advanced to be hazarded in a commercial speculation.

MARITIME LAW. The law of shipping, maritime insurance, and such like. As regards its source, it is largely derived from the civil law; and so far as it deals with such questions as the effects of a blockade, and of carrying contraband, and of carrying enemy goods in neutral vessels, and of trading with the enemy, it is derived almost exclusively from the principles of international law.

See title INTERNATIONAL LAW.

MARITIME LIEN. Is a lien attaching to ship and freight for damage occasioned by ship, and which lien affords the ground of an action *in rem* in the Court of Admiralty; this lien does not attach to the cargo. The lien attaches as from the date of the damage occurring, and has precedence accordingly over all subsequent liens and rights arising *ex contractu*, excepting, *semble*, subsequent bottomry bonds. The liability of the owners of the ship is limited by the amount of the security, i.e., the ship and freight, but as regards the costs of the proceedings, the owners are personally liable. Kay's Shipmasters, 917-19.

MARITIME TERRITORY: See title TERRITORIAL WATERS.

MARK. Was the unit of the German community, called also the *vicus*; an aggre-

MARK—*continued.*

gate of such communities constituted the *pagus* or shire; and an aggregate of shires constituted the *populus* or state. All the land within the *vicus* belonged to it, and was annually allotted as to its arable portions among the freemen, the pasture lands being enjoyed in common without allotment.

See title **FOLKLAND**.

MARKET. In its legal signification may be defined to be the liberty or privilege by which a town or lord is enabled to keep a market (Old Nat. Brev. 149). Any one being a grantee thereof from the Crown may be entitled to a market; and for infringement or disturbance of his rights may obtain an injunction (*Elwes v. Payne*, 12 Ch. Div. 468). (See also title **FRANCHISE**). The Markets and Fairs Clauses Act (10 & 11 Vict. c. 114) consolidates in one Act the provisions usually contained in special Acts for constructing and regulating fairs and markets; and under the stat. 31 & 32 Vict. c. 51, the usual days for holding fairs, if inconvenient, may on representation to the Home Secretary be altered, a notice of the alteration being published in the *Gazette*. The fairs of the metropolis are regulated by the stats. 2 & 3 Vict. c. 47, and 31 & 32 Vict. c. 106. No one may place a stall in a market without leave from the owner of the soil (*Northampton (Mayor) v. Ward*, 1 Wils. 107), and trespass will lie for so doing (*Norwich (Mayor) v. Swan*, 2 W. Bl. 1116), unless the right to place the stall there exists by custom (as it does in many cases) or by grant, or license, or prescription.

The word "market" sometimes denotes simply that purchasers of the particular commodities may always be had, in other words, that there is always a demand for the commodities; and when there is not, the damages for breach of contract of sale by non-acceptance of the commodities are measured by general considerations, and not by any particular rule.

See title **DAMAGES**.

MARKET OVERT. Selling goods in *market overt* means selling them in an *open market*, as opposed to selling them privately; the former kind of sale effects a change in the property of the things so sold, even as against the true owner, e.g., in the case of stolen goods; but a sale out of market overt does not. In the country, the market-place or spot of ground set apart by custom for the sale of goods and wares, &c., is, in general, the only market overt. In London, however, a sale in an open shop of proper goods, is equivalent to a sale in market overt; for every day, except Sunday, is a market there. See

MARKET OVERT—*continued.*

generally the *Case of Market Overt*, Tud. L. O. Mer. Law, 713.

MARKS, MERCHANDISE. The marks placed upon goods the articles of commerce to denote the maker, and incidentally the quality of the goods, are called marks on merchandise, and by the Common Law would be protected upon the like grounds that trade-marks are protected, viz., the prevention of frauds upon the public, and indirectly upon the manufacturer of the goods. The Merchandise Marks Act, 1862 (25 & 26 Vict. c. 88), was passed for the purpose of amending the law relating to the fraudulent marking of merchandise, and the sale of merchandise falsely marked for the purpose of fraud. The Act makes it a misdemeanor to forge or counterfeit any mark with a fraudulent intent, or to apply any mark to goods with a fraudulent intent (s. 2), or to any bottle, case, or such like with a fraudulent intent (s. 3), or to sell or cause to be sold any goods marked with, or in a bottle or case marked with, a forged or counterfeited mark, knowing the same to be forged or counterfeited (s. 4), and colourable variations are no defence (s. 5); but the use of a name, word, or expression, used to denote the quality only, and not for the purpose of fraud, constitutes no offence within the Act (s. 9). The punishment is fine or imprisonment (not exceeding two years), or both.

See title **TRADE-MARKS**.

MARKSMAN. A deponent in an affidavit who cannot write his name, but makes his mark or cross instead, is so termed (2 Q. B. 520, n. (a); 4 Dowl. P. C. 765). The proof of such a signature by comparison of handwriting is excluded, a mark not presenting sufficient data of comparison.

MARQUE AND REPRISAL, LETTERS OF. These words "marque and reprisal," are frequently used as synonymous; but taken in their strict etymological sense, the latter signifies a re-taking, i.e., a taking in return, and the former signifies passing the frontiers (*marches*) in order to such re-taking. Letters of marque and reprisal are grantable by the law of nations, whenever the subjects of one state are oppressed and injured by those of another, and justice is denied by the latter state; and the party to whom these letters are granted may then seize the bodies or the goods of the subjects of the state to which the offender belongs, until satisfaction be made, wherever they happen to be found. Reprisals are to be granted only in case of a clear and open denial of justice. They are regulated in England by the stat. 4 Hen. 5, c. 7. They are of course granted only in times of peace,

MARQUE AND REPRISAL, LETTERS OF—continued.

and for a cause which is not sufficient to provoke an actual war between the two countries. But at the present day, in consequence partly of treaties and partly of the practice of nations, the making of reprisals is confined to the seizure of commercial property on the high seas, by public cruisers, or by private cruisers specially authorized thereto.

See titles PRIVATEERING; REPRISALS.

MARRIAGE. The law of marriage depends partly on statute and partly on the Common Law. The most important statute upon the subject was the 26 Geo. 2, c. 33 (Lord Hardwicke's Act), by which the publication of banns, and the solemnization in one of the churches where they had been published, were required; and that statute also enacted that two witnesses besides the minister should be present, and that the register should be signed by the minister, parties, and witnesses. This statute, referring only to the formalities of the marriage, was strictly territorial or local (see title *LEX LOCI ACTUS*), whence Gretna Green marriages were valid (*Brook v. Brook*, 9 H. L. C. 193). The stat. 3 Geo. 4, c. 75, declared marriages of infants by licence, without consent, valid. The stat. 4 Geo. 4, c. 76, repealed Lord Hardwicke's Act, but re-enacted as a requisite to marriage, the publication of banns in some church or authorized chapel, and any party interested (e.g., the parent of a minor) may object to the banns (ss. 2, 8). Consent to the marriage of an infant (not being a widower or widow) is to be given by the father; and failing him, by a guardian of the person of the infant; and failing him, by the mother; and failing her, by the guardian duly authorized by the Court of Chancery (s. 16); but a marriage without the required consent is valid (*Rex v. Inhabitants of Birmingham*, 8 B. & C. 29). Marriage by special licence is good (s. 20); also by ordinary licence (s. 14). Before a minor can obtain the ordinary licence, one of the parties to the marriage must swear that (among other things) the required consent has been obtained (s. 14); and in case the oath is false (and even in case of a marriage by banns without such consent), an information lies in the Court of Chancery against the offending party at the relation of the parent or guardian; and the Court has power to declare a forfeiture of the property accruing to the offending party by virtue of the marriage, and also to settle the property on the innocent party and the issue of the marriage (s. 23), and for that purpose to set aside (so far as necessary) any other settlement made in

MARRIAGE—continued.

consideration of the marriage (s. 24). This information must be filed within one year after the solemnisation of the marriage (s. 25) (see title *ABDUCTION*). The stat. 6 Geo. 4, c. 92, and other subsequent statutes, provide for the validity of marriages celebrated in churches and chapels in which banns have not been usually published. And under other statutes, commencing with the stat. 6 & 7 Will. 4, c. 85, marriages by or without licences may be solemnised by virtue of the superintendent registrar's certificate.

By the Common Law of England the requisites to the validity of a marriage were the following:—

- (1.) The presence of a priest in holy orders (*Catherwood v. Caslon*, 13 M. & W. 261; *Reg. v. Millis*, 10 Cl. & F. 534);
- (2.) The presence of witnesses (*Beamish v. Beamish*, 9 H. L. C. 274), or at least of one witness (*Wing v. Taylor*, 2 S. & T. 278);
- (3.) The consent of the parties (*Harrod v. Harrod*, 1 K. & J. 4);
- (4.) The formalities of marriage as defined by the *Lex loci actus*, must be observed (*Brook v. Brook*, 9 H. L. C. 193);
- (5.) The essentials of marriage, as defined by the *lex domicilii*, including therein all questions of personal capacity or incapacity, must be observed (*Brook v. Brook*, *supra*);
- (6.) The parties must not be within the prohibited degrees of consanguinity or of affinity; and for that purpose illegitimate relationship counts; but
- (7.) The consent of the parents is not necessary (*Rex v. Birmingham*, 2 M. & R. 230).

See title *HUSBAND AND WIFE*.

MARRIAGE ACT, ROYAL. This Act (12 Geo. 3, c. 11), as interpreted in *The Sussex Peerage Case* (11 Cl. & Fin. 85), prohibits the contracting of marriages (and annulled any already contracted) in violation of its provisions, whether the ceremony was performed within the realm of England or without. Its principal provision is that which requires the sanction of the Queen to the marriage of all descendants of George II.

MARRIAGE ARTICLES. Are the heads or jottings of the provisions to be embodied in a marriage settlement; and they usually specify the several fortunes of the respective marrying parties which are to be brought into settlement. They should invariably be in writing and signed by the parties, in

MARRIAGE ARTICLES—*continued.*

order to satisfy the Statute of Frauds. In case of any variance between the settlement and the articles, the settlement will usually be rectified in accordance with the articles, unless it can be inferred from all the circumstances that the settlement was intended to express a new agreement of the parties (Snell's Equity, 5th ed., pp. 441-2).

See title **MARRIAGE SETTLEMENTS**.

MARRIAGE, BREACH OF PROMISE OF. The promise, to support an action, must have been made to the plaintiff (*Cole v. Cottingham*, 8 C. & P. 75). Moreover, it must appear not only that the defendant proposed or even promised to marry the plaintiff, but also that she promised to marry him; for in this, as in other cases of contract, mutuality is an essential requisite (*Veneall v. Veness*, 4 F. & F. 844). With reference to the evidence of the promise, the parties themselves, although formerly incompetent as witnesses (14 & 15 Vict. c. 99, s. 4), were made competent by the stat. 32 & 33 Vict. c. 68; but there must be some corroboration of the female's own affirmation of the promise. Various defences may be raised to the action, e.g., (1.) General bodily infirmity arising subsequently to the contract (*Atchinson v. Baker*, Peake's Add. Cas. 103), not being, *semble*, mere infirmity arising from an illness (*Hall v. Wright*, El. Bl. & El. 746); (2.) Prior unchastity of the female, not discovered until after the contract (*Wharton v. Lewis*, 1 C. & P. 529); and (3.) Mutual releases (*Davis v. Bomford*, 6 H. & N. 245).

See title **PRE-CONTRACTS OF MARRIAGE**.

MARRIAGE BROKAGE CONTRACTS.

Are contracts by either party to the marriage with some third party to pay him a commission or percentage of the property obtained by the marriage, in consideration of his having acted as the broker or middle man to introduce the parties to each other. Such contracts are void, as being against the policy of the law.

See title **FRAUD**.

MARRIAGE CONSIDERATION. Contracts based upon this consideration are required to be in writing by the Statute of Frauds (29 Car. 2, c. 3). The consideration if past and already executed is meritorious only; but if executory, it is a valuable consideration, equivalent to money or money's worth.

MARRIAGE, INFORMATION OF: See title **MARRIAGE**.

MARRIAGE OF MINORS: See title **MARRIAGE**.

MARRIAGE SETTLEMENTS. These are settlements made on marriage, either by the parties themselves to the marriage contract, or by one of them, or by some parent or other relation of the parties, or of one of them on their behalf. Such settlements if made before marriage are called *ante-nuptial*, if made after the marriage, are called *post-nuptial*: and there is this broad distinction between ante-nuptial and post-nuptial settlements, that the former are equivalent to purchases for value, while the latter are considered as voluntary conveyances only, and the respective natural effects of that distinction attach to the respective settlements. Consequently, an ante-nuptial settlement receives the like favour in Equity and also at Law which a purchase for value receives, while a post-nuptial settlement is subject to the like liabilities to be defeated both in Equity and at Law which every voluntary settlement is subject to (*see* titles **VOLUNTARY SETTLEMENTS**; **VALUABLE CONSIDERATION**). Two rules, however, have been established, which partially favour post-nuptial settlements above purely voluntary settlements, namely:—

(1.) If the slightest addition of value, not notoriously colourable, is added to the meritorious consideration of blood or natural affection, then the post-nuptial settlement is taken out of the category of voluntary settlements altogether, and is placed in the category of settlements for value, with all the corresponding incidents of advantage attaching to the latter (*Hewison v. Negus*, 16 Beav. 594); and

(2.) If the post-nuptial settlement has been preceded by marriage articles entered into previously to the marriage, then the post-nuptial settlement relates back to the date of the articles, and becomes practically ante-nuptial, or equivalent to a settlement for value; and it does not matter whether the articles are in writing or rest in parol merely (*Dundas v. Dutens*, 2 Cox, 235; *Warden v. Jones*, 2 De G. & J., 76), the subsequent settlement in writing supplying in the latter case, before any action has arisen, the original defect of writing (*Bailey v. Sweeting*, 9 C. B. (N.S.) 843; *Bill v. Bament*, 9 M. & W. 40).

Also, by the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 91, the following provisions have been made with reference to post-nuptial settlements by traders:—

I. With reference to the husband's property in his own right,—

(1.) Any post-nuptial settlement made within two years of the subsequent bankruptcy of the trader is *ipso facto* void upon the bankruptcy; and

(2.) Any post-nuptial settlement made within ten years of the subsequent bank-

MARRIAGE SETTLEMENTS—contd.

ruptcy of the trader, and outside of the first two years thereof, is also void upon the bankruptcy, until proof of *bona fides*.

II. With reference to the husband's property *in right of his wife*,—

(3) Any post-nuptial settlement by a trader on his wife and children is good, notwithstanding the bankruptcy, if the property have accrued during the coverture.

Also, by the same Act, and the same section thereof, it is provided, that, with reference to covenants and contracts made before marriage by a trader to settle future property yet to acquire, all such covenants and contracts shall be void upon the trader's bankruptcy, unless prior to such bankruptcy the property referred to has been both acquired and settled pursuant to the covenant or contract (*Ex parte Bishop, In re Tönnies*, L. R. 8 Ch. App. 718; and distinguish *In re Andrews*, 7 Ch. Div. 635).

Assuming that a marriage-settlement is ante-nuptial, or (although post-nuptial,) is for any one or more of the foregoing reasons valid, the following question arises upon it, namely, what is the extent, or who are within the scope, of the marriage consideration. The general rule is, that the consideration of marriage supports only limitations to the intended husband and wife and the expected issue, and not limitations to any other persons (*Johnson v. Legard*, 6 M. & S. 60); but to this rule there are two exceptions, namely,—

- (a.) Settlements made previously to and in contemplation of a second marriage, upon the issue of a former marriage (*Clarke v. Wright*, 6 H. & N. 849); and
- (b.) Settlements made previously to, and in contemplation of, a first marriage upon the issue of either of the marrying parties by a future marriage (*Jenkins v. Keymis*, 1 Lev. 150; *Clayton v. Wilton*, 3 Mad. 302).

There is also, speaking with a rough accuracy only, a third exception, namely,—

- (c.) Settlements made upon collaterals, if there is any person purchasing on their behalf; but the validity of such limitations to collaterals clearly depends upon the money consideration and not on the marriage consideration alone (*Heap v. Tonge*, 9 Hare, 90).

The peculiarity which attaches to marriage as a consideration is this, that, unlike other considerations, when the marriage consideration has once had effect, the parties cannot be remitted to their original positions, the consideration not admitting,

MARRIAGE SETTLEMENTS—contd.

like a money sum, of being repaid or returned. The law regards the consideration of marriage in a sacred light. Where, therefore, the sacredness of marriage is made a mere pretext for committing a fraud, as where a trader who has been already living in concubinage with a woman marries her on the eve of his bankruptcy, and previously to such marriage settles all or a material part of his property on her, and his expected issue by her, the marriage consideration being clearly fictitious will be disregarded by the Court, and the settlement, although it is ante-nuptial, will be set aside upon the trader's bankruptcy, or as against his creditors (*Columbine v. Penhall*, 1 Sm. & Giff. 228; *Bulmer v. Hunter*, L. R. 8 Eq. 46), the wife being in such cases presumed to have notice of the husband's embarrassment,—a presumption which, perhaps, would hardly be rebuttable by evidence.

MARRIED WOMAN: See titles HUSBAND AND WIFE; EQUITY TO A SETTLEMENT; SEPARATE ESTATE; SURVIVORSHIP, WIFE'S RIGHT OF; &c., &c.

MARSHAL. There are, or used to be, several officers of this name, but those which are more particularly connected with law are (1.) The Marshal of the King's House or Knight Marshal, whose special authority is in the king's palace, to hear and determine all pleas of the Crown, and to punish all faults committed within the verge, and to hear and judge of suits between those of the king's household; (2.) The Marshal of the Queen's Prison, who, previously to the stat. 5 & 6 Vict. c. 22, was called the Marshal of the King's Bench Prison, and had the custody of the King's Bench Prison; (3.) The Marshal of the Exchequer, to whose custody that Court committed the king's debtors for securing payment of their debts, and who also assigned to sheriffs, escheators, customers, and collectors their auditors, before whom they had to account (Fleta, lib. 2, c. 4, 5; Cowel).

MARSHALLING OF ASSETS. As it is right that every claimant upon the assets of a deceased person should be satisfied (if his claim be just) so far as that object can be effected by any arrangement consistent with the nature of the respective claims of the parties in general, it has been long a general principle of Equity, that if a claimant has two or more funds to which he may resort, a person having an interest in one only of such funds has a right to compel the former to resort to the other or others of them, if that is necessary for the satisfaction of both. This principle

MARSHALLING OF ASSETS—contd.

is not confined to the administration of the estate of a person deceased, but applies wherever the election of a party having two funds will disappoint the claimant having the single fund. Thus, where A., a creditor, can resort to more than one fund of the deceased, and B., another creditor, can resort to only one, then in such case A. shall resort to that fund on which B. has no claim, and thus both will be satisfied; and this is termed marshalling of assets.

The question who are entitled to marshal, and against whom, is one of very considerable complexity, but may be conveniently explained in the following manner:—

Upon referring to the title ADMINISTRATION OF ASSETS, it will be seen that there is an order usually observed in applying the properties which are applicable in payments of debts; now, by substituting in the same order the various persons to whom these various properties would go if there were no debts to pay, and to whom they do go so far as they are not exhausted by that payment, we obtain the following list of persons entitled to participate in the property of the deceased. viz.:—

- (1.) Next of kin;
- (2.) Heir-at-law;
- (3.) Heir-at-law;
- (4.) Charged devisees (specific or residuary) and charged legatees;
- (5.) Uncharged pecuniary legatees;
- (6.) Uncharged specific and residuary devisees; and uncharged specific legatees; and
- (7.) Appointees.

Now the general rule of marshalling is this, That if any person in the above list is disappointed of his benefit under the will through the creditor seizing upon (as he may) the fund intended for him, such disappointed person may recoup or compensate himself for that disappointment by similarly going against the fund intended for and disappointing in his turn any one or more of the persons prior in the above list; and such secondly disappointed person or persons may in his or their turn do the like against those prior to him or them; so that eventually the next of kin have to bear the disappointment which was occasioned by the act of the creditor. Moreover, persons who stand in the same position in the above list, may have contribution (if not compensation) as against each other. But no one has any right to compensation as against persons posterior to himself in the above list. Similar rules apply in the case of legacies, when the personal estate is insufficient to pay them, and when some of them are charged on lands and the others are not;

MARSHALLING OF ASSETS—contd.

but there is no marshalling in such a case, if the legatees are charitable.

See titles ADMINISTRATION OF ASSETS; LEGACIES.

MARSHALSEA, COURT OF. The court or seat of the marshal of the king's house. This Court was originally held before the steward and marshal of the king's house, and was instituted to administer justice between the king's domestic servants, in order that they might not be drawn into other Courts, and thus deprive the king of their services. This Court latterly merged into the *Palace Court*, which was erected by King Charles I. to be held before the steward of the household and knight marshal, and the steward of the Court or his deputy, with jurisdiction to hold plea of all manner of personal actions which should arise between any parties within twelve miles of the king's palace at Whitehall. The Court was held once a week, together with the ancient Court of Marshalsea, in the borough of Southwark, and a writ of error lay from there to the Court of King's Bench. The business of this Court has of late years much decreased, owing to the new Courts of request or conscience and the County Courts that have since been established.

See title COURT OF THE LORD STEWARD OF THE KING'S HOUSEHOLD.

MARSHALSEA PRISON. This prison, which was also styled the Prison of the Marshalsea of Her Majesty's Household, was a prison for debtors, and for persons charged with contempt of Her Majesty's Court of the Marshalsea; the Court of the Queen's Palace of Westminster, commonly called the *Palace Court*, and the High Court of Admiralty; and also for Admiralty prisoners under sentence of courts martial. By 5 Vict. c. 22, this prison and the Fleet and the Queen's Bench prisons were consolidated into one prison called the Queen's Prison (5 Vict. c. 22; 6 Jur. 254).

MARTIAL LAW. The law which is properly designated Martial Law consists of no settled code, but of the will and pleasure of the king or his lieutenant; for in the time of war, on account of the great necessity there is for guarding against dangers that often arise, and which require immediate attention, the king's power is absolute and his word is law. Nevertheless, martial law in that sense does not exist in time of peace (*Grant v. Gould*, 2 H. Bl. 69, 100); and the law of Courts Martial, sometimes called Military and Naval Law, is to be distinguished from it, as that law which governs soldiers and

MARTIAL LAW—continued.

sailors as such in times of peace, and for the due administration of which there are special Courts military or Courts naval provided. Yet so jealous of these jurisdictions was the Common Law of England that they had continuance for one year only, being annually re-constituted by the Mutiny and Marine Mutiny Acts which were passed at the beginning of each session of Parliament; and in the Army Discipline Act Commencement Act, 1879 (42 & 43 Vict. c. 32), for putting in force the Army Discipline Act, 1879 (42 & 43 Vict. c. 33), the like constitutional principle is preserved, a short Commencement Act being rendered necessary in every year (42 & 43 Vict. c. 33, s. 2).

See title **ARMY DISCIPLINE ACT, 1879.**

MASTER. This is a name descriptive of various officers or offices in the law, several of which have recently been abolished.

See titles **MASTERS IN CHANCERY;**
MASTERS AT COMMON LAW.

MASTER OF THE FACULTIES. An officer under the Archbishop of Canterbury who grants licences and dispensations (Cowel).

MASTER OF THE ROLLS. One of the judges of the Court of Chancery; he is so called because he has the custody of the rolls of all patents and grants which pass the great seal, and also of the records of Chancery. He presides in a court called the Rolls Court, and his duties are assistant to those of the Lord Chancellor, whose deputy he is, and all the jurisdiction of the Lord Chancellor is vested in him as such deputy by long usage confirmed by Act of Parliament in the reign of Geo. II. (*In re St. Nazaire Co.*, 12 Ch. Div. pp. 97-98). He is first called Master of the Rolls in 11 Hen. 7, c. 18; but his office is as ancient as the Court itself. Unlike that of the Vice-Chancellors, his jurisdiction, prior to the Judicature Acts, 1873-5, used to be in the nature of a distinct jurisdiction, which the suitor might for certain purposes elect in preference to that of the Lord Chancellor; but in consequence of the Judicature Acts, the Rolls Court as a Court of Justice is now upon a level in all respects with the Vice-Chancellors' Courts; but the Master of the Rolls retains his ancient dignities, and continues invested with his ancient functions, as a personal officer, excepting that he is no longer capable of sitting in the House of Commons (36 & 37 Vict. c. 66, s. 9).

MASTER AND SERVANT. This is the relation which arises out of the contract of hiring. That contract may be either for an expressly defined period or for an indefinite or unexpressed period; but a general

MASTER AND SERVANT—continued.

hiring, in the absence of any custom to the contrary, is presumed to be a yearly hiring, and in all cases, a hiring at so much per month is a hiring for a year (*Fawcett v. Cash*, 3 N. & M. 177). In the case of domestic servants, such hiring may be determined by a month's notice or a month's wages in advance given or paid at any time (*Turner v. Mason*, 14 M. & W. 112); but in the case of clerks and the higher classes of servants, the hiring, if general, is construed to be a hiring for one year, and so on from year to year, and must be determined with the year, at least in the absence of misconduct (*Beeston v. Collyer*, 4 Bing. 339). But a hiring at two guineas a week for one year has been held to be not a yearly but a weekly hiring (*Robertson v. Jenner*, 15 L. T. (N.S.) 514). So on a contract to pay a commercial traveller by commission, no implication arises of a yearly hiring (*Naylor v. Yearsley*, 2 F. & F. 41).

Every person suffering himself to be hired as a skilled artisan warrants that he possesses the requisite ability and sufficiency, and upon proof of his want of such ability or sufficiency, i.e., of his incompetency, his employer may discharge him (*Harmer v. Cornelius*, 5 C. B. (N.S.) 236).

A servant has a right to be paid for his work, and paying for same otherwise than by money is contrary to the Truck Act (1 & 2 Will. 4, c. 37), but that Act properly applies to labourers only (*Riley v. Warden*, 2 Ex. 59).

A servant is not personally liable on contracts made by him for his master; but he is liable for torts committed by him, although at the command of his master (*Cranch v. White*, 1 Scott, 314) (a case of trover); similarly he is civilly liable for assisting his master in a fraud (*Cullen v. Thomson*, 4 Macq. H. L. C. 441). Conversely, the master is liable for the tort of his servant committed in his service (*McManus v. Crickett*, 1 East, 106).

A master lies under certain duties to his servant. He is bound to provide an apprentice with medical attendance and medicine during sickness (*Reg. v. Smith*, 8 C. & P. 153); *secus*, in the case of a menial or general servant. He is bound to provide for the reasonable safety of his servant while engaged in his employment, as by fencing machinery and otherwise; but having done that, he is secure,—thus, a master was held not liable for an injury sustained by his servant through the breaking down of a carriage in which the servant was riding at the time on his master's business, through a defect in the carriage of which the master was not aware (*Priestley v. Fowler*, 3 M. & W. 1).

MASTER AND SERVANT—continued.

A master may maintain an action for debauching his servant (*Fores v. Wilson*, Peake, 55); and may even justify an assault in protecting his servant (*Tickell v. Read*, Loft. 215). So also trespass will lie by a master for enticing his servant away (*Hart v. Aldridge*, Cowp. 54).

Under various statutes the justices have a summary jurisdiction in questions arising between masters and their servants, as for non-payment of wages by the master, for misconduct on the part of the servant, and such like.

MASTERS IN CHANCERY. The masters in Chancery were officers of that Court whose duty it was to make inquiries (when so required by the Court) into matters which the Court could not conveniently, without the assistance of such officers, make for itself, and to report to the Court their findings or conclusions with respect to such matters. The duties of these masters were of a mixed character, being partly judicial, and partly ministerial, the powers which they possessed in both respects having been delegated to them by the Court. Whenever a master had acted in obedience to the directions of the Court, he used to inform the Court, by a document in writing, of what he had done, or what conclusion he had come to; and in most cases this document was called the *master's report*. The masters in Chancery, in addition to their ordinary functions, acted also as messengers from the House of Lords to the House of Commons. There were also certain other officers of the Court of Chancery called masters extraordinary in Chancery; these were usually solicitors, who were appointed by the Court to act in the various counties of England in taking affidavits, acknowledgments of deeds, recognizances, &c., which otherwise would have had to be taken before the masters in London, and would thus have occasioned to the suitors loss of time and expense in coming to London for that purpose (*Gray's Ch Prac.* 103). The duties formerly discharged by the masters in ordinary in Chancery are now discharged by the chief clerks attached to the chambers of the various judges; those formerly discharged by the masters extraordinary are now discharged by solicitors qualified as commissioners for taking oaths and acknowledgments throughout the kingdom.

See titles **CHIEF CLERK**; **REGISTRAR**.

MASTERS AT COMMON LAW. Each of the three superior Courts of Common Law or Common Law Divisions has five important officers attached to it, termed masters. One of the masters of each Court

MASTERS AT COMMON LAW—contd.

or Division always attends the sittings of his own Court in banco, and usually sits on the lower bench, appropriated for him and other officers, at the foot of the judicial bench. The Court of Appeal at Common Law, also, is always attended by one of the masters. Their chief duties, when attending the Court, consist in taking affidavits sworn in Court, in administering oaths to attorneys on their admission, and in certifying to the Court, in cases of doubt or difficulty, what the practice of the Court is. Their principal duties out of Court consist in hearing and determining all the minor questions of procedure, *e.g.*, extending the time to plead, giving leave to defend, and such like; also, in taxing attorney's costs, in computing principal and interest on bills of exchange, promissory notes, and other documents, under rules to compute,—in examining witnesses who are going abroad, for the purpose of obtaining their testimony,—in hearing and determining rules referred to them by the Court in the place of the Court itself,—and in reporting to the Court their conclusions with reference to the rules referred to them.

See titles **CHAMBERS**; **CHIEF CLERK**; **REGISTRAR**.

MASTERS OF SUPREME COURT. This is the name designating the officers under whose control and superintendence the central office of the Supreme Court of Judicature is placed by the Act 42 & 43 Vict. c. 78.

See title **CENTRAL OFFICE (SUPREME COURT)**.

MATERNAL ANCESTORS: See title **DESCENTS**.

MATERNAL INHERITANCE. As opposed to a paternal inheritance, was an inheritance derived through the mother or the mother's family, and the descent of the estate used to be (and still would be) traced accordingly.

See title **DESCENTS**.

MATRIMONIAL CAUSES. The jurisdiction of the Ecclesiastical Courts in matters and causes matrimonial was transferred by s. 6 of the stat. 20 & 21 Vict. c. 85, to the Court by that Act established, and which was called the Divorce Court, and is now a branch of that division of the High Court which is called the Probate, Divorce, and Admiralty Division. Matrimonial causes include the principal matters of divorce, judicial separation, nullity of marriage, restitution of conjugal rights, and jactitation of marriage, together with various matters incidental to these principal matters, such as damages in divorce, variations

MATRIMONIAL CAUSES—*continued.*

of marriage settlements, custody of children, and such like. For people in humble life, a woman may obtain from a police court an order amounting to judicial separation from her husband in case of his conviction for an aggravated assault upon her (41 Vict. c. 19).

MATRONS, JURY OF. A jury of matrons is a jury formed of women, which is impanelled to try the question whether a woman be with child or not, where she being sentenced to death for felony pleads pregnancy in stay of execution.

See title PREGNANCY, PLEA OF.

MATTER IN DEED. Is some private matter or thing contained in a deed between two or more parties; as the covenants or recitals in a lease; and these, although inrolled, that is, transcribed upon the records of one of the Queen's Courts at Westminster, or at a Court of Quarter Sessions, as they often are, for safe custody, do not thereby become matter of record, but are simply deeds recorded or inrolled; and there is a material difference between a matter of record and some matter recorded for the purpose of custody only,—a record being an entry on parchment of judicial matters or proceedings which have taken place in a Court of record, and of which the Court takes judicial notice, as matter coming peculiarly under its own cognizance, whereas the inrolment of a deed is a private act of the parties concerned, of which the Court takes no cognizance at the time when it is done.

See title ESTOPPEL.

MATTER IN PAIS. Simply means matter of fact, probably so called because matters of fact are triable by the country, i.e., by a jury.

See title ESTOPPEL.

MATTER OF RECORD. Signifies some judicial matter or proceeding entered upon one of the records of the Court, and of which the Court takes peculiar cognizance. Thus, the judgments in actions in the Superior Courts, and in other Courts of record, being matter which is entered upon the records of the Court and filed with its officer, are thence termed matters of record.

See title ESTOPPEL.

MAYOR'S COURT. See title LORD MAYOR'S COURT.

MEASURE OF DAMAGES: See titles DAMAGES; MARKET.

MEASURES, WEIGHTS AND: See title WEIGHTS AND MEASURES.

MEDIATION: See title INTERVENTION OR MEDIATION.

MEDICAL PRACTITIONER. The stat. 55 Geo. 3, c. 194, makes regulations regarding the education, examination, admission, and practice of apothecaries, and imposes a penalty of £20 for every violation thereof. Practising as an apothecary means mixing up and preparing medicines prescribed either by a physician or by the apothecary himself (*Woodward v. Ball*, 6 C. & P. 577). An apothecary violating the Act has no means of recovering his charges, s. 21 (*Steel v. Henley*, 1 C. & P. 574).

The stat. 15 & 16 Vict. c. 56, regulates the qualification of pharmaceutical chemists; and the stats. 14 & 15 Vict. c. 13 (as to arsenic), and 31 & 32 Vict. c. 121 (as to other poisons generally), regulate the sale of medicines of a poisonous character.

The stats. 21 & 22 Vict. c. 90 (the Medical Act), and 23 & 24 Vict. c. 66, and other Acts, regulate the qualifications and powers of surgeons and physicians, and constitute a council, the members of which are the sole judges of the correctness of professional conduct (*Ex parte La Mert*, 4 B. & S. 582). A physician registered under 21 & 22 Vict. c. 90, who attends a patient professionally, and who is not prohibited by any bye-law of the College of Physicians from suing for same, may recover his fees without an express contract (*Gibbon v. Budd*, 2 H. & C. 92); but before that Act, a physician could not maintain an action for his fees (*Chorley v. Balcot*, 4 T. R. 317).

MEDIETAS LINGUE. A jury *de medietate lingue* was a jury consisting one-half of natives and the other half of foreigners, to try a cause in which either the plaintiff or the defendant was a foreigner (Staun. Pl. Cor. Lib. 3, c. 7). But such juries were abolished by the Juries Act, 1870 (33 & 34 Vict. c. 77). Aliens who have been domiciled here for ten years or upwards, and being otherwise qualified, are now competent generally to serve on juries.

See title JURY.

MELIORATIVE WASTE: See title AMELIORATIVE WASTE.

MEMBER OF PARLIAMENT. Is the person chosen either by the county or by the borough or group of boroughs having the right of representation to represent it in Parliament (see titles ELECTORAL FRANCHISE; REPRESENTATION AND REPRESENTATIVE; REPRESENTATION IN PARLIAMENT). He was entitled from the earliest times to receive wages from his constituents for his attendance in Parliament and for his expenses incidental thereto, and for levying and raising the amount he was given the

MEMBER OF PARLIAMENT—contd.

writ *de levandis expensis* by Edw. II., who also fixed the amount at 4s. *per diem*. The issue of this writ for the purpose was constant till the end of Hen. VIII.'s reign; after that date, the payment of members continued, but if not made voluntarily, appears not to have been customarily enforced by writ. The latest instance of the writ being issued is in 1681, in the case of Thomas King, who was member for Harwich. Excepting by desuetude, the writ is still issuable, but for nearly 200 years has not issued. At the present day, and in fact since the year 1858, no property qualification is required in any member; but by the stat. 9 Anne, c. 5, £600 a year in land was required of every knight of the shire, and by the stat. 1 & 2 Vict. c. 48, this property qualification had been retained, with the variation that the income might arise either from land or from personal estate or from both. By an old stat., 23 Hen. VI., c. 15, a knight of the shire required further to have been a gentleman born, *i.e. generosus a nativitate*; but this stat. has long fallen into practical desuetude. The House has an inherent right to expel a member; the expulsion operates to vacate the seat of the member expelled, but does not render him ineligible. Attainder for treason or felony is a disability by the Common Law (4 Inst. 47); and a mere conviction (without attainder) for treason or felony is equally a disability (Smith O'Brien, 1849; O'Donovan Rossa, 1870; and see the stat. 33 & 34 Vict. c. 23; and the case of John Mitchell, chosen for Tipperary, in 1875). Without expelling, the House has also full power to punish its offending members by commitment or otherwise. See May's Parliamentary Practice; May's Constitutional History; Hallam's Middle Ages; Hallam's Constitutional History; Taswell-Langmead.

MEMORANDA, IN EVIDENCE. For the purpose of "refreshing his memory," a witness may refer to memoranda made at or shortly after the dates of the matters referred to therein; and in the case of scientific witnesses, called to speak of the results of their observations and experiments, these memoranda are very much used, and appear to be almost indispensable.

MEMORANDUM OF ASSOCIATION. Where a company is being formed under the Companies Acts, 1862, 1867, and 1877, a written document called the memorandum of association is invariably drawn up, expressing (among other things) the object for which the association or company is formed; and such document is subscribed by at least seven persons as

MEMORANDUM OF ASSOCIATION—continued.

shareholders and members in and of the company.

See titles ARTICLES OF ASSOCIATION; LIMITED LIABILITY.

MEMORIAL OF DEEDS. By several Acts of Parliament all deeds and wills concerning the conveyance or disposition of estates in the counties of York, Kingston-upon-Hull, and Middlesex (subject to certain exceptions), are required to be registered, and such registration is effected by the execution and deposit of a memorial under the hand and seal of some or one of the grantors or grantees, his or their heirs, executors or administrators, guardians or trustees, which memorial is to contain,—first, the day of the month and year when the instrument bears date, the names and additions of all the parties to it, and of the witnesses, and the places of their abode; and, secondly, a description of the property conveyed, or proposed to be conveyed or disposed of, the names of the parishes wherein respectively it lies, and the manner in which the same property is dealt with or affected by such instrument or instruments. Provision has now been made for rendering the registration of such memorials universal throughout England, by and in accordance with the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), but the last mentioned Act is not compulsory.

MEMORY, LEGAL: See title LEGAL MEMORY.

MEMORY, LIVING: See title LIVING MEMORY.

MEMORY OF MAN. In law the memory of man is supposed to extend back to the time of Richard I.; and until the 2 & 3 Will. 4, c. 71, any custom might have been destroyed by proving that it had not existed uninterruptedly from that period. But though it was essential to the validity of a custom that it should have existed before the commencement of the reign of Richard I., yet proof of a regular usage for twenty years, not explained or contradicted, was sufficient for a jury to find the existence of an immemorial custom (*Mounsey v. Ismay*, 3 H. & C. 486).

See titles LEGAL MEMORY; LIVING MEMORY; PRESCRIPTION.

MENSÂ ET THORO: See title DIVORCE.

MERCANTILE CUSTOM: See titles CUSTOMARY LAW; CUSTOM OF MERCHANTS; EXTRINSIC EVIDENCE.

MERCANTILE LAW. Is that law which treats of matters of trade between merchant and merchant, whether trading alone, or in partnership, or as members of

MERCANTILE LAW—*continued.*

a company. It is largely occupied with Bills of Exchange and other negotiable instruments; contracts of carriage and of affreightment; contracts of insurance and of guarantees; and with questions of lien, stoppage *in transitu*, and the like.

See titles CUSTOM OF MERCHANTS; MARITIME LAW.

MERCHANDISE MARKS ACT: See title MARKS, MERCHANDISE.

MERCHANT SHIPPING. The law of merchant shipping is concerned with the ownership of the vessel, including the registration of transfers of and charges upon such ownership; the liabilities of the owner of the vessel, and his duty to secure the seaworthiness of the vessel; the reciprocal rights and duties of masters and seamen; matters of pilotage, salvage, wreck; the safety of passengers and of cargo; and such like. The principal Act is the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104); but there are very many other Acts relating to different branches of this law.

MERCY. When the judgment in an action was for the plaintiff, the defendant was said to "be in mercy" (*miser cordia*), that is, amerced or fined for his delay of justice; and when the judgment was for the defendant, the plaintiff was said to "be in mercy" for his false claim. The phrase has been long obsolete (Steph. 122).

See title AMERCIAMENT.

MERCY, PREROGATIVE OF. The sovereign may pardon a criminal after conviction, and without assigning any cause for so doing; but the improper exercise of the prerogative would reflect upon the ministry. The prerogative does not extend to exempt the accused from undergoing his prosecution.

MERE MOTION. The free and voluntary act of a party himself, without the suggestion or influence of another person. The phrase is used in letters patent, whereby the king grants, "of his (especial grace, certain knowledge, and) mere motion" (*mero motu*), his licence, power, and authority to the patentee to use and enjoy, exclusively, the new invention, the grant being assumed to be of the free and unfettered will of the sovereign (Webster on Patents, 76, n. (d)).

The expression is also applied to the occasional interference of the Court, who, under certain circumstances, will (*ex mero motu*), "of their own motion," object to an irregularity in the proceedings of the parties, though no objection be taken to the informality by the plaintiff or defendant himself (1 Bing. N. C. 258; 1 B. & P. 366).

MERE RIGHT. The right of property (the *jus proprietatis*), which a person may have in anything, without having either possession or even the right of possession, is frequently spoken of under the name of the "mere right," and the estate of the owner is in such cases said to be totally divested and put to a right (Co. Litt. 345).

MERGER. This term is the equivalent of *confusio* in the Roman Law, and indicates that where the qualities of debtor and creditor become united in the same individual, there arises a confusion of rights which extinguishes both qualities; whence also merger is often called Extinguishment. And just as in the Roman Law the prætor in certain cases where merger would be inequitable, intercepted and prevented it,* so also in English Law the Chancellor interferes in like cases to prevent it. And therefore it is a rule of English Law, that merger of a debt will not take place, if it would be to the prejudice of creditors of the deceased (*In re Price, Price v. Price*, 11 Ch. D. 163), but only when all are paid (*Chambers v. Kingham*, 10 Ch. D. 243); also, that merger of estates and charges or other interests therein (although such merger would invariably, prior to the Judicature Acts, 1873-5, have taken place at Law) would or would not take place in Equity according to the intention actual or presumed of the person in whom the two interests come to be united; and even at Law, merger was excluded in certain exceptional cases. And now, under the Judicature Act, 1873 (s. 25, sub-s. 4), there is to be no merger at Law wherever there would have been none in Equity.

The doctrine of merger is chiefly of importance with reference to real property; and in examining the subject, it is convenient to divide it under two heads, namely:—

- (1.) Cases in which the owner of the charge becomes also owner of the estate; and
- (2.) Cases in which the owner of the estate becomes also owner of the charge.

Now, **FIRSTLY**, as a *general rule*, where the owner of the charge becomes also owner of the estate whether in fee simple or in fee tail, the charge is *ipso facto* merged and extinguished in the estate. But to this general rule there are the following *exceptions*, that is to say,—(1.) The charge may be kept alive, and the intention to keep it alive may be either expressed in so many words, or may be implied from circumstances or from conduct. For example, if a mortgagee who purchases the equity of redemption takes a conveyance

* See Brown's Savigny on Obligations, p. 15.

MERGER—continued.

thereof to a trustee for himself, and the conveyance contains a declaration that the mortgage security shall remain on foot, there, from the expressed intention of the party, merger is excluded. Again, the intention to prevent a merger, where not expressed, has been implied under the following circumstances, viz.:—

(a.) The mortgagee, becoming beneficial devisee of the equity of redemption and being also executor of the testator-mortgagor, in his residuary account as executor stated that he had retained £467 out of the personal estate towards payment of his mortgage debt, and afterwards devised the property to X., Y., and Z., provided they undertook to receive the same with all the liabilities attaching thereunto; and it was held upon the intention which these acts implied, that the charge had not been merged in the estate (*Hatch v. Skelton*, 20 Beav. 453). Again,

(b.) If the effect of suffering the charge to merge would be to give priority to subsequent incumbrances, it will be presumed, from the clear advantage arising to the owner of the estate from keeping the charge alive, that the charge has not become merged in the estate (*Forbes v. Moffatt*, 18 Ves. 384); and this will be *à fortiori* so, if the owner is a lunatic (*Lord Compton v. Oxenden*, 2 Ves. Jun. 261); and,

(c.) If the owner of the charge becomes entitled only to a limited interest in the estate, the charge will clearly not merge, although this case is hardly an exception to the general rule as stated above.

And, SECONDLY, as a *general rule*, where the owner, whether in fee simple or in fee tail, becomes also owner of the charge, the charge is *ipso facto* merged or extinguished in the estate. This rule is almost without exception where the charge comes to the owner of the estate by succession or by bequest; and even where it comes to him by being purchased up by him, the general rule almost invariably holds, but with the following *exceptions*:—

(a.) When the owner of the estate who buys up the charge is not in possession of the estate, but is, say, a tenant in tail or in fee simple in remainder expectant upon some other estate, the owner of which might bar or exclude his interest altogether, in that case the charge will not merge (*Wigsell v. Wigsell*, 2 S. & S. 364), even although he should afterwards become entitled in possession (*Horton v. Smith*, 4 K. & J. 624); also,

(b.) Similarly, where the owner who buys up the charge has only a defeasible estate by reason of some executory devise over, which may or may not take effect, the

MERGER—continued.

charge will not merge in the estate, even although the owner should be in possession (*Drinkwater v. Combe*, 2 S. & S. 340); and,

(c.) If the owner who buys up the charge is an infant, the Court of Chancery sanctioning the purchase, there is no merger, as the infant can express no intention in the matter, and the Court will not prejudice him or the real or personal representatives who may claim under him (*Alsop v. Bell*, 24 Beav. 451); also,

(d.) If the owner who becomes entitled also to the charge has an interest in keeping the charge alive, *e.g.*, if the merger or extinguishment of the charge would give priority to subsequent incumbrances, in that case there will be no merger, in whatever manner, whether by succession, bequest, or purchase, the owner has acquired the charge (*Grice v. Shaw*, 10 Hare, 76); and,

(e.) If the owner who becomes entitled to the charge has only a limited interest in the estate, *e.g.*, if he is only tenant for life, the charge will clearly not merge, at least when he has acquired the charge by purchase (*Burrell v. Earl of Egremont*, 7 Beav. 205); and apparently (on principle at least), not even where he has acquired the charge by succession or bequest; but this case is, in fact, scarcely an exception to the general rule of merger as stated above (see *Morley v. Morley*, 5 De G. M. & G. 620); lastly,

(f.) No merger will take place where a merely contracting purchaser of an estate pays off a charge upon it, before the completion of his purchase (*Watts v. Symes*, 1 De G. M. & G. 240); and apparently not even if the purchase is afterwards completed.

There are also other special causes excluding merger. Thus, *tithes* will not merge by mere unity of possession (*Chapman v. Gatcombe*, 2 Bing. N. C. 516); as neither will a *commutation rent-charge in lieu of tithes*; but provision has been made by certain recent statutes for effecting a merger of both whenever the land and the tithes or rent-charge belong to one and the same individual. Moreover, *redeemed land-tax* is on the same footing as commutation rent-charge with regard to the question of merger (*Ware v. Polhill*, 11 Ves. 257).

Again, where the estate and the charge become vested in the same individual in different rights, *e.g.*, the estate in his own right and the charge in *autre droit*, or *vice versa*, in such a case, the general rule, even at law, is that the union of the two would not cause any merger, if such union be occasioned by the act of law, *e.g.*, by descent, and not by the act of the party,

MERGE—*continued.*

e.g., by purchase. So, if the owner of a term make the freeholder his executor, the term will not merge; but if the executor holding the term as such, should himself purchase the immediate freehold, the better opinion is that the term would merge, subject only to the rights of the creditors (if any) of the testator.

Again, if one of two joint holders of a term obtain the immediate freehold, his moiety of the term would merge; and conversely, if the sole owner of a term obtain the immediate freehold jointly with another, one moiety of the term would merge, and the joint ownership of the freehold would continue, subject only to the remaining moiety of the term.

MERITORIOUS CAUSE OF ACTION. A person is sometimes said to be the meritorious cause of action when the cause of action, or the consideration on which the action was founded, originated with, or was occasioned by, such person. Thus, in an action by husband and wife for the breach of an express promise to the wife in consideration of her personal labour and skill in curing a wound, she would be termed the meritorious cause of action. So in an action by husband and wife upon an agreement entered into with her before marriage, she would be the meritorious cause of action; for it originated or accrued out of a contract entered into with her. So a promissory note made to the wife during coverture in her own name is presumed to be made upon a consideration moving from her (Leake on Contracts, 240-41). In all such cases, the husband and wife ought to be joined as co-plaintiffs, because in case the wife survive after commencement but before conclusion of the action, the right of recovery will survive to her, and the suit will not have abated by the husband's death. But it appears to be optional with the husband, if he chooses to take the risk, to sue alone in all such cases.

MERITS. The real or substantial grounds of the action are frequently so termed, in contradistinction to some technical or collateral matter which has been raised in the course of the suit. Thus where, at a time when special demurrers were in use, a defendant demurred to the plaintiff's declaration on the ground of some mere technical informality, and the plaintiff, instead of amending, joined in demurrer, with the view of having the point argued before the Court; in such a case, although he might be beaten upon the demurrer, by the Court deciding against the sufficiency of the declaration in point of form, yet as the merits or substantial

MERITS—*continued.*

grounds of the action still remained to be tried, he might ultimately be successful upon these. So an *affidavit of merits* signifies an affidavit that upon the substantial facts of the case justice is with the party so making such affidavit. Such an affidavit is required in support of certain applications to the Court, *e.g.*, in order to obtain leave to defend an action where the claim is for a debt or liquidated demand in money, and the writ is specially indorsed (Order XIV., 1 May, 1877).

MERITS, AFFIDAVIT OF: See title MERITS.

MERTON, STATUTE OF. The 20 Hen. 3, is so called because it was passed in the convent of St. Augustin, at Merton, in Surrey. The particular provisions of the statute regarded, 1st. Legitimacy of children; 2ndly. Dower; 3rdly. Inclosure of common lands; and, 4thly. Wardships.

See titles APPROVEMENT; LEGITIMATION.

MESNE. Middle, intermediate, intervening. The word "mesne" is ordinarily used in the following combinations:—1st. Mesne Lord; 2nd. Mesne Process; 3rd. Mesne Assignments; 4th. Mesne Incumbrances; 5th. Mesne Profits.

1st. A *Mesne Lord* was the term applied in the feudal times to the lord of a manor who had tenants under him, and yet a superior lord over him, and so held an intermediate position between the two.

2nd. *Mesne Process* is generally used in contradistinction to final process, and signifies any writ or process issued between the commencement of the action and the suing out final process or execution in such action; and includes also the writ of summons, notwithstanding this is the process by which personal actions are commenced, and therefore cannot be regarded now as mesne or intermediate process, in the literal sense of the word. See *per* Parke, B., in *Harmer v. Johnson*, 14 M. & W. 340.

3rd. *Mesne Assignment* signifies an intermediate assignment. Thus, if A. grant a lease of land to B., and B. assign his interest to C., and C. in his turn assign his interest therein to D., in this case the assignments so made by B. and C. would be termed mesne assignments; that is, they would be assignments intervening between A.'s original grant and the vesting of D.'s interest in the land under the last assignment.

4th. *Mesne Incumbrances* signify intermediate charges, burdens, liabilities, or incumbrances; that is, incumbrances which have been created or have attached to property between two given periods. Thus,

MESNE—continued.

when a vendor of an estate covenants to convey land to a purchaser free from all mesue incumbrances, it commonly means free from all charges, burdens, or liabilities which might by possibility have attached to it between the period of his purchase and the time of the proposed conveyance to the intended vendee.

5th. *Mesne Profits* are intermediate profits; that is, profits which have been accruing between two given periods. Thus, after a party has recovered the land itself in an action of ejectment, he frequently brings another action for the purpose of recovering the profits which have been accruing or arising out of the land between the periods of his title to the possession accruing or being raised, and of his recovery in the action of ejectment, and such an action is thence termed an action for mesne profits. In ejectment by landlord against tenant, mesne profits are recoverable in the very action itself of ejectment, upon proof of title by the landlord; but in all other cases of ejectment, a special action for mesne profits must have been brought as above, although now under the Judicature Act, 1873, these profits may be recovered in the action of ejectment itself.

MESNE ASSIGNMENT: See title **MESNE**.

MESNE INCUMBRANCES: See title **MESNE**.

MESNE LORD: See title **MESNE**.

MESNE PROCESS: See title **MESNE**.

MESNE PROFITS: See title **MESNE**.

MESNE, WRIT OF. A writ in the nature of a writ of right, which lay when, upon subinfeudation, the mesne or middle lord suffered his under-tenant, or tenant paravail, to be distrained upon by the lord paramount for the rent due to him by the mesne lord (2 Inst. 374).

MESSAGES FROM THE CROWN. The mode of communicating between the Sovereign and the Houses of Parliament. Such messages are brought either by a member of the House, being a minister of the Crown, or by one of the royal household. In the Lords, when there is such a message, the bearer of it having intimated that he has a message under the royal sign manual, the Lord Chancellor proceeds first to read it, and then the clerk at the table reads it over again. In the Commons, the member appears at the bar and informs the Speaker that he has a letter from Her Majesty. He then takes it to the table and presents it, upon which the Speaker reads it, the members the meanwhile remaining uncovered (May's Parl. Pr.).

MESSENGERS. The messenger of the Court of Chancery is an officer whose duty

MESSENGERS—continued.

it is to attend on the great seal either in person or by deputy, and to be ready to execute all such orders as he shall receive from time to time from the Lord Chancellor, Lord Keeper, or Lords Commissioners (Chan. Com. Rep. 138, cited in Smith's Ch. Pr. 57). There are certain persons attached to the Court of Bankruptcy who are also styled messengers, and whose duty consists, amongst other things, in seizing and taking possession of the bankrupt's estate during the proceedings in the bankruptcy (Yate Lee's Bankruptcy, pp. 898-900).

MESSUAGE. This word is now synonymous with the word "dwelling-house," but, as having once had a larger signification, it invariably precedes the word "dwelling-house" in an enumeration of parcels. A grant of a messuage with the appurtenances will pass not only the dwelling-house but also all buildings adjoining or attached to it, together with the curtilage, garden, and orchard, and the close in which the house is built, and any pleasure grounds adjoining and belonging to it (see 2 Bing. N. C. 618; *Les Termes de la Ley*).

METALLIFEROUS MINES REGULATION ACTS. The Acts at present in force are the stats. 35 & 36 Vict. c. 77, and 37 & 38 Vict. c. 39, and these Acts apply to every mine to which the Coal Mines Regulation Act does not apply. The earlier and principal Act contains a great many minute and exacting provisions, relating to (among other things) the employment of women, young persons, and children above and below ground, inspectors and inspections, arbitration in disputes, and proper ventilation and management generally. Penalties are imposed upon persons offending against the Acts not exceeding £20 on the owner or agent, and not exceeding £2 on other persons, and (after notice) £1 for every day that the offence continues; also, imprisonment for a period not exceeding three months for wilful offences causing danger to life or limb.

See title **COAL MINES REGULATION ACT**.

METROPOLIS. Various statutes have been passed, mostly in the present reign, for the due management of the metropolis, for a summary of the effect of which see the following respective titles.

METROPOLITAN. The Archbishop of Canterbury is styled "Primate of all England and the Metropolitan," because the province of Canterbury contains within it the metropolis or chief city. The Archbishop of York is metropolitan of the province of York. The metropolitans presided

METROPOLITAN—continued.

over the churches of the principal cities of their respective provinces. It was their duty to ordain the bishops of the province, to convoke provincial councils, and to exercise a general superintendence over the doctrine and discipline of the bishops and clergy within the province. The province of York anciently claimed and had a metropolitan jurisdiction over all the bishops of Scotland until about the year 1466, shortly after which time Pope Sixtus the Fourth created the Bishop of St. Andrew's Archbishop and Metropolitan of all Scotland (1 Burn's Ecc. Law, by Phillimore, 194, 197, tit. "Bishops"; Rog. Ecc. Law, 105, 113).

METROPOLITAN BOARD OF WORKS :
See title BOARD OF WORKS.

METROPOLITAN BUILDINGS. The stat. 18 & 19 Vict. c. 122 (the Metropolitan Building Act, 1855), amended by the Acts 23 & 24 Vict. c. 52, and 32 & 33 Vict. c. 82, and 41 & 42 Vict. c. 32, taken in conjunction with 7 & 8 Vict. c. 84, ss. 54-63, regulates the situation, construction and use of buildings in the metropolis and its neighbourhood, and the repair or removal of buildings that are dangerous; and the remedying of structural defects in theatres, &c. No contract for building in contravention of these Acts can be enforced (*Stevens v. Gourley*, 7 C. B. (N.S.) 99). It is in general necessary, before commencing buildings, to give notice thereof to the district surveyor, but in the case of buildings intended for Her Majesty's use or service, such notice is unnecessary (*Reg. v. Jay*, 8 El. & Bl. 469); and the rules of construction contained in Schedule 1 of the Act of 18 & 19 Vict. c. 122, have no reference to public buildings, all which latter class of buildings are to be constructed in such manner as may be approved by the district surveyor, from whom there is an appeal to the Metropolitan Board of Works (*Reg. v. Carruthers*, 10 Jur. (N.S.) 767). The Building Acts generally provide that no structure shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of building, thus securing a certain regularity of frontage to the street (*Tear v. Freebody*, 4 C. B. (N.S.) 228). Before commencing alterations in adjoining tenements it is necessary to give three months' notice to the owner of the tenements adjoining them (*Cowen v. Phillips*, 33 Beav. 18).

METROPOLITAN BURIALS. The stat. 10 & 11 Vict. c. 65 (Cemeteries Clauses Act, 1847) consolidates the provisions usually inserted in Acts for constructing

METROPOLITAN BURIALS—continued.

cemeteries; and the subsequent Act, 15 & 16 Vict. c. 85, with certain amending Acts, expresses the law regarding the interment of the dead within the limits of the metropolis, there being also a special Act (20 & 21 Vict. c. 35) for the City of London. The stat. 20 & 21 Vict. c. 81, provides for the constitution of burial boards in parishes. A special Cemetery Act usually provides that certain fees shall be paid by the cemetery company to the incumbent of the parish or other ecclesiastical district from which any body shall be removed for interment in the cemetery (*Vaughan v. South Metropolitan Cemetery Company*, 1 J. & H. 256), an incumbent as a rule enjoying the like right under the ordinary Burial Acts.

METROPOLITAN FIRE BRIGADE. Was established in virtue of the Act 28 & 29 Vict. c. 90, and is now regulated by that Act and the Acts 32 & 33 Vict. c. 102; 38 & 39 Vict. c. 65; 39 & 40 Vict. c. 55; and 40 & 41 Vict. c. 52. It is subject to the control of the Metropolitan Board of Works.

METROPOLITAN GAS. The stat. 3 & 4 Will. 4, c. 90, contains general provisions for lighting the parishes in England and Wales with gas; but its provisions are excluded in districts where the Public Health Acts are adopted. The Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), consolidates the provisions usually contained in Acts authorizing the construction of gasworks. The metropolis is supplied with gas by various companies, under the provisions of the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), amended by the 24 & 25 Vict. c. 79.

METROPOLITAN MAGISTRATES. The jurisdiction and duties of magistrates of the police courts established within the metropolitan police district are regulated by the stats. 2 & 3 Vict. c. 71, 3 & 4 Vict. c. 84, and 11 & 12 Vict. cc. 42, 43. These magistrates are appointed by the Queen in virtue of the stat. 21 & 22 Vict. c. 73, s. 14, when *stipendiary*; but in addition to the stipendiary magistrates, there are also others entitled to act as magistrates within the metropolitan police district by virtue merely of being nominated on the commission of the peace for the county. The 1st section of the stat. 21 & 22 Vict. c. 73, extending the jurisdiction of a stipendiary magistrate, when sitting alone, does not extend to the metropolitan police magistrates.

METROPOLITAN MANAGEMENT ACT, 1855. This Act (18 & 19 Vict. c. 120), as amended by the Metropolis Management

METROPOLITAN MANAGEMENT ACT, 1855—continued.

and Building Acts Amendment Act, 1878 (41 & 42 Vict. c. 32), provides for the local management of the metropolis in respect of sewerage and drainage, paving, cleansing, lighting, and such like things. It provides for the election of vestry boards for each parish or ward within the metropolis; and for the formation of parishes into districts and for the constitution of district boards; and the vestry board and the district board are respectively incorporated (s. 42, Act 1855). The Act of 1855 also constitutes and incorporates the Metropolitan Board of Works (s. 43), the members of which are elected by the vestry boards and district boards respectively. And to these various boards the general management of the metropolis in the respects aforesaid is committed, the metropolitan board having the principal or arterial management.

METROPOLITAN POLICE. The stats. 10 Geo. 4, c. 44, 2 & 3 Vict. c. 47, and 3 & 4 Vict. c. 84, regulate the police in and near the metropolis; and by the stat. 19 & 20 Vict. c. 2, one commissioner of police for the metropolis is to be henceforth appointed; but the Queen may appoint two assistant commissioners. Under the stat. 24 & 25 Vict. c. 51, s. 3, a penalty not exceeding £5 may be imposed upon any person who assaults a constable of the metropolitan police force in the execution of his duty. The city of London police are not subject to the provisions of the Metropolitan Police Acts, but to the statute 2 & 3 Vict. c. xciv.

METROPOLITAN POLICE DISTRICT. Is a district extending about fifteen miles all round from Charing Cross, and embracing for some purposes the entire counties of Middlesex, Surrey, Hertford, Essex, and Kent; but the city of London is not included within the district. The city of London is, however, comprised within the Metropolitan Management Act, 1855, and Metropolitan Building Act, 1855, and certain other Acts, but for the purposes only of these Acts.

METROPOLITAN SEWERS. The stat. 11 & 12 Vict. c. 112, consolidated the metropolitan commissions of sewers, which were continued for short intervals by subsequent Acts, until the year 1856, when by the stat. 18 & 19 Vict. c. 120, all duties, powers, and authorities vested in the Metropolitan Commissioners of Sewers ceased to be so vested, and the Metropolitan Board of Works was substituted in the place of these commissioners, and all property, matters, and things vested in the Metropolitan Commissioners of Sewers,

METROPOLITAN SEWERS—continued.

except such sewers as were vested in any vestry or district board outside the limits defined in the schedules of the Act, were vested in the Metropolitan Board of Works. The city of London is not affected by these Acts, but is regulated by its own Act, viz., 11 & 12 Vict. c. 163 (City of London Sewers Act).

METROPOLITAN WATER. The Waterworks Clauses Act, 1847 (10 Vict. c. 17) consolidates the provisions usually inserted in Acts for constructing waterworks; and the provisions regulating the supply of water to the metropolis are principally comprised in the stat. 34 & 35 Vict. c. 113. Wells, tanks, and cisterns may be closed for pollution (37 & 38 Vict. c. 89); and there are compulsory provisions whereby every house within the metropolis is to have its own water supply (15 & 16 Vict. c. 84; 25 & 26 Vict. c. 102).

MEUBLES. These are in French Law the moveables of English Law. Things are *meubles* from either of two causes,—(1.) From their own nature, *e.g.*, tables, chairs; or (2.) From the determination of the law, *e.g.*, obligations.

MEUBLES MEUBLANS. These are in French Law the utensils and articles of ornament usual in a dwelling-house.

MIDDLESEX, BILL OF: See title BILL OF MIDDLESEX.

MILEAGE. A payment or charge of so much per mile is so termed. It is frequently used with reference to the charge made by sheriffs, when, for the purpose of executing writs, they have to travel any given number of miles.

MILITARY COURTS: See titles COURTS OF JUSTICE; MARTIAL LAW.

MILITARY LAW: See title MARTIAL LAW.

MILITARY SERVICE: See titles ESCUAGE; FEUDAL SYSTEM.

MILITIA: See titles ARMY; FYRD.

MINERALS: See title MINES AND MINERALS.

MINES AND MINERALS. *Primâ facie* the owner of the surface is entitled to the surface itself, and all below it, *ex jure naturæ*; and those who claim the property in the minerals below must do so by some grant or conveyance by him; and in such latter case the rights of the grantee must depend on the terms of the grant; although, *primâ facie*, it will be presumed, if the minerals are to be enjoyed, that a power to get them was also granted as a necessary incident (*Rowbotham v. Wilson*, 8 H. L. C.

MINES AND MINERALS—continued.

348). Where the claim to mines or minerals is rested upon the Statute of Limitations, it is not enough to shew the absence for twenty years of enjoyment of the mines or minerals on the part of the plaintiff, but it is necessary further to shew the presence of enjoyment on the part of the defendant (*Howe v. Grenfel*, Russ. & My. 396).

As to what are mines, it has been said (*Cleveland v. Meyrick*, 37 L. J. (Ch.) 124) that the definition depends on the mode of working and not upon the material obtained from the mine; and so in that case slates obtained by mining as opposed to quarrying were held to be mines. Therefore, generally mines are materials obtained by mining, and minerals are the like materials obtained either by mining or by quarrying, such materials being so very numerous and various as to admit of description or enumeration only, and not of definition.

Where the surface of land belongs to one owner, and the mines and minerals belong to another owner,—Then

(a.) If nothing appears shewing their respective titles, or the measure of the respective grants of the respective hereditaments to the two respective owners, the mine owner cannot so mine either the vertical or the adjoining strata as to destroy the surface above or adjoining, or so as to occasion a subsidence thereof, while that surface remains in its natural state (*Humphries v. Brogden*, 15 Q. B. 739); and after buildings have stood on the surface for twenty years, the right of natural support to the land and buildings thereon from the vertical strata and also from the adjacent strata is acquired (*Browne v. Robins*, 4 H. & N. 186); and

(b.) If the mode of the acquisition of the respective titles, or even the respective deeds of grant of the respective several tenements, are existing, then the words of the deeds are to be regarded; and in consequence of such words the right of natural support, as well from the vertical as from the adjacent strata, may be found to have been either abandoned or diminished; but the Court fights against that conclusion (*Harris v. Ryding*, 5 M. & W. 60; *Williams v. Bagnall*, 15 W. R. 273; and *Smith v. Darby*, L. R. 7 Q. B. 720; *Buchanan v. Andrews*, L. R. 2 Sco. App. 286; *Aspden v. Seddon*, L. R. 10 Ch. App. 394; and see Bainbridge on Mines, 4th ed., by Brown, pp. 269–293).

MINISTERIAL POWERS. These powers, as the name indicates, are given for the good, not of the donee himself exclusively, or of the donee himself necessarily at all,

MINISTERIAL POWERS—continued.

but for the good of several persons, including or not including the donee also. They are so called because the donee of them is as a *minister* or servant in his exercise of them. They are of various kinds.

(1.) The ministerial powers of a tenant for life are the following, viz.:—

(A.) A power of leasing. This power depends upon and is regulated by the stat. 40 & 41 Vict. c. 18 (Settled Estates Act, 1877), which repealed the Act 19 & 20 Vict. c. 120 (Leases and Sales of Settled Estates Act, 1856), and the Acts amending same. Under the Act it is lawful for a tenant for life who is so under a settlement dated after the 1st of November, 1856, which does not expressly exclude the Act, to demise for any term not exceeding, in England, twenty-one years, and in Ireland thirty-five years, any part of the settled estates (except the principal mansion-house or the demesnes thereof), provided he observes the following requisites, namely:—

- (a.) Lease only in possession;
- (b.) Make the demise by deed;
- (c.) Reserve the best obtainable rent;
- (d.) Take no premium or fine-gift;
- (e.) Make the lessee impeachable for waste;
- (f.) Insert a covenant for payment of rent, and other usual and proper covenants;
- (g.) Insert a condition of re-entry for non-payment of rent for twenty-eight days, or for non-observance of the other covenants; and
- (h.) Obtain the lessee to execute a counterpart of the lease.

The tenant for life may exercise the power of leasing to the extent aforesaid without any application to the Court of Chancery.

And in case the settlement is of a date prior to the 1st of November, 1856, or in case a longer term of demise than twenty-one years or thirty-five years (as the case may be) is desired to be granted, then upon application to the Court of Chancery for its sanction thereto, the tenant for life may (under certain conditions specified in the Act) grant the following varieties of lease, namely:—

- (a.) An agricultural or an occupation lease for twenty-one years or under in England and thirty-five years or under in Ireland;
- (b.) A mining lease for forty years or under;
- (c.) A water lease or other easement lease for forty years or under;
- (d.) A repairing lease for sixty years or under; and
- (e.) A building lease for ninety-nine years or under.

And where it is possible to satisfy the Court

MINISTERIAL POWERS—continued.

that it is customary in the district and beneficial to the inheritance to grant longer leases than for the periods above mentioned, the Court will sanction the tenant for life granting leases for longer periods than those above mentioned in all the above mentioned varieties of lease, excepting only the agricultural lease.

(B.) A power of borrowing money for the improvement of the estate, charging the repayment of the loan upon the inheritance. This power was necessitated by the somewhat rigorous rule of Courts of Equity which denied any remuneration to tenants for life for the expenses they might have incurred, even for permanent improvements, unless the improvements were absolutely indispensable for the maintenance of the estate at its accustomed value (*Dent v. Dent*, 30 Beav. 363); and now no prudent tenant for life should expend his own money on the estate, it being free to him to expend borrowed money for the purpose. His power of borrowing depends upon various Acts, that is to say—

(a.) If, on the one hand, the money intended to be borrowed is to be expended in *agricultural* improvements, then he may have it from Government under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), upon the terms of that Act;

(b.) If, on the other hand, the money intended to be borrowed is to be expended in the improvement of a *residence*, then he may have it from Government in like manner although to a more limited extent, under the Limited Owners' Residences Act, 1870 (33 & 34 Vict. c. 56), and the Act amending same (34 & 35 Vict. c. 84) upon the terms of those two Acts; and

(c.) Thirdly, if the money intended to be borrowed is to be expended in the construction of waterworks or reservoirs for water on the settled estates, he may have it from Government under the Limited Owners' Reservoirs Act, 1877 (40 & 41 Vict. c. 31), upon the terms of that Act; and

(C.) A power of selling the settled estates and conveying the same to the purchaser for an estate in fee simple. This power depends on various Acts, principally upon the Act 11 Geo. 4 & 1 Will. 4, c. 47, which authorizes a sale or mortgage of the lands, when that is requisite for the payment of the debts of the testator, being the settlor; the provisions, however, of which Act have been largely superseded by the provisions of the Trustee Act, 1850 (13 & 14

MINISTERIAL POWERS—continued.

Vict. c. 60), and the Settled Estates Act, 1877 (40 & 41 Vict. c. 18).

(2.) The ministerial powers of a tenant for life in right of his wife, and of a tenant by the curtesy or in dower, depend as to leasing on the Settled Estates Act, 1877, and are generally subject to the same or the like provisions as are above stated regarding a tenant for life in his own right; and

(3.) The ministerial powers of a tenant in tail depend partly on the stat. 3 & 4 Will. 4, c. 74 (as to leasing), and partly on the Settled Estates Act, 1877; but owing to the facility with which he may at the present day bar the entail and become absolute owner, the question of his ministerial powers is comparatively insignificant.

See title CONVEYANCES.

MINISTERS. Various attempts were made in early times, notably in the reign of Edw. III. (1342) to render ministers responsible to Parliament; but these attempts were practically unsuccessful. The impeachment of obnoxious ministers was the alternative remedy resorted to, and was attended with a greater measure of success (see title IMPEACHMENT); and in the present day the practice of impeachment has practically ceased altogether, the responsibility of ministers to Parliament being now fully established, and also effectively exercised. The country is now governed by the Ministry (see title CABINET MINISTRY), who are maintained in office by that party in the Commons who for the time being approve of their policy; and although in theory, the ministers are nominated by the Crown, yet in fact they are a committee of the leading members of both Houses of Parliament. Among the ministers (members of the Cabinet) are distributed the various great branches of the administration of the country; and each minister conducts the ordinary business of his own office without reference to his colleagues. But all such business of any branch of the administration as is likely to be the subject of serious discussion in Parliament is brought under the consideration of the whole Ministry assembled in Cabinet Council. Where a ministry loses its majority in the House of Commons, upon a matter that is of sufficiently grave importance, it is the duty of the ministers to tender their resignations to the Crown, and it is the duty of the Crown to nominate another ministry, unless the Crown should in the lawful exercise of its prerogative,—not to be slightly resorted to,—determine to continue the defeated ministry in office for a time, or until a dissolution of Parliament can be conveniently resorted to. The

MINISTERS—*continued*.

Cabinet has the right of censuring and (if policy should so dictate) of dismissing any of its members for acting contrary to the Cabinet: see the case of Lord Palmerston, 1851, who was removed from the office of Foreign Secretary in Lord John Russell's Administration; when the Cabinet acts in this manner, it is the Crown acting through it; and the Cabinet, if it is unwilling to be made the instrument of the Crown for such a purpose, should tender its resignation, or excuse itself to the Crown for its refusal.

MINOR. A person who has not attained his majority is usually so termed, in the Irish Reports principally; that is, an infant under the age of twenty-one years.

See title **INFANCY**.

MINT. Under the statute 33 & 34 Vict. c. 10 (entitled the Coinage Act, 1870), all coins made at Her Majesty's Royal Mint in England are to be of the weight and fineness specified in the 1st schedule to the Act (s. 3); and gold is made a legal tender for any amount; silver for an amount not exceeding forty shillings; and bronze for an amount not exceeding one shilling (s. 4). Bullion is to be coined without charge (s. 8). The Chancellor of the Exchequer for the time being is constituted master or warden of the Mint (in England) and governor of the Mint (in Scotland); and there are deputy masters and other officers (s. 14).

See title **PRY.**

MISDEMEANOR. A misdemeanor is an act committed, or omitted, in violation of a public law either forbidding or commanding it. This general definition, however, comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms, though in common usage the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye, while smaller faults and omissions of less consequence are comprised under the milder term of misdemeanors only. In the English Law the word "misdemeanor" is generally used in contradistinction to felony, and misdemeanors comprehend all indictable offences which do not amount to felony—as libels, conspiracies, attempts and solicitations to commit felonies, &c. (Harris, Criminal Law.)

MISERICORDIA. This word was commonly used in our law to signify a discretionary mulct or amercement imposed upon a person for an offence; thus, when the plaintiff or defendant in an action was amerced the entry was always *ideo in misericordia*; the fine was in proportion to the offence; and if a man was outrageously

MISERICORDIA—*continued*.

amerced in a Court not of record—as in a Court Baron, for instance—there was a writ called *Moderata Misericordia*, to be directed to the lord or his bailiff, commanding them that they take moderate amercements in just proportion to the offence of the party to be amerced. When a fine was amerced on a whole county instead of an individual, it was then termed *Misericordia Communis*. (F. N. B. 75; *Les Termes de la Ley*).

See titles **AMERCEMENT**; **MEROY**.

MISFEASANCE. Doing evil, trespassing, &c.; and he who does so is sometimes called a misfeasor (Cowel). The term is used in contradistinction to a *non-feasance*, which means simply an abstention from doing altogether. An interesting application of this distinction is to be found in the *Six Carpenters' Case* (1 Sm. L. C. 132), where the mere refusal to pay for the wine (*scil.* beer) which the men had drunk in a public-house, was declared not sufficient to make them trespassers *ab initio* in coming upon the premises at all, as breaking the pots or doing other wilful damages and *misfeasances*, it was stated, would have made them.

MISJOINDER. The joining of two or more persons together as the plaintiffs or defendants in an action who ought not to be joined. Nonjoinder is the omitting to join one or more persons who ought to have been joined as the plaintiffs or defendants in an action. The misjoinder of plaintiffs is no longer fatal to the action on its merits, and need not even be amended (Order xvi., 1), but the plaintiff who is successful may have to pay the defendant or defendants the extra costs (if any) occasioned to the latter by the misjoinder. The like remarks hold good regarding the misjoinder of defendants, but the wrong defendant may be ordered to be struck out, and (if necessary) a new and proper defendant substituted, and even without the consent of the latter to be made a party to the action.

See titles **AMENDMENT**; **NON-JOINDER**.

MISNOMER. The mistake in a name or the using one name for another. It is a general rule of law that a misnomer has no effect if the subject matter or person is certain or ascertainable notwithstanding the misnomer, "*Falsa demonstratio non nocet, si de corpore constat*;" "*Falsâ demonstratione legatum non peremî*;" and "*Longè magis falsa causa non nocet*" (Just. Inst. ii. 20, 30). But no misnomer or *falsa demonstratio* is to be assumed, and the maxim is excluded where the words used have a subject matter to which they are exactly

MISNOMER—continued.

applicable, in which latter case the contrary maxim comes in, viz., "*Non accipi debent verba in demonstrationem falsam, quæ competunt in veram limitationem.*" The two maxims are illustrated in the two very recent cases of *Travers v. Blundell*, 6 Ch. Div. 436; *Homer v. Homer*, 8 Ch. Div. 758.

See titles **FALSA DEMONSTRATIO NON NOCET**; **FALSA CAUSA NON NOCET**.

MISPLEADING. Pleading incorrectly, or omitting anything in a pleading, which is essential to the maintenance or defence of an action; as in the case of a plaintiff not merely stating his title in a defective manner, but setting forth a title which is essentially defective in itself. Also, in Chancery suits, it was a mispleading in certain cases if the defendant did not allege the absence of *notice*; and that is substantially still the case.

See title **PLEADING**.

MISPRISION. In its most general sense comprises all such high offences as are under the degree of capital, but closely bordering thereon; and it is said that a misprision in that sense is contained in every treason and felony whatsoever. Misprisions are generally divided into two sorts, *negative* and *positive*, the former consisting in the concealment of something which ought to be revealed, the latter in the commission of something which ought not to be done. Of the first or negative kind, is *misprision of treason*, which consists in the bare knowledge and concealment of treason, without any degree of assent thereto. Of this negative kind is also *misprision of felony*, which is the concealment of a felony which a man knows but never assented to. Positive misprisions are generally denominated *high misdemeanors*; such, for example, are the mal-administration of high public officers; the embezzling of the public money; contempts against the king's prerogative, his person, and government, or his title, &c. (1 Hawk. P. C. 60).

MISPRISION OF FELONY } See title
MISPRISION OF TREASON } **MISPRISION.**

MISREPRESENTATION. When made heedlessly or with knowledge, regarding a material circumstance in the contract, to some third person with the intent that he should act upon it as true, is a species of actual fraud, for which, in case it produce damage, an action will lie, either for recovery of the damages sustained, or in certain cases to enforce the making good the misrepresentation.

See title **FRAUD**.

MISTAKE. Is either of law or of fact; when of *law*, it is not in general any ground for relief in equity, the maxim *ignorantia juris neminem excusat* being applicable to that class of mistake. But the maxim is excluded, where the mistake of law is so egregious as to suggest imbecility, or when it is accompanied with imposition. When the mistake is a mistake of *fact*, and the fact is a material one to the contract, and it was not through any negligence of the mistaking party that it was overlooked or misappreciated, then the mistake is almost invariably a ground of relief in equity.

See title **RECTIFICATION IN EQUITY**.

MITTER LE DROIT. This phrase is used in contradistinction to that of *mitter l'estate*, and both are employed to point out the mode in which releases of land operate. A release might be a conveyance of a right to a person in possession. Thus, where a person was disseised or put out of possession of lands, although the disseisor thereby acquired the possession, still the right of possession and property remained in the disseisee; but if the disseisee agreed to transfer his right to the disseisor, the proper mode of carrying such an agreement into execution was by a release, the disseisor already having the possession; and as in such cases nothing but the bare right passed, the release was said to enure by way of *mitter le droit*, i.e., transferring the right. A release is also said to enure by way of *mitter l'estate*, i.e., of passing the estate, e.g., when two or more persons become seised of the same estate by a joint title, either by contract or descent, as joint tenants or co-parceners, and one of them releases his right to the other, such release is said to enure by way of *mitter l'estate*, i.e., transferring the estate (4 Crif. Dig. 84, 85).

And see title **CONVEYANCES**, sub-title **RELEASE**.

MITTER L'ESTATE: See title **MITTER LE DROIT**.

MITTIMUS, WRIT OF. A writ by which records used to be transferred from one Court to another, sometimes immediately, as out of the King's Bench into the Exchequer; and sometimes mediately by a *certiorari* into Chancery, and from thence by a *mittimus* into another Court. (*Les Termes de la Ley*).

MIXED ACTIONS are such as partake of the twofold nature of real and personal actions, having for their object the demand and restitution of real property, and also personal damages for a wrong sustained.

MIXED PRESUMPTIONS. Are presumptions of mixed law and fact, that is, presumptions of fact recognized by law,—

MIXED PRESUMPTIONS—*continued.*

e.g., presumptions which juries are commonly recommended to draw as inferences from the facts that are proved.

See titles PRESUMPTIONS, QUALITY OF; PRESUMPTIONS, VARIETIES OF.

MOBILIA OSSIBUS INHERENT. Means literally, that moveable property inheres in the bones of the owner, that is to say, follows his person or rather his domicile; and it is upon this maxim that the prevalence of the *lex domicilii* as regards personal property depends.

See title DOMICILE.

MODERATÂ MISERICORDIÂ, WRIT OF: See title MISERICORDIÂ.

MODO ET FORMÂ: See title MANNER AND FORM.

MODUS ACQUIRENDI: See title TITLE.

MODUS ET CONVENTIO VINCUNT LEGEM. Means literally that the terms of the express agreement of the parties may override or modify any general rule or principle of law. This maxim holds generally good; but has been excluded upon various general grounds of policy in some few cases, *e.g.*, the mortgagor cannot in the mortgage deed validly agree with the mortgagee to bargain away his equity of redemption on failure to repay the money lent.

MODUS DECIMANDI. A discharge from the payment of tithes is said to be either *de modo decimandi* or *de non decimando*. (1.) A *modus decimandi*, commonly called by the simple name of a *modus* only, is where there is by custom a particular manner of tithing allowed, different from the general manner of taking tithes in kind, *e.g.*, by a pecuniary compensation, as twopence an acre for the tithe of land, or by a compensation partly in kind and partly in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him, and the like; in short, any means whereby the general law of tithing is altered, and a new method of taking tithes is introduced, is called a *modus decimandi*, or special manner of tithing. (2.) A discharge from the payment of tithes by a custom *de non decimando*, arises either by personal privilege or by real composition or other like circumstance. Thus, a vicar is discharged from paying tithes to the rector, and the rector to the vicar; and a discharge by real composition is where there is an agreement between the owner of lands and the parson or vicar (with the consent of the ordinary and the patron), that such lands shall for the future be discharged from payment of

MODUS DECIMANDI—*continued.*

tithes in consideration of some land or other REAL recompense being given to the parson in lieu and satisfaction thereof (2 Inst. 490; 14 M. & W. 393).

See title TITHES.

MOIETY (from the French, *moitié*, half). The half part of anything. Thus, joint tenants are sometimes said to hold by moieties (Cowel). The shares of two joint tenants are of necessity moieties; but the shares of two tenants in common entitled equally would also be moieties. An inaccurate but common use of the word "moiety" is that in which it signifies merely *part, share, or proportion*, whether equal or unequal.

MOLESTATION. Under the Masters and Workmen Molestation Act, 1871 (34 & 35 Vict. c. 32), molestation consists in either (1) persistently following a fellow workman about from place to place; or (2) hiding any tools, clothes, or other property owned or used by such workman, or depriving him of or hindering him in the use thereof; or (3) watching or besetting the house or other place where such workman resides or works or carries on business, or happens to be, or the approach to such house or place, or, with two or more other persons, following such workman in a disorderly manner in or through any street or road. The act must in each case have for its objects the coercing of the workman or his employer to do or abstain from doing some lawful act falling within the scope of the workman's employment.

MOLLITER MANUS IMPOSUIT. When a person is sued for an assault, he may set forth the whole case, and plead that he laid hands on the plaintiff gently, *molliter manus imposuit*. From these words having been so used in pleas, several justifications in actions of trespass for assault are called by this phrase (1 Sid. 301). The degree of gentleness [or of roughness] necessarily varies with the degree of resistance, *semble*.

MONASTERIES: See titles MONK; CHURCH AND STATE.

MONEY. When earmarked can in general be followed; *secus*, when (as it usually is) not earmarked (11 Ch. Div. 772). Trust moneys mixed with the trustee's own moneys, although not earmarked, are however made good out of the aggregate mixed moneys, in priority to any payment thereout to the trustee himself,—that being a species of penalty imposed upon the trustee for his breach of duty (*Pennell v. Deffell*, 4 De G. M. & G. 382; Lewin on Trusts, 5th ed. 627). Bills and notes are for some purposes like money in respect of not being earmarked,—the general point of resem-

MONEY—continued.

blance between them and money being their *currency*, whereby they cannot (like other chattels) be received from a *bonâ fide* purchaser for value.

MONEY-BILLS. Originally, the Lords and Commons in Parliament voted separate supplies, the last of such votes of which there is any trace having been in 18 Edw. 3. For a brief period subsequently to that date, the Lords and Commons appear to have voted joint supplies; but from the reign of Richard II. probably, and from that of Henry IV. certainly, the practice was for the Commons singly to vote the supplies, and for the Lords merely to assent thereto. See Rolls 9 Hen. 4, where mention is made of the Commons having remonstrated to the King on account of the Lords interfering in the matter of the grant of supplies, and the King is represented to have thereupon conceded that the Commons should for the future determine all such grants without interference from the Lords. This practice appears to have been all the more reasonable in those early reigns, because the supplies fell principally upon the Commons, and in the case of the tenths and fifteenths of goods fell exclusively upon them, unless in the exceptional instance in which the Lords were expressly subjected to the tax.

Originally, money-bills were not in general entered in the statute book, being only so entered when (as was, however, the frequent practice) some relief of grievances was so interwoven with them as to render their entry unavoidable. This was the case, for example, with the money-bill 14 Edw. 3, stat. 1, c. 21. It is not till the reign of Henry VII. that money-bills, being purely such, appear in the statute book, and even then they appear occasionally only; however, by the reign of Henry VIII. they are entered regularly.

In their first mode of entry in the statute-book, money-bills are expressed to be enacted by the authority of Parliament; but by the reign of Charles I. the Commons began the practice of omitting the names of the Lords in the preamble and of retaining it only in the enacting part; and this is the present practice (see, *e.g.*, 36 & 37 Vict. c. 3).

About 1661, the Commons began for the first time to object to the Lords making any *alterations* in money-bills, the immediate occasion of their objection being certain alterations made by the Lords in a bill of that year, introduced by the Commons for providing for the paving of the streets of Westminster. Again, in 1671, the Commons having introduced a bill imposing a tax on sugar, and the Lords

MONEY-BILLS—continued.

having proposed some modifications in it, the Commons remonstrated, and a conference ensued between the two Houses, and in this conference the Commons laid claim to an *exclusive* privilege in the matter of money bills. The conference ended in nothing definitive, but the exclusive right which was then claimed has since been acquiesced in, although it has never been expressly acknowledged, by the Lords. A like exclusive privilege, which was claimed shortly after 1688, in the matter of bills imposing pecuniary penalties, was similarly acquiesced in, not acknowledged.

MONEY-CLAIMS: See title MONEY-COUNTS.

MONEY COUNTS. These were simply forms of pleading in actions of *assumpsit*, and were provided by the C. L. P. Act, 1852, Sch. B. They were goods sold, work done and materials provided, money lent, money paid, money received and such like other counts, which were also sometimes called the common *indebitatus* counts. Similar forms of pleading are given under the head of "money-claims" in Appendix A to the Judicature Act, 1875, part ii. sect. 2, *e.g.*, "The plaintiff's claim is 50*l.* for the price of goods sold" or "for arrears of rent," and so forth. These money-claims are in all cases either for sums certain or for sums ascertainable by calculation, and as being such are contradistinguished from damages and other like uncertain sums which are only to be ascertained through the intervention of a jury.

See title MONEY DEMANDS.

MONEY DEMANDS. In law are such demands as are certain beforehand, or ascertainable by calculation, without the intervention of a jury; and as being such, they are usually contradistinguished from *damages*.

MONITION. An order, or admonitory epistle, issuing from an Ecclesiastical Court, and addressed to some person or persons offending against the law ecclesiastical, advising him or monishing him or them to act in obedience thereto. When a party has been duly served with a monition, he is technically said to have been "monished." See Rog. Ecc. Law; Burn's Ecc. Law, tit. "Monition;" *Martin v. Mackonochie*, 3 Q. B. Div. 730.

MONK. The profession of a religious person of this character made him dead in law, or civilly dead; but since the Reformation, the monkish profession is not recognised by law in England; and amounting, therefore, to no religious profession at all, it no longer renders the monk civilly dead (*In re Metcalfe*, 33 L. J. (Ch.) 308).

See titles CIVIL DEATH; CLERGYMEN.

MONOPOLIES, CASE OF: See title **MONOPOLY**.

MONOPOLY is the sole right of selling a particular article of manufacture. The power to grant such a right was in early times claimed as a prerogative of the Crown. Its exercise was in many cases most beneficial, as ingenious foreign workmen were from time to time drawn to England by the expectation of substantial commercial advantages being secured to them by royal letters patent (being, in fact, these grants of monopoly); and enterprising Englishmen were also induced by the like expectation to travel abroad and acquire a practical knowledge of trades and arts. But the Crown experiencing in those days the evils of no regular taxation—the chief of which was a perpetually-recurring want of money to conduct the affairs of Government—the prerogative was exposed to, and its exercise soon became affected with, many abuses, principally in this respect,—that the monopoly was sold at a ruinous price, usually to the highest bidder, whether or not he was the true and first inventor of the process of manufacture, and latterly without any regard at all to his capacity or ability as an inventor or manufacturer, and frequently indeed to courtiers, who made it a means of gain exclusively, and did not assist the national industry at all. The evils arising from this abuse of the prerogative were become so great by the latter end of the reign of Elizabeth, that the Courts of Common Law, in the *Case of Monopolies* (*Darcy v. Allen*, 11 Rep. 84), 44 Eliz., adjudged monopolies to be illegal; and parliament took up the matter as early as 1601, and, in the next reign, succeeded in regulating the abuse by enacting the Patent Act (21 Jac. 1, c. 3), which is the basis of the Patent Law at the present day.

See title **PATENTS**.

MONSTER. One who has not the shape of a human being, and, although born in lawful wedlock, cannot be heir to any land. But mere deformity of person does not make any one a monster.

MONSTRANS DE DROIT (*showing of right*). One of the Common Law methods of obtaining possession or restitution from the Crown, of either real or personal property, is by *monstrans de droit*, literally, a manifestation or shewing of right, which may now be preferred or prosecuted like an action either in the Chancery or in any of the Common Law Divisions, although originally in the Chancery and Exchequer Divisions only (see *Petitions of Right Act*, 1860, 23 & 24 Vict. c. 34). A *monstrans de droit* lies when the right of the party, as well as the right of the Crown, appears upon record, and is putting in a claim of right,

MONSTRANS DE DROIT—*continued*.

grounded on facts already acknowledged and established, and praying the judgment of the Court whether, upon those facts, the king or the subject has the right. (*Day's Common Law Pro.* 562).

See title **PETITION OF RIGHT**.

MONTH, in law, is a lunar month, or twenty-eight days, unless otherwise expressed. Hence a lease for twelve months is for forty-eight weeks only; but if it be for "a twelvemonth," it is good for the whole year; and in a contract, if the parties obviously intended that a month should be a calendar month, the law will give it that effect. If money be lent for nine months, it must be understood calendar months (*Str.* 446); similarly in the case of bills of exchange and promissory notes. In legal proceedings, as in time to plead, a month used to be four weeks (3 Burr. 1455), but it now denotes a calendar month (*Order LVIII.*, 1). But where a statute speaks of a year, it means always the whole twelve months (2 Cro. 167), and month shall be intended a calendar month (13 & 14 Vict. c. 21).

See titles **DAY**; **TIME**; **YEAR**.

MORA. Means literally delay; and as applied in Roman Law, is the basis upon which interest is allowed upon money due and payable, but which remains unpaid, or the payment of which is said to be *in morâ*.

See title **INTEREST OF MONEY**.

MORAL OBLIGATION. A moral consideration is not a sufficient consideration to support a simple contract or promise or *assumpsit* (*Wennall v. Adney*, 3 B. & P. 349, n.), unless of course it was moved by a preceding request (see title **CONTRACT**). The obligation of a father as such to maintain his child is a moral obligation only, and not a legal obligation (*Mortimore v. Wright*, 6 M. & W. 482); he cannot therefore be charged for necessities supplied to his child without his previous request, or upon a subsequent promise to pay for same (*Eastwood v. Kenyon*, 11 A. & E. 438, overruling *Lee v. Muggeridge*, 5 Taunt. 36). In Roman Law, such an obligation would be good as a ground of defence (see Brown's *Savigny, Naturalis Obligatio*); and it is possible that even in English Law, the Chancery Division might be induced to regard it likewise, in at least certain classes of suits (e.g., specific performance or injunction suits), as a valid ground of defence. And certain it is that a father neglecting his duty (although moral only) to provide for his children, whereby they become chargeable to the parish, may in English Law be rendered legally liable to make such provision by an

MORAL OBLIGATION—*continued.*

order of the police court or of a justice of the peace.

See titles **CONTRACTS**; **NATURALIS OBLIGATIO**.

MORE OR LESS. These words when added to statements of acreage (in conveyances) and to the stated amounts (in contracts) give a margin of variation which may be either in excess or in diminution of the expressed acreage or amount. A material variation is not covered by them (*Reuter v. Sala*, 4 C. P. Div. 239).

MORT CIVILE, in French Law denoted civil death, as upon conviction for felony. It was nominally abolished by a law of the 31st of May, 1854, but something very similar to it, in effect at least, still remains. Thus, the property of the condemned possessed by him at the date of his conviction goes and belongs to his successors (*héritiers*), as in case of an intestacy; and his future acquired property goes to the State by right of its prerogative (*par droit de déshérence*), but the State may, as a matter of grace, make it over in whole or in part to the widow and children.

See title **FORFEITURE**.

MORT D'ANCESTOR, ASSIZE OF. Was a writ which lay for a person whose ancestor died seised of lands, &c., that he had in fee simple, and after his death a stranger abated; and this writ directed the sheriff to summon a jury or assize, who should view the land in question, and recognise, i.e., find, whether such ancestor was seised thereof on the day of his death, and whether the demandant was the next heir.

See titles **ABATEMENT OF POSSESSION**; **OUSTER**.

MORTGAGE. A mortgage may be described to be a conveyance of lands by a debtor to his creditor, as a security for the repayment of a sum of money borrowed. The debtor who so makes a conveyance of his lands is termed the mortgagor, and the creditor to whom the lands are so conveyed as a security for the money lent, is termed the mortgagee.

(1.) Mortgages of *freehold* lands are of two sorts: either the lands are conveyed to the mortgagee and his heirs in fee simple, with a proviso that if the mortgagor pays the money borrowed on a certain day, the mortgagee will reconvey the lands; or else the lands are conveyed to the mortgagee, his executors, administrators, and assigns for a long term of years, with a proviso that if the money borrowed is repaid on a certain day, the term shall cease and become void. There is also another kind of mortgage, where the pro-

MORTGAGE—*continued.*

viso for redemption does not oblige the mortgagor to pay the money on a particular day, but allows him to do it at any indefinite time; and this is called a Welsh mortgage (2 Cruise, 81; 2 Bl. 152).

(2.) Mortgages of *leasehold* lands are likewise of two sorts, being either (1) by assignment, in which case the mortgagee coming into legal privity with the lessor becomes liable to the latter on the rents and covenants; or (2) by underlease, in which case the mortgagee by reason simply of the absence of that privity with the lessor does not become liable to the latter on the rents and covenants. In either case, there is the usual proviso for the re-assignment or surrender of the premises upon repayment of the principal money lent and interest and costs.

(3.) Mortgages of *copyhold* lands, where they constitute the principal or entire security, are usually made by surrender without admittance, subject to a proviso making void the surrender upon repayment of the principal, interest, and costs; but where they are only a subordinate part of the security, the mortgagee is frequently satisfied with a covenant to surrender which he takes from the mortgagor, subject to the usual proviso that the covenant shall be discharged and become void upon repayment of the mortgage debt and interest and costs.

The mortgagee's remedy against his mortgagor, is either (1.) By Foreclosure, which he effectuates by means of a suit in Equity: or (2.) By Sale, which he carries out either by exercising his power of sale (if any) contained in the mortgage deed, in which case he must carefully conform to the terms of the power, or by exercising the statutory power of sale, which is to be taken (in the absence of an express one) to be implied in every mortgage deed (23 & 24 Vict. c. 145), in which latter case also he must carefully comply with the words of the enabling statute. Also, in an action of foreclosure, the Court may direct a sale of the lands, in lieu of granting a foreclosure decree (15 & 16 Vict. c. 86, s. 48), but not of course upon a mere interlocutory application (11 Ch. Div. 204). The mortgagor's remedy against his mortgagee is, — By Redemption, which in the ordinary case he exercises by simply paying back the borrowed money, and in all cases of peculiarity or of unsettled accounts by means of a suit in Equity. Where an estate is mortgaged for successive debts to successive mortgagees, if any mesne mortgagee wishes to realise his mortgage debt, he offers in his statement of claim to redeem the prior mortgagees, and prays to foreclose those that are posterior to himself, according to

MORTGAGE—continued.

the rule of practice,—“Redeem up, foreclose down.”

See titles NOTICE; TACKING.

MORTGAGE DEED. Is the indenture, whereby the repayment of the money lent on the security of lands and hereditaments, or personal estate is secured, together with interest at the agreed rate, and whereby also the property which forms the security is legally assured or conveyed to the mortgagee subject to redemption in the usual way. When the mortgage money is paid off, there is another deed executed for the purpose of reconveying the property to the mortgagor; and upon the preparation subsequently of any abstract of title to the property, the mortgage deed, and also the deed of reconveyance, are required to be abstracted.

MORTGAGE BY DEPOSIT. It is usual, with the customers of banks especially, for persons to borrow money on the security of real or personal estate without any deed or even memorandum of agreement, and by means of a simple deposit of the title deeds relating to the property with the lender; such a mortgage extends to future advances.

MORTGAGE, EQUITABLE, BY CONVEYANCE. Where the legal estate in lands has been conveyed to a first mortgagee, and the mortgagor makes a second mortgage by conveyance, he necessarily conveys only what he has, that is, an equitable estate; and this second mortgage is therefore called an equitable mortgage by conveyance.

MORTGAGE, LEGAL: See titles CONSOLIDATION OF MORTGAGES; MORTGAGE; NOTICE; TACKING.

MORTGAGE OF PERSONAL PROPERTY. In a mortgage (as distinguished from a pledge) of personal property, the possession usually remains with the mortgagor, and it is only upon the happening of some specified default that the mortgagee takes possession. Every mortgage of personal property involves in it a right in the mortgagee to sell the property upon giving to the mortgagor notice of the intention so to do, and there is no necessity (as there is in the case of a mortgage of real or leasehold property) to have an express power (given by the mortgage deed or by statute) or a previous decree of foreclosure or judicial decree for sale.

MORTGAGE OF REAL PROPERTY: See title MORTGAGE.

MORTGAGORS AND MORTGAGEES. The mortgagor has (usually) the equitable estate, and the mortgagee the legal estate.

MORTGAGORS AND MORTGAGEES—continued.

The mortgagor is not accountable (like a bailiff or agent) to the mortgagee for the rents and profits of the hereditaments included in the mortgage; on the other hand, the mortgagee upon taking possession of such hereditaments becomes strictly accountable for such rents and profits, as well those actually received as also those which without his (the mortgagee's) wilful default might or would have been received.

MORTMAIN ACTS. These Acts had for their object the prevention of lands getting into the possession or control of religious corporations, or, as the name indicates, *in mortuâ manu*. After numerous prior Acts dating from the reign of Edward I., it was enacted by the stat. 9 Geo. 2, c. 36 (called the Mortmain Act *par excellence*), that no lands should be given to charities unless the following seven requisites should be observed, viz:—

- (1.) A deed should be used;
- (2.) The deed should be attested by two or more witnesses;
- (3.) The deed should be indented;
- (4.) The deed should be delivered at least twelve calendar months before the death of the grantor;
- (5.) The deed should be enrolled in the Court of Chancery within six months from its execution;
- (6.) The grant should take effect in possession immediately from the execution of the deed; and
- (7.) The grant should be irrevocable and without any equivalent whatsoever in favour of the grantor.

Moreover, by the same Act, for a *purchase* deed of lands conveyed to a charity, all the before mentioned seven requisites, other than and except only the fourth one of them, were equally rendered necessary to the validity of the deed.

And in addition the charity, if it is (as it usually is) a corporation aggregate, must have a license from the Crown or other equivalent authority to hold the lands given or purchased in mortmain.

There were certain old exceptions to the Mortmain Act, viz., the Universities of Oxford and Cambridge, and the three schools of Eton, Winchester, and Westminster.

But the original seven requisites have, in more recent years, been some of them removed altogether, and others of them relaxed. Thus:—

(1.) A deed, although that is in general still required, yet it is optional with the donor in mortmain, either to use a *deed* or a *will* in the following cases:—

- (a.) In the case of a gift of land for a

MORTMAIN ACTS—continued.

public park, not exceeding twenty acres for any one such park;

(b.) In the case of a gift of land for an elementary school, not exceeding one acre for any one such school;

(c.) In the case of a gift of land for a public museum, not exceeding two acres for any one such museum.

See 34 Vict. c. 13, The Public Parks, Schools, and Museums Act, 1871.

(2.) The attestation of the deed by two or more witnesses, although that is in general still required, yet the attestation of one witness suffices in the following cases:—

(a.) In the case of a gift of land as a site for a poor school, or for a church, chapel, or meeting-house, or for the residence of the minister, master, or mistress thereof (4 & 5 Vict. c. 38, s. 10, and 36 & 37 Vict. c. 49), the gift in any one case not exceeding one acre of land; and

(b.) (Judging at least from the statutory form of the conveyance, see s. 13 of the Act.) In the case of the gift of land not exceeding one acre in any one case in favour of any of the following objects:—

Institutions for the promotion of science, or of literature, or of the fine arts;

Institutions for the instruction of adults, or the diffusion of useful knowledge;

Foundation and maintenance of libraries and reading-rooms;

Public museums;

Picture-galleries;

Natural history collections;

Mechanical and philosophical inventions, instruments, and designs.

See the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112).

(3.) The necessity to *indent* the deed of gift was altogether abolished by the Act 24 Vict. c. 9.

(4.) The necessity that the deed should be delivered twelve calendar months before the death of the donor remains as a general rule, but has been abolished in the following cases:—

(a.) In the case of a gift of land as a site for a poor school, church, chapel, or meeting-house, or for the residence of the minister, master, or mistress thereof (7 & 8 Vict. c. 37, s. 3, and 36 & 37 Vict. c. 49), the gift in any one case not exceeding one acre of land;

(b.) In the case of the gift of land not exceeding one acre in any one

MORTMAIN ACTS—continued.

case in favour of any of the following objects:—

Institutions for the promotion of science, or of literature, or of the fine arts;

Institutions for the instruction of adults, or the diffusion of useful knowledge;

Foundation and maintenance of libraries and reading-rooms;

Public museums;

Picture-galleries;

Natural history collections;

Mechanical and philosophical inventions, instruments and designs.

See the Literary and Scientific Institutions Act, 1854. *supra*; and

(c.) In the case of a gift of land for the recreation of adults, or for the playground of children,

See the Recreation Grounds Act, 1859 (22 Vict. c. 27).

On the other hand, where under the Public Parks, Schools, and Museums Act, 1871 (34 Vict. c. 13), the gift of land is made either by *deed* or by *will*, the necessity for execution of the deed twelve calendar months before the death of the grantor is retained, and the like necessity is enacted in the case of such gift being made by *will* (s. 5).

(5.) The requisite of enrolment in the Court of Chancery within six months from the execution of the deed is in general preserved, but it has been removed in the following case, viz.:—

In the case of a gift of lands for the recreation of adults, or for the playgrounds of children.

See the Recreation Grounds Act, 1859, *supra*.

On the other hand, where under the Public Parks, Schools, and Museums Act, 1871 (*supra*), the gift of lands is made either by deed or will, the enrolment thereof must be made within six calendar months after the time the same comes into operation, such enrolment being, however, made in the books of the Charity Commissioners (See title CHARITY COMMISSIONERS).

(6.) The requisite, that the grant should take effect in possession *immediately* from the execution of the deed, has been slightly relaxed by the stat. 26 & 27 Vict. c. 106, which has enacted that if such gift take effect within one year from the date of the instrument it shall be deemed to take effect in possession immediately; and

(7.) The irrevocability of the gift remains as a general rule, but under the recent statutes mentioned above, it is a general rule that where any of the lands given for the popular uses specified above,

MORTMAIN ACTS—continued.

cease to be employed for such uses, they shall revert to the donor, or his representatives, at the time they cease to be used; also, the requisite excluding reservations in favour of the donor remains as a general rule, but has been exploded in the following cases:—

- (a.) In all cases of the reservation of a peppercorn or nominal rent only (24 Vict. c. 9);
- (b.) In all cases of the reservation of any mines or minerals or any easement (24 Vict. c. 9);
- (c.) In all cases of any covenants or conditions as to erections or repairs, &c. (24 Vict. c. 9);
- (d.) In all cases of the apparent gift being in fact a purchase, and the consideration money therefore is reserved, partly or wholly, in the form of a rent-charge in lieu of a gross sum (24 Vict. c. 9, and 27 Vict. c. 13); and
- (e.) In all cases of the gift of land, either for the recreation of adults, or for the playgrounds of children.

See the Recreation Grounds Act, 1859, *supra*.

Under the stat. 33 & 34 Vict. c. 34, it is rendered lawful for all corporations and trustees holding moneys upon trust for any public or charitable purpose to invest such moneys on lands without regard to the Mortmain Acts; but in case of the equity of redemption becoming liable to be barred, the Court is to direct a sale and not a foreclosure of the security.

See title CHARITY COMMISSIONERS.

MORTUARY. A mortuary was that beast or other moveable chattel which, upon the death of the owner thereof, by the custom of some places, became due to the parson, vicar, or rector of the parish in which the person so dying resided, in lieu or satisfaction of tithes or other ecclesiastical offerings which such party might have forgotten or have neglected to pay while alive (21 H. 8, c. 6; *Les Termes de la Ley*). In another sense, more usual at the present day, a mortuary is a dead-house.

See title FACULTY.

MOTHER AND CHILD: See title FATHER AND CHILD.

MOTION. An application to the Court by the plaintiff or defendant in an action, or by the counsel for either, to obtain some rule or order of Court necessary in the course of the proceedings; and the act of making such an application is termed moving the Court. Many of these applications may be made by summons at chambers (see title CHAMBERS); and, on the other hand, some of them require even

MOTION—continued.

a petition to be presented in the action (see title MOTIONS, VARIETIES OF). The word motion also signifies instance, desire, will, &c. Thus a person is said to do a thing of his own motion, *i.e.*, voluntarily, without being required to do it.

See title MERE MOTION.

MOTION OF COURSE**MOTION ON NOTICE****MOTION OPPOSED****MOTION EX PARTE**

See title MOTIONS, VARIETIES OF.

MOTION FOR JUDGMENT. Is a mode of obtaining the opinion or the decree of the Court, where there is no dispute upon the facts, and therefore no necessity for any trial (properly speaking) of the action, *e.g.*, for default of appearance to writ of summons, or for default of pleading, or (occasionally) upon the report of a referee; also, subsequently to verdict found, and in certain other cases.

MOTION, NOTICE OF. Is usually two clear days; and short notice is one day, or such other period under two days as the Court may specially allow in any particular case.

MOTIONS IN PARLIAMENT. Making a motion in either House of Parliament is simply the act of submitting a proposition. In the House of Commons, a member desirous of making a motion is desired to give previous notice thereof, and having done so, it is entered in terms upon the notice paper or order book. In the Lords, this notice is not required by the rules of the House, but, for the sake of general convenience, the same practice ordinarily prevails. In the House of Commons, there are certain fixed days appointed for motions of which notice has been previously given, as contradistinguished from "orders of the day," which latter are questions which the House has already agreed to consider, or has partly considered and adjourned for further consideration or debate. On an "order" day the orders have precedence of motions, and on a "motion" day the motions have precedence of orders; but in either case if the one can be disposed of in time, the House will proceed to the other.

MOTIONS, VARIETIES OF. The principal varieties of motions are the following:—

(1.) Motion *ex parte*,—that is, a motion made in Court by counsel on behalf of one or other of the parties to the action, in the absence (and usually without the knowledge) of the other party or parties. It requires to be supported with an affidavit,

MOTIONS, VARIETIES OF—*continued.*

and it is not usually to be resorted to excepting in cases of great urgency, and also in cases for which that mode of proceeding is specially provided by statute (*See* title **NEW TRIAL, MOTION FOR**).

(2.) *Motion upon Notice*,—that is, a motion made in Court by counsel on behalf of one or other of the parties to the action, in the presence of (and usually after two clear days' notice to) the other party or parties. It requires to be supported with an affidavit or affidavits, the non-moving party or parties usually putting in some affidavit or affidavits in opposition to the motion, in which latter case the motion is said to be opposed; and the opposition may vary in degree. This mode of proceeding is the usual one adopted upon all applications for injunctions, receivers, and other like interlocutory applications; and in a proper case, the Court will give leave to serve short notice (*i.e.*, one clear day) of the intention to make the motion, and sometimes even along with service of the writ of summons commencing the action, and before the defendant or defendants have appeared to the writ.

(3.) *Motion of Course*,—that is, a motion the object of which is granted as a matter of course, and which, therefore, is not usually made in open Court, but is granted by the master, chief clerk, or officer of the Court when the paper containing the direction to move is laid before him, with a barrister's signature attached. Almost everything that may be done on motion of course can also be done, and is ordinarily done, in the Chancery Division, by petition of course at the Rolls (2 *Dan. Ch. Pr.*, Appendix).

(4.) *Motion Opposed*,—*See* this title, subtitle **MOTION UPON NOTICE**.

(5.) *Motion for Judgment*,—*See* title **MOTION FOR JUDGMENT**.

(6.) *Motion by way of Appeal*,—all appeals in the Supreme Court that are made to the Court of Appeal are made by way of *motion*, and that usually upon notice by the appellant to the respondent, although occasionally (*e.g.*, in a matter of grave urgency) the motion may be made *ex parte*. The notice of appeal is fourteen days long from any judgment (whether final or interlocutory), and is four days long from any interlocutory order. And appeals from County Courts and other inferior Courts to any Divisional Court of the High Court, are usually made by motion, although there is an alternative mode of proceeding in that way, *viz.*, by special case.

MOVEABLES. Moveable and immoveable is one of the commonest, because one of the most apparent and natural, of the

MOVEABLES—*continued.*

modern divisions of things, as the subjects of property. It is not coincident, however, with the historical divisions which have obtained most extensively in ancient or in modern times, not agreeing with the Roman Law division into *Res Mancipi* and *Res Nec Mancipi* (agricultural and non-agricultural) on the one hand, nor with the English Law division into lands and chattels, or real and personal property, on the other. For example, a leasehold house is an immoveable, and yet is personal property; and a dignity or title of honour is a moveable and yet is real property. Nevertheless, just as the division into *Res Mancipi* and *Res Nec Mancipi* gradually gave way before the industrial development of Roman greatness, so also the division into real and personal property may also eventually give way in English Law; but for the present, the distinction of property into moveables and immoveables is not fertile with consequences in English Law, but it has some effects in international law.

See titles **DOMICILE; MOBILIA OMBIBUS INHERENT**.

MULIER PUISNE: *See* title **EIGNÈ**.

MUNICIPAL CORPORATION: *See* title **CORPORATIONS, MUNICIPAL**.

MUNICIPAL ELECTIONS: *See* title **CORPORATIONS, MUNICIPAL**.

MUNICIPAL LAW. Is the law proper or peculiar to any state as opposed to International Law, which is the law common to a number of states.

See title **CIVIL LAW**.

MUNIMENTS. Deeds, evidences, and writings in general, whether belonging to public bodies or to private individuals, are called muniments; and in cathedral and collegiate churches, and generally in all offices, there is a strong room or compartment provided for the keeping of the muniments, which is thence termed a muniment house or strong room (*Les Termes de la Ley*; 3 *Inst.* 170).

MURDER. The act of a person of sound memory, and of discretion, unlawfully killing any person under the king's peace, with malice aforethought, either express or implied. *Express malice* is signified by one person killing another with a deliberate mind and formed design; and which formed design is evidenced by external circumstances discovering that inward intention; as by lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. *Implied malice* is signified by one person's voluntary killing another without any provocation; for when such deliberate

MURDER—continued.

acts are committed, the law implies or presumes malice to have urged the party to the commission of them, although no particular enmity can be proved (3 Inst. 4; 1 Hale, 455). And in case a person trespassing in pursuit of game fires at a bird, and, without any intention at all of doing so, hits and kills a man, that is murder, inasmuch as the act of poaching is felonious, and the felony therein couples itself to the death, and supplies the intention which was lacking (*R. v. Crispe*, 1 B. & Ald. 282).

See titles HOMICIDE; MALICE.

MUSIC, COPYRIGHT IN. Musical compositions intended for the stage are protected as dramas (see title DRAMA, COPYRIGHT IN); when not intended for the stage, they are protected by the Act 5 & 6 Vict. c. 45, the word "book" including a "sheet of music." In the early case of *Bach v. Longman* (2 Cowp. 623), Lord Mansfield decided that music was protected by the old Copyright Act, 8 Anne c. 19 (see title COPYRIGHT). The term for which the copyright exists is twenty-eight years and the residue thereafter of the author's life if he should be living (3 & 4 Will. 4, c. 15; 5 & 6 Vict. c. 45). The copyright must be registered; it is assignable only by writing; and the assignment must be registered. As to what is an infringement of this species of copyright, see *D'Almaine v. Boosey* (1 Y. & C. 288).

MUTE. A prisoner is said to stand mute when, being arraigned for treason or felony, he either makes no answer at all, or answers foreign to the purpose, or with such matter as is not allowable, and will not answer otherwise; or upon having pleaded not guilty, refuses to put himself upon the country.

MUTINY ACT. An Act of Parliament to punish mutiny and desertion, and for the better regulation of the army, and their quarters. The Mutiny Act, properly so called, relates to the army only; the Marine Mutiny Act relates to the navy. Each Act is passed annually, the jealousy of the constitution for the individual's liberties being such as not to tolerate that such Acts, or the jurisdictions which they establish, should become perpetual or permanent. This necessity for their annual re-enactment also secures the annual re-assembling of Parliament.

See title ARMY DISCIPLINE ACT, 1879.

MUTUAL CREDIT. Where A. runs up debts with B., with the knowledge that B. owes money to A., and A. believes (and B. expects or might reasonably expect) that he (A.) will write off these debts against the money owing, these debts are said to

MUTUAL CREDIT—continued.

be contracted under a mutual credit; and such mutual credit affords the basis of set-off.

See title SET-OFF.

MUTUAL DEBTS. Are debts owed reciprocally from A. to B. and from B. to A.

See title SET-OFF.

MUTUAL PROMISES. In a declaration in special assumpsit, the plaintiff usually alleged that, in consideration that he, at the request of the defendant, had then promised the defendant to observe, perform, and fulfil all things in the agreement on his, the plaintiff's, part, the defendant promised the plaintiff that he would perform and fulfil all things in the said agreement on his, the defendant's part to be observed and performed; and this was termed the allegation or statement of mutual promises. Where such an allegation was a material part of the action, it would still be made under the present practice in the statement of claim.

See title MUTUALITY OF OBLIGATION.

MUTUALITY OF OBLIGATION. One of the three cardinal requisites to a simple contract. It is not to be confounded with Bilaterality of Contract.

See titles CONTRACTS; UNILATERAL CONTRACTS.

MUTUUM. In Roman Law, was a loan of money or other fungible article, repayable in the like amount of the article lent.

See title COMMODATUM.

N.

NAME. The proper name is entitled as a general rule to the first eminence, and the additions or descriptions annexed thereto receive in the interpretation of documents only secondary importance.

See titles EXTRINSIC EVIDENCE; FALSA DEMONSTRATIO NON NOCET.

NAME AND ARMS CLAUSE. Not unfrequently, an estate is given by will to John Jones subject to the condition that within one year (or some other specified period) after the death of the testator or testatrix the devisee shall take the name and use the arms of Smith in addition to or in lieu of his own name and arms; and the clause in which such a condition is expressed is usually called the Name and Arms clause. Failing compliance with the condition within the prescribed time, the estate goes over to another person, usually upon the like condition.

See title EXECUTORY DEVISES.

NANTISSEMENT. In French Law is the contract of pledge; if of a moveable,

NANTISSEMENT—*continued.*

it is called *gage*, and if of an immoveable it is called *antichrèse*.

See titles ANTICHRESIS; WELSH MORTGAGE.

NATIONAL DEBT. Commenced in the reign of Charles II. During the civil war of Charles I.'s reign, large sums of money had been deposited for safe custody with the London goldsmiths, who, after the Restoration (1660), began to act in the new capacity of bankers, and to advance money to the national exchequer on the security of an assignment of some branch of the public revenue. Down to 1672, these loans were always punctually repaid; but in that year, upon the outbreak of the Dutch war, Charles II. was persuaded by the Cabal administration (see title CABAL MINISTRY) to issue a proclamation forbidding the payment of any money out of the Exchequer due upon existing securities, but promising instead to add the interest then due to the capital, and to allow 6 per cent. interest on this new stock. Interest was paid down to the year 1683, and was then stopped; and notwithstanding every effort of the lenders (see title BANKERS' CASE), nothing was done for the public creditor until 1699, when an Act was passed (which was to take effect after December 25, 1705) charging the Excise with payment of 3 per cent. interest on the principal sum. Five years previously, in 1694, the sum of £1,200,000, at 8 per cent. interest, had been borrowed by the Government from a body of merchants, who, in return, received the privilege of incorporation by royal charter, as "The Governor and Company of the Bank of England." The charter was originally granted for only eleven years certain, parliament reserving the right to redeem the debt at any time after 1705, upon giving a year's notice; and with the redemption of the debt the charter was to expire (see title BANK OF ENGLAND). But new loans were from time to time raised by the Government in a similar manner, and the Bank Charter has been prolonged by several renewals. At the end of William III.'s reign, the national debt amounted to over £16,000,000; under Queen Anne it reached the sum of £54,000,000. The Spanish War, which commenced in 1739, added £31,300,000; and in 1763, after the Seven Years' War, the debt amounted to £146,000,000. The American War of Independence increased the debt by £121,000,000; and £601,000,000 was added during the great French War, at the close of which the National Debt had reached the enormous total of £840,850,491.

From £840,850,491, its amount in 1817, it had been reduced on the 31st of March, 1873, to £726,584,423, making together

NATIONAL DEBT—*continued.*

with £4,829,100 unfunded debt, and a sum of £53,558,580, the estimated capital of existing terminable annuities, a total national debt of £784,972,103, the interest and management of which amounted to an annual charge of £26,804,853. At the present time the National Debt (which in 1876 had been reduced to £725,000,000) is being continuously reduced.

NATIONALITY. According to the English Law, depends upon the locality of birth, and not upon parentage; but according to the laws of the continental nations, it depends upon the parentage; and the latter principle has been largely introduced by statute into English Law. Nationality has nothing to do with domicile.

See titles ALLEGIANCE; DOMICILE; NATURALIZATION.

NATIVO HABENDO, WRIT OF. Was a writ which lay for a lord when his villein had run away from him; it was directed to the sheriff, and commanded him to apprehend the villein, and to restore him together with his goods to the lord. But if a villein had tarried in a town or upon ancient demesne lands for the period of a year and a day without having been claimed by his lord, then the lord could not seize him in either of such places (*Les Termes de la Ley*). It was a writ of right raising the title of the lord, upon whom also the *onus probandi* was laid; and in favour of liberty the proof of villenage, or nifty, required to be carried back as far as 1 Ric. 1.

See titles HOMINE REPLEGIANCO; VILLENAGE.

NATURAL-BORN SUBJECTS. Those who are born within the dominions, or rather within the allegiance, of the King of England.

See titles ALLEGIANCE; DENIZEN.

NATURALIS OBLIGATIO. Is a moral obligation, as opposed to a legal obligation, which was called *civilis obligatio*. It is not sufficient to support an action, but (in Roman Law) formed the basis of a valid *exceptio* or defence. See Brown's Savigny on Obligations.

NATURALIZATION. The making a foreigner a lawful subject of the State, or, as it is sometimes termed, the king's natural subject. Formerly, an Act of Parliament was required in each particular case to naturalise an alien; the king by his letters patent might denizenise but not naturalise. However, by the 7 & 8 Vict. c. 66, which was a General Act, it was enacted that aliens of friendly states might become naturalised British subjects upon

NATURALIZATION—continued.

complying with the requisites of the Act. And now, by the Naturalization Act, 1870 (33 & 34 Vict. c. 14), further facilities of naturalization are afforded, and the important privilege of expatriation is conferred; also, the evil or inconvenience of a "double allegiance" is remedied.

See titles ALLEGIANCE; DENIZEN.

NAVAL COURTS. Any naval officer or (in his default) any consular officer of the Queen resident on any foreign station is authorized by the Merchant Shipping Act, 1854, to summon a naval Court to inquire into wrecks and general complaints abroad, the Court consisting of not more than five and not fewer than three members, in Her Majesty's naval or consular service, and having power to administer oaths, &c., and being obliged to report the results of its inquiries to the Board of Trade. It has power in a proper case and for proper cause to supersede a master, to discharge seamen, to forfeit wages, and to send offenders home for trial, &c., &c. See the Merchant Shipping Act, 1854, and the Act 18 & 19 Vict. c. 91, s. 18.

NAVIGABLE AND NON-NAVIGABLE RIVERS: See titles NAVIGATION, PUBLIC RIGHT OF; RIVERS.

NAVIGATION, PUBLIC RIGHT OF. The right of the public to navigate a public river is paramount to any right of property in the Crown, which never had the power, *e.g.*, to grant a weir in obstruction of the navigation (*Williams v. Wilcock*, 3 N. & P. 608). As to what is evidence of a public river, the flux and reflux of the tides is *prima facie* evidence of its being so; but that evidence is not conclusive, because a public right of navigation in such a river may have been extinguished either (a.) By legal means; *e.g.*, by an Act of Parliament, or under a writ of *ad quod damnum*, or by an order of commissioners of rivers; or (b.) By natural causes—*e.g.*, a retreat of the sea or a deposit of silt and mud (*Rex v. Montague*, 6 D. & R. 616). A navigable river is a public highway for vessels at all times and states of the tide (*Colchester (Mayor) v. Brooke*, 7 Q. B. 339); and an obstruction to the navigation may be the subject either of an action or of an indictment, according to the circumstances. Similarly, the public have a right of user of a canal, which is an artificial navigable river, *e.g.*, with boats propelled by steam power, if they do no injury to the canal beyond what would be occasioned by traction by horses (*Case v. Midland Ry. Co.*, 5 Jur. (N.S.) 1017).

NAVIGATION, RULES OF: See title RULE OF THE ROAD.

NAVY. The English Navy consists (roughly speaking) of the Royal Navy and the Merchant Navy. As regards the *Merchant Navy*, see titles MERCANTILE LAW; MERCHANT SHIPPING; SHIPS, ENGLISH AND FOREIGN; SHIPS, OWNERSHIP OF; SEAMEN; &c., &c. As regards the *Royal Navy*, see titles ADMIRALTY, COURT OF; ARMY; ARMY DISCIPLINE ACT, 1879; MARTIAL LAW; PRIZE; &c.

See title ARMY.

NE EXEAT REGNO, WRIT OF. A prerogative writ which issues to restrain a person from leaving the kingdom. This writ is occasionally resorted to in Equity when one party has an equitable demand against another, and that other is about to leave the kingdom and in that manner frustrate or impede the recovery of the demand. In its origin, it was confined to great political objects and purposes of state; and in its present application to private matters, it should be jealously guarded. F. N. B.: Gray's Ch. Pr. 16.

See title ABSCONDING DEBTOR.

NE RECTOR PROSTERNET ARBORES. This is the statute, 35 Edw. 1, stat. 2, prohibiting rectors, *i.e.*, parsons, from cutting down the trees in churchyards. In *Rutland v. Green* (1 Keble. 557) it was extended to prohibit them from opening new mines and working the minerals therein.

See title EQUITY OF A STATUTE.

NECESSARIES. Are such things as meat, drink, apparel, lodging, medicines, &c., in the case of infants and married women, and include also (in the case of infants) education. The fortune and circumstances present and prospective of the infant influence the question in this case; and the present fortune of the husband determines the question in the case of his wife. As regards the liability of infants for necessities, see title INFANTS, INCAPACITIES OF; and as regards the husband's liability for his wife's necessities, see title HUSBAND AND WIFE.

NEGATIVE AVERMENT. As opposed to the traverse or simple denial of an affirmative allegation, a negative averment is an allegation of some substantive fact, *e.g.*, that premises are not in repair, which although negative in form is really affirmative in substance, and the party alleging the fact of non-repair must prove it.

See titles AFFIRMATION, PROOF OF; ONUS PROBANDI.

NEGATIVE PREGNANT. In pleading signifies the statement of a negative proposition in such a form as may imply or carry with it the admission of an affirmative. Thus, in an action of trespass for

NEGATIVE PREGNANT—continued.

entering the plaintiff's house, if the defendant pleads that the plaintiff's daughter gave him licence to do so, and that he entered by that licence, and the plaintiff replies that he did not enter by her licence, such a replication would be a negative pregnant, inasmuch as it might imply or carry with it (i.e., be "pregnant with") the admission that a licence was given, although the defendant did not enter by that licence. A negative pregnant is one of those faults in pleading which fall within the rule that pleadings must not be evasive or of doubtful meaning, and in the case supposed, the defendant would be justified in moving to strike out the reply as embarrassing or to have it amended; and the evasive reply involving an admission, the defendant might occasionally take advantage of the admission.

See title PLEADING.

NEGLIGENCE. Negligence producing damage to the plaintiff is in all cases a ground of action; but the question what shall be considered negligence for this purpose is a question for the jury, subject to certain rules of law, or of common sense, according to which the measure of culpable negligence varies according as the circumstances of the case differ. In all cases, the first point to settle is the amount or degree of diligence exigible from the defendant, for by means of that positive criterion, it is possible to ascertain in the next place the amount or degree of negligence on the defendant's part which will involve him in liability for the damage which has arisen. The rule is, that the negligence is inversely in proportion to the diligence. For example, if but slight diligence (*levis diligentia*) is exigible, then only gross negligence (*crassa negligentia*) amounting almost to wilfulness or intentionality (*dolus*), will render the defendant liable, as is the case with gratuitous bailees, whether depositaries or mandatories. And, on the other hand, if extreme diligence (*exacta diligentia*) is exigible, then the slightest negligence (*levis negligentia*, or *levis culpa*) will in like manner render the defendant liable, as is the case with inn-keepers, carriers, and generally with paid bailees.

But, subject to these rules, the question is one of fact; and the mode of proof varies from the most apparent case, in which the facts speak for themselves (*res ipsa loquitur*) condemning the defendant, into the least tangible case of all in which the judge hesitates whether or not there is any question of negligence at all which he can submit to the jury. Then, occasionally, the plaintiff has by his own negligence

NEGLIGENCE—continued.

contributed to the damage; and, before the jury can find for him, they must be persuaded upon the evidence that the defendant's negligence was such as that the damage would have arisen at all events although the plaintiff had been ever so diligent.

See title CONTRIBUTORY NEGLIGENCE.

NEGOTIABLE SECURITY. Is any security for money or goods which passes by delivery from hand to hand with or without indorsement, in such manner as to confer upon the transferee a title that is complete and not subject (excepting in very exceptional cases) to any equities affecting the security in the hands of the transferor. Bills, notes, and debentures payable to bearer, are examples of negotiable securities.

NEGOTIATIONS. Differ from an agreement, in that nothing is concluded by them, and no liability as upon a concluded agreement attaches.

See title SPECIFIC PERFORMANCE.

NEGOTIORUM GESTORUM. One of the six quasi contracts mentioned by Justinian, and which is distinguished from the contract of *mandatum* in one particular only, viz., the absence of any request prior to the employment being accepted.

See title MANDATUM.

NEMO BIS VEXARI DEBET. This maxim, which (when fully expressed) is *nemo bis vexari debet pro una et eadem causa*, means literally that no one is to be a second time troubled (with litigation or criminal prosecution) in respect of one and the same matter (civil or criminal). As regards civil demands, the maxim lies at the basis of the plea of *res judicata*; and as regards criminal prosecutions, the maxim lies at the basis of the plea of *autrefois acquit*.

See titles AUTERFOIS ACQUIT; RES JUDICATA, PLEA OF.

NEMO DEBET BIS PUNIRI PRO UNO DELICTO: See title NEMO BIS VEXARI DEBET.

NEMO EST HÆRES VIVENTIS. A living person has no heir; that is to say, a person must first die before his heirs can be ascertained or even exist; but an heir apparent may exist during the life of his ancestor.

See titles HÆREDES; HEIR.

NEMO POTEST EXUERE PATRIAM SUAM: See title ALLEGIANCE.

NEMO POTEST MUTARE CAUSAM POSSESSIONIS SUÆ. Literally, no one may alter the character (i.e. quality) of his

NEMO POTEST MUTARE CAUSAM POSSESSIONIS SUÆ—continued.

own possession,—e.g. from being consistent possession into being adverse possession. Thus, a tenant for life cannot acquire adversely against his remainderman; or, *semble*, a copyholder against his lord, or a lessee against his lessor.

NEMO TENETUR DIVINARE. Literally, no one is obliged to conjecture. Wherefore conjectural explanations (as contradistinguished from inferences from the facts proved) are not admissible in law. The maxim has its principal application in connection with *circumstantial evidence*.

NEMO TENETUR SE IPSUM ACCUSARE. Literally, no one is bound to accuse or to convict himself. This maxim exempts a witness from answering questions tending to criminate him.

NEUTRALITY. Is the condition in which a third nation is, when it holds aloof from two other nations who are at war with each other. The duties of a friendly neutrality have been considerably increased of late years, whence the Foreign Enlistment or Neutrality Act of 59 Geo. 3, c. 69, has been repealed, and a more stringent Neutrality Act, viz., the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90) has been substituted in its place. Under that Act, which extends to all the Queen's dominions and the adjacent territorial waters, the penalty of fine and imprisonment, or of either, and with or without hard labour, is imposed upon any British subject enlisting without the licence of the Queen in the military or naval service of either belligerent, or agreeing to so enlist, or inducing others to so enlist, or leaving England with the intention to so enlist, or inducing others to embark with that intention, under a misrepresentation of the fact, or taking illegally enlisted persons on board, with a knowledge of the fact. And under the same Act, illegal ship-building and all particular acts assistant thereto, and all illegal expeditions generally, are subject to the like penalties, together with the forfeiture of the vessel or other materials of the expedition.

See title FOREIGN ENLISTMENT.

NEW ASSIGNMENT. From the very general terms in which declarations were framed, the defendant was sometimes not sufficiently guided or tied down to the real cause of complaint, and was in consequence led or left to apply his plea to a different matter from that which the plaintiff had in view. In such cases, a plaintiff was obliged to resort, in his replication, to a mode of pleading termed a new assign-

NEW ASSIGNMENT—continued.

ment, for the purpose of setting the defendant right. A new assignment was the pleading whereby the plaintiff assigned afresh his ground of complaint with more certainty and particularity than he had previously done in the declaration, and distinguished the true ground of complaint from that which the defendant in his plea had assumed it to be. Thus, in an action of trespass *quare clausum fregit*, for repeated trespasses, the declaration usually stated that the defendant on divers days and times before the commencement of the suit broke and entered the plaintiff's close, and trod down the soil, &c., without setting forth more specifically in what parts of the close, or on what occasions, the defendant trespassed, and it often happened that the defendant claimed a right of way over a certain part of the close, and in exercise of that right had repeatedly entered and walked over it, and had also entered and trodden down the soil, &c., in parts out of the supposed line of way, and the plaintiff intended to apply his action to the trespasses, properly so called, i.e., these entries, &c., that were not covered and excused by the right of way, even if such a right of way existed. The defendant, by reason of the generality of the declaration, might, therefore, in his plea, allege, as a complete answer to the whole complaint, that he had a right of way by grant, &c., over the said close; and if he did that, and the plaintiff confined himself in his replication to a denial of that plea, and the defendant at the trial proved a right of way as alleged, the plaintiff would be precluded from giving evidence of any trespasses committed out of the line or track over which the defendant thus appeared entitled to pass. In such a case, therefore, the plaintiff's course was, in his replication, to new assign, by alleging that he brought his action not only for those trespasses, supposed or assumed by the defendant, but also for others committed on other occasions, and in other parts of the close out of the supposed track or line of way over which the defendant so claimed a right to pass; and such a new assignment was usually called a new assignment *extra viam* (Steph. Pl. 247, 252; Bull. & Leake, Prec. in Plead., pp. 653-657).

By the C. L. P. Act, 1852, s. 87, only one new assignment could be pleaded to any number of pleas to the same cause of action; and such new assignment was to be consistent with and confined to the particulars (if any) delivered in the action, and was to state that the plaintiff proceeded for causes of action different from all those which the pleas professed to justify, or for an excess over and above what all the

NEW ASSIGNMENT—*continued*.

defences set up in such pleas justified, or both. And now under the present practice, the plaintiff is not in such a case (or in any case) to new assign, but he is to amend his declaration, *i.e.*, his statement of claim, so as to better guide or tie down the defendant to the real cause of action (Order XIX. 14).

See title AMENDMENT.

NEW COMBINATION: See title PATENTS.

NEW STYLE: See title YEAR.

NEW TRIAL, MOTION FOR. This motion is in the first instance for a rule or order to shew cause why a new trial should not be had, and is one of the few motions *ex parte* that are preserved by the Judicature Acts, 1873-75. The motion is made to the Court of Appeal when the trial has been by a judge without a jury (Order XXXIX. 1, Dec., 1876), and to a Divisional Court of the High Court when the trial has been by a judge with a jury. The grounds for making the motion may be either that the damages awarded are excessive, or are inadequate, or that the judge misdirected the jury in matter of law, or that evidence was wrongly admitted or rejected; and the grounds of objection must be taken at the trial, wherever that is possible (Order LVIII. 13). And after hearing the motion, the Court may either make no order or may make an order *nisi* for a new trial; and in the latter case, the other side is required to shew cause against the rule *nisi* being made a rule absolute. When the rule is made absolute, a new trial will follow in due course; and the result of the trial, if that should be acquiesced in, will in general determine the liability for the costs of both trials. In any case, where the Court would make absolute the rule *nisi*, it may adopt one or other of the following courses instead of directing a new trial, that is to say, it may itself finally determine the question or questions in dispute upon the materials before it (if sufficient), or it may direct the motion to stand over for further consideration until such time as it has sufficient materials before it, and may direct the trial in the meantime of any question or issue likely to assist its final determination.

NEW TRIAL MOTION PAPER. By the former practice of the Courts motions for new trials must in general have been made within the first four days of term; but when from pressure of business, or other like cause, the Courts had not had time to dispose of all the applications, it was the practice to have the names of the causes and of the counsel who were instructed to

NEW TRIAL MOTION PAPER—*contd.*

move therein put into a list, called the new trial motion paper; and the motions were then heard and disposed of on the following or some subsequent day, according to the seniority of counsel appointed to move therein.

See title NEW TRIAL, MOTION FOR.

NEW TRIAL PAPER. A paper containing a list of causes in which rules *nisi* had been obtained for a new trial, or for entering a verdict in place of a nonsuit, or for judgment *non obstante veredicto*, or for otherwise varying or setting aside proceedings which had taken place at Nisi Prius. These were called on for argument in the order in which they stood in the paper, on days appointed by the judges for the purpose.

See title NEW TRIAL, MOTION FOR.

NEW TRUSTEES. Almost all settlements and wills contain a power in some person or persons specified for that purpose to appoint a new trustee or new trustees in the place or places of the original trustees, or some or one of them, upon the death or practical incapacity of such latter trustee or trustees to continue in the execution of the trusts of the settlement or will; and when no such power is contained in the settlement or will, a power to the like effect is deemed to be inserted therein under and by virtue of Lord Cranworth's Act (23 & 24 Vict. c. 134). The High Court (Chancery Division) will also in a proper case appoint new trustees, either under the Trustee Acts (1850 & 1852) or by virtue of its general jurisdiction where that is called into aid. It is usual and proper upon every appointment of new trustees, to vest in them either alone or jointly with the old and continuing trustees or trustee (if any) all the trust property, by proper conveyances and transfers thereof. And the new trustees declare their acceptance of the trust, and are invested thereupon with all the powers of the original trustees.

NEW WRIT. For the election of a member of parliament, upon the existing representative vacating his office or dying, is issued from the office of the Clerk of the Crown in Chancery under the Speaker's warrant and (if the House be sitting) by its own order; but upon a general election, the new writ is issued out of Chancery by advice of the Privy Council.—See Bushby's Election Manual, 5th ed., 1880.

NEWSPAPERS: See title PRESS, LIBERTY OF.

NEXT FRIEND. An infant sues by his *next friend* (*prochein ami*) and defends by his guardian *ad litem*. Similarly a

NEXT FRIEND—*continued.*

married woman where she has an interest conflicting with that of her husband, sues by her next friend; and in such a case, the husband is made a defendant; and it does not matter whether the property be the separate estate of the wife or not. But no next friend is required in cases within M. W. P. Act, 1870. The name of the next friend is always mentioned in the title of the cause or matter, and a written authority from the next friend must, in the case of a suit, be filed together with the writ (15 & 16 Vict. c. 86, s. 11). The next friend is responsible for the costs of the suit if unsuccessful.

NEXT OF KIN. Means literally the nearest of kin to any particular deceased person, and where the words "in blood" (*Hallon v. Foster*, L. R. 3 Ch. App. 505) are used, that is the meaning of next of kin in law. But usually the phrase next of kin denotes the person or persons entitled to succeed under and according to the statutes for the distribution of intestate's personal estate (22 & 23 Car. 2, c. 10; 29 Car. 2, c. 30; and 1 Jac. 2, c. 17), under which statutes a wife receives either one-half (where there are no children) or one-third (where there are children), and subject to the right of the widow (if any) the children take equally the entire estate, the right of representation being unlimited; and failing children, brothers and sisters of the deceased whether of the half or whole blood take equally, and the children (but not the grandchildren) of any deceased brother or sister represent him or her, and are entitled accordingly. A father excludes all brothers and sisters and also the mother; but a mother comes in equally with brothers and sisters. Beyond these particular rules, the remaining next of kin, whether of the half or the whole blood, are to be ascertained by counting the degrees between them and the deceased person through the common ancestor.

NEXT PRESENTATION. The right of presenting a clerk in holy orders to a church living upon the next vacancy thereof, is called the right of next presentation; such right is the subject of lawful sale and purchase, provided the purchaser is not himself the intended presentee (12 Anne, stat. 2, c. 12, s. 2); but no spiritual person may sell a next presentation the bestowal of which is in him by virtue of his office (3 & 4 Vict. c. 113, s. 42). A next presentation is considered to be personal property, and as such is distinguished from an entire advowson which is real property.

See title ADVOWSON.

NEXUM. In Roman Law, expressed the tie or obligation involved in the old con-

NEXUM—*continued.*

veyance by *mancipatio*; and came latterly to be used interchangeably with (but less frequently than) the word *obligatio* itself.

NIGHT. As to what, by the Common Law, is reckoned night and what day, it seems to be the general opinion that if there be daylight, or *crepusculum*, enough begun or left to discern a man's face, that is considered day; and night is when it is so dark that the countenance of a man cannot be discerned (1 Hale's P. C. 350). However, the limit of 9 P.M. to 6 A.M. has been fixed by statute as the period of night in prosecutions for burglary and larceny (24 & 25 Vict. c. 96, s. 1).

NIHIL CAPIAT PER BREVE, or PER BILLAM. An old judgment given against a plaintiff either in bar of his action, or in abatement of his writ (Co. Litt. 863).

See title DISMISSAL OF ACTION.

NIHIL, or NIL DEBET. The plea to an action of debt on simple contract was commonly not indebted, or *nil debet*. However, by r. 11, T. T. 1853, the plea of *nil debet* was abolished (Bull. & Leake, Prec. Pl. 462).

NIHIL, or NIL DICIT. When the plaintiff in an action had stated his case in the declaration, it was incumbent on the defendant, within a prescribed time, to make his defence and to put in a plea, otherwise the plaintiff would be entitled to have judgment by default or *nil dicit* of the defendant.

See title DEFAULT, JUDGMENT BY.

NIHIL FACIT ERROR NOMINIS: See title FALSA DEMONSTRATIO NON NOCET.

NIHIL HABUIT IN TENEMENTIS. A plea formerly pleaded in an action of debt only, when brought by a lessor against a lessee for years, or at will, without a deed (2 Lil. Abr. 214).

NIMIA SUBTILITAS REPROBANDA. Means literally that too much subtlety in law is to be rebuked and avoided; and the maxim applies to legal argumentation as well as to the practical administration of properties.

NISI PRIUS. The *nisi prius* Courts are such as are held for the trial of issues of fact before a jury and one presiding judge, and which form the subject-matter of a civil action. The *nisi prius* Courts are to be distinguished from the Courts sitting in *banc* or *banco*, and also from the Crown Courts. Thus, a judge is said to be sitting in *banc* when, in company with one, two, or three other judges, he is hearing and determining questions of law, which have been raised for the opinion of the Court; and at

NISI PRIUS—*continued*.

the assizes, a judge is said to be sitting in the Crown Court when he is sitting with a jury for the trial of prisoners. The origin of the phrase is to be found in the old form of *præcipe* to the sheriff commanding him to have the persons of the jury at Westminster on such and such a day, "*unless sooner*" (*nisi prius*) the judge should go down himself to the country to try the case there.

NISI PRIUS RECORD ; See titles ENTRY ON THE ROLL ; ISSUE ROLL.

NO DUTY UPON DUTY : See title LEGACY DUTY.

NO SURVIVORSHIP UPON SURVIVORSHIP : See titles LAPSE ; SURVIVORSHIP.

NO TRUE BILL : See titles IGNORAMUS ; TRUE BILL.

NO USE UPON A USE : See title USES.

NOBILITY. The privilege of the nobility is confined to the actual peer for the time being ; and the privilege, even as so restricted, is little valued even by its possessor ; in these respects, the English nobility differs from a *noblesse*. The early commingling of county and borough members in the Commons House is assigned as one of the principal causes of this character of the English nobility.

See titles PEERS ; HOUSE OF LORDS.

NOLLE PROSEQUI. A *nolle prosequi* was in the nature of an acknowledgment or undertaking by the plaintiff in an action to forbear to proceed any further either in the action altogether, or as to some part of it, or as to some of the defendants. A *nolle prosequi* was different from a *non pros.*, for there the plaintiff was put out of Court with respect to all the defendants. If a plaintiff misconceived his action, or made a mistake as to the party sued (as where he sued a *feme covert*, and she pleaded coverture in bar, or the like), he might enter a *nolle prosequi* as to the whole cause of action, and proceed *de novo* in another action (2 Arch. Pract. 1512). If money were paid into Court, and the plaintiff determined on accepting that sum in satisfaction of the action, he might reply that he accepted the sum paid into Court in satisfaction of that part of the declaration to which the plea was pleaded ; and if he did so, he must at the same time have added a *nolle prosequi* as to the residue, otherwise the defendant might sign judgment of *non pros.* But if he accepted the sum in satisfaction of part only of his action, namely, of that part to which the plea of payment into Court was pleaded, then he must have replied to the

NOLLE PROSEQUI—*continued*.

other pleas of the defendants. (Day's Com. Law Prac. 110).

See title JUDGMENT, VARIETIES OF.

NOMINA ARCARIA : See titles NOMINA TRANSCRIPTITIA ; LITERIS OBLIGATIO.

NOMINA TRANSCRIPTITIA. In Roman Law, obligations contracted by *literæ* (i.e., *literis obligationes*) were so called because they arose from a peculiar transfer (*transcriptio*) from the creditor's day book (*adversaria*) into his ledger (*codex*).

See title LITERIS OBLIGATIO.

NOMINAL DAMAGES : See title DAMAGES.

NOMINAL DEFENDANT. Otherwise called a merely formal defendant, is a person whom the exigences of legal procedure oblige the litigant to make a party to his action or other legal proceeding, but as against whom no relief whatsoever is claimed in the action, or at all events no immediate relief. Such a defendant usually incurs no costs or only the smallest possible costs, and he is entitled to be paid by the plaintiff all costs necessarily incurred by him in the action from having been made a party thereto.

NOMINATION TO A LIVING. The rights of nominating and of presenting to a living are distinct, and may reside in different persons. Presentation is the offering a clerk to the bishop. Nomination is the offering a clerk to the person who has the right of presentation. Thus, one seised of an advowson may grant to A. and his heirs that whenever the church becomes vacant, he will present such a person as A. or his heirs shall nominate. He who has the right of nomination is, to most purposes, considered as the patron of the church (Plowd. 529 ; Rog. Ecc. Law, 5).

See title NEXT PRESENTATION.

NON-ACCESS. By husband to wife may be proved either by shewing that husband was not within the kingdom (and wife was) during the entire period of gestation (*Queen v. Murray*, Salk. 122) or by other pertinent evidence (*R. v. Bedall*, 2 Str. 1076). The wife's evidence of non-access is not sufficient, even if it is admissible (*R. v. Reading*, Rep. temp. Hardw. 79).

NON ACCIPI DEBENT, &c. : See title FALSA DEMONSTRATIO NON NOCET.

NON-AGE. Under twenty-one years of age in some cases, and under fourteen or twelve in others.

See titles AGE ; INFANTS.

NON-APPEARANCE : See titles APPEARANCE TO WRIT ; TRIAL, APPEARANCE AT.

NON ASSUMPSIT. The name of a plea which occurred in the action of *assumpsit*, by which the defendant denied that he undertook, or promised, to do the thing which the plaintiff in his declaration alleged that he did undertake and promise to do; and this plea operated as a denial, in point of fact, of the existence of any express promise of the fact alleged in the declaration, or of the matters of fact from which the promise alleged would be implied by law (Steph. on Plead. 170, 180).

NON ASSUMPSIT INFRA SEX ANNOS. There are certain periods limited by law within which actions must be brought. In an action on a simple contract the period is six years; if, therefore, any person commenced an action of *assumpsit* for anything which did not accrue or happen within such period of six years, the defendant might plead *non assumpsit infra sex annos*, i.e., that he made no such promise within six years, which plea was an effectual bar to the complaint; and the defendant in such a case would now plead the Statute of Limitations.

NON CEPIT. A plea which occurred in the action of replevin, in which action the plaintiff alleged in his declaration that the defendant "took certain cattle or goods of the plaintiff in a certain place called, &c.," and this plea stated that he did not take the said cattle or goods "in manner and form as alleged," which involved a denial both of the taking and of the place in which the taking was alleged to have been, the place being a material point in this action (Steph. on Plead. 185).

See title REPLEVIN.

NON-CLAIM. The omission or neglect of him who ought to claim his right within the time limited by law; as within a year and a day where a continual claim was required, or within five years after a fine had been levied (*Les Termes de la Ley*).

NON COMPOS MENTIS. Not master of his wits; in other words, of unsound mind.

See title LUNACY.

NON-CONFORMISTS. Were originally oppressed by various Acts of Parliament (see titles CORPORATION ACT; FIVE MILE ACT; TEST ACT), all which have been repealed by the Toleration Act (1 Will. & Mary, c. 18), and various subsequent Acts culminating in the Universities Tests Act, 1871 (34 & 35 Vict. c. 26), whereby all lay degrees and offices in the three Universities of Oxford, Cambridge, and Durham were thrown open to them.

See titles CHURCH AND STATE; DISSENTERS.

NON CONSTAT. It is by no means clear or evident; a phrase used in general to state some conclusion as not following, although it might seem, *prima facie*, to follow.

NON-CONTENTIOUS JURISDICTION: See titles CONTENTIOUS JURISDICTION; VOLUNTARY JURISDICTION.

NON DAMNIFICATUS. This was a plea in an action of debt on an indemnity bond, or bond conditioned "to keep the plaintiff harmless and indemnified," &c.; it was in the nature of a plea of performance, being used where the defendant meant to allege that the plaintiff had been kept harmless and indemnified according to the tenor of the condition (Steph. on Plead. 388).

NON DECIMANDO: See title MODUS DECIMANDI.

NON DETINET. A plea which occurred in the action of detinet, by which the defendant alleged that he did not detain "the said goods" in the plaintiff's declaration specified, &c. It operated therefore as a denial of the detention of the goods in question by the defendant (Steph. on Plead. 175).

See title DETINUE.

NON EST FACTUM. A plea which occurred in the action of debt on bond or other specialty, and also in covenant. In this plea the defendant denied that the deed mentioned in the declaration was his (Steph. on Plead. 169, 172). By r. 10, T. T. 1853, in actions on specialties and covenants, the plea of *non est factum* operated as a denial of the execution of the deed in point of fact only, and all other defences had to be specially pleaded, including matters which made the deed absolutely void as well as those which made it voidable; and such is the present effect of the plea.

NON EST INVENTUS. When a writ is directed to the sheriff commanding him to arrest the defendant, and he is unable to do so because he cannot find him, he returns the writ with an indorsement on it to that effect, and this is technically called a return of *non est inventus*.

See title IMPRISONMENT FOR DEBT.

NON-EXISTING GRANT, TITLE BY. Long prior to the Prescription Act (3 & 4 Will. 4, c. 71), juries were directed by the Court after proof of uninterrupted enjoyment of an incorporeal hereditament to presume that such hereditament or right had a legal origin in some grant since lost or destroyed (*Reed v. Brookman*, 3 T. R. 151); and this was called making title by non-existing grant. The presumption was

NON-EXISTING GRANT, TITLE BY—
continued.

not generally conclusive but was rebuttable; and now under the 3 & 4 Will. 4, c. 76, certain lengths of uninterrupted enjoyment are made conclusive of the right.

See title PRESUMPTIONS, QUALITY OF.

NON-FEASANCE. The omitting to do what ought to be done, *e.g.*, where a gratuitous bailee simply refuses to enter upon the agency, and for which mere non-feasance he is held to be not liable (*Balfour v. West*, 13 C. B. 466).

See title MISFEASANCE.

NON-FUNGIBLES: See title FUNGIBLES.

NON-JOINDER. The not joining of any proper or necessary person or persons as a co-defendant or co-plaintiff (Tidd's New Pract. 318). The non-joinder of a plaintiff or the selection of a wrong plaintiff (if either has arisen through a *bonâ fide* mistake, even a mistake of law (*Duckett v. Gover*, 6 Ch. Div. 82) will be remedied and a proper plaintiff or plaintiffs will be added or substituted as the case may require (Order xvi. 1), the new plaintiff or plaintiffs consenting (Order xvi. 13). The like remarks hold regarding the non-joinder of defendants, but a defendant may be added without any consent on his part to become a party.

See title MISJOINDER.

NON-NAVIGABLE RIVERS: See title RIVERS.

NON-OBSTANTE, CASE OF: See title DISPENSING POWER.

NON OBSTANTE VEREDICTO. When the defence of the defendant in an action put upon the record was not a legal defence to the action in point of substance, and the defendant obtained a verdict, the Court, upon motion, gave the plaintiff leave to sign judgment notwithstanding the verdict, provided the merits of the case were very clear; and this was called judgment *non obstante veredicto* (2 Arch. Pract. 1551). And a verdict obtained in that manner would, *semble*, afford ground for moving for a new trial under the present practice of the Courts, and upon such motion the Court of Appeal or (as the case might be) the Divisional Court would direct judgment for the plaintiff in a proper case.

See title NEW TRIAL, MOTION FOR.

NON OMNE QUOD LICET HONESTUM. Means literally that what is lawful to do is not invariably an honourable thing to do; *e.g.*, a person may keep within the strict letter of the law and even within the strict rules of equity, so as not to be liable either at law or in equity, and yet his

NON OMNE QUOD LICET HONESTUM
—continued.

conduct may not be honourable, but morally detestable.

NON PROSEQUITUR. If in the proceedings of an action at law the plaintiff neglected to take any of those steps which he ought to take within the time prescribed by the practice of the Courts for that purpose, the defendant might enter judgment of *non pros.* against him, whereby it was adjudged that the plaintiff did not follow up (*non prosequitur*) his suit as he ought to do, and therefore the defendant ought to have judgment against him (Smith's Action at Law, 96). And in such a case, the defendant would under the present practice move to dismiss the plaintiff's action for want of prosecution.

See title DISMISSAL OF ACTION.

NON QUOD DICTUM SED QUOD FACTUM INSPICIENDUM EST. The words of the parties are not conclusive of their intention, where these words are at variance with their actual conduct, *e.g.*, it may be expressed that some specified sum is "*liquidated damages*," and yet the specified sum may be in fact only the outside limit of uncertain and unliquidated damages, when the nature of the contract or bond is regarded (*Kemble v. Farren*, 6 Bing. 141).

NONSUIT. A renunciation or giving up the suit by the plaintiff; and this was usually done on his discovering some error or defect, or when he found that his evidence was not sufficient to maintain his case. The stage of the proceedings at which a plaintiff was nonsuited was usually just before the judge had summed up, but it might be done at any time before the jury had delivered their verdict. It was, however, entirely optional with the plaintiff whether he would submit to a nonsuit or not; he could not be compelled to do so, but might insist on the case going to the jury, and take his chance of the verdict. In cases, however, where it was doubtful whether the verdict would be a favourable one, it was usual for the plaintiff to choose (or elect as it was termed) to be non-suited, because after a nonsuit he might commence another suit against the defendant for the same cause of action, which might be advisable if he could come better prepared with evidence, or could otherwise repair the defect which was the cause of his failure; but if a verdict were once given, and judgment followed thereon, he was for ever barred from suing the defendant upon the same ground or complaint (1 Arch. Pract. 409, 444; Steph. on Plead. 120). Under the Judicature Acts, 1873-75, a judgment of nonsuit is to have the same effect as a

NONSUIT—*continued*.

judgment for the defendant upon the merits (Order xli. 6), but the Court may otherwise direct, and may also relieve on the ground of fraud, &c.

NON SUM INFORMATUS. Judgment by default was either by *nil dicit*, that is, where the defendant was stated to have appeared, but to have said nothing in bar or preclusion of the action; or by *non sum informatus*, where he was said to appear by attorney, but the attorney said that he was not informed by the defendant of any answer to be given. This latter was used only in cases where judgment was entered in pursuance of a previous agreement between the parties (*Les Termes de la Ley*). Nothing exactly similar to judgment by *non sum informatus* appears in the Judicature Acts or the orders and rules made thereunder; but where counsel for the defendant is instructed not to oppose any particular judgment order or decree, and so informs the Court, that judgment order or decree (not being by consent of the defendant) corresponds with the judgment of *non sum informatus* in all material respects.

NON TRADER: See title TRADERS AND NON-TRADERS.

NON-USER. Is one of the modes recognised by law for the extinguishment of easements. The non-user, to have that effect, must shew an intention in the dominant owner to renounce the right. This mode of extinguishing easements is applicable to continuous, not to discontinuous, easements (Gale on Easements, 623-627, 5th ed.). Where the non-user consists in a user in excess of the permitted user, and the excess is not separable from the lawful measure, and the excess is substantial, then the easement is lost or in a manner forfeited (3 Ad. & E. 825).

NOSCITUR A SOCIIS. This maxim denotes that a phrase or clause is best understood by reading it in connection with its context before and after.

See title EX ANTECEDENTIBUS ET CONSEQUENTIBUS.

NOT GUILTY. A plea which occurred in the action of trespass or trespass on the case *ex delicto*, by which the defendant denied being guilty of the trespasses, &c., laid to his charge in the plaintiff's declaration. When a defendant pleads not guilty in a criminal charge he thereby puts himself upon trial, and is entitled to all the chances of escape from conviction which the rules of law afford him in case of the evidence being doubtful, or from any other cause, notwithstanding he may in fact have committed the act which is usually taken to constitute the offence (*accusare*

NOT GUILTY—*continued*.

nemo se debet, nisi coram Deo). An accused person is, therefore, in almost all cases justified in pleading not guilty to a criminal charge. On the other hand, in civil cases, when a defendant pleaded not guilty he was said to plead the general issue, whereby he was taken to deny the gist of the action only. For example, in actions for torts the plea of not guilty operating as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, it followed that in an action for a nuisance to the occupation of a house by carrying on an offensive trade the plea of not guilty operated as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, but did not operate as a denial of the plaintiff's occupation of the house. And again, in an action for slander of a plaintiff in his office, or profession, or trade, the plea of not guilty operated as a denial of speaking the words, of speaking them maliciously and in the defamatory sense imputed, and with reference to the plaintiff's office, or profession, or trade, but did not operate as a denial of the fact of the plaintiff holding the office, or profession, or trade alleged (Smith's Action at Law, p. 533). Under the present practice, the effect of the plea in all such cases is substantially the same, or at all events has not been enlarged, the invariable rule now being to deny substantially and in minute detail everything that is intended or not expressed to be non-admitted.

NOT GUILTY BY STATUTE. This plea has been given under a large number of statutes, for the protection usually of public and official personages, but also, although less generally, for the protection of merely private individuals. By R. G., T. T., 1853, rule 21, a defendant pleading this defence is required to insert in the margin of his plea the words "by statute," adding the year, chapter, and section, of any statute or statutes on which he relies, and stating whether they are public or not; and then he may avail himself of any of the defences provided by the statute or statutes specified. This plea is prescribed by the Judicature Acts (Order xix., 16), and its effect is unaltered; but it cannot (excepting by leave of the Court) be joined with any other plea or defence.

NOTARY. In ancient times a notary was a scrivener, who took minutes and made short drafts of writings and instruments, both of a public and of a private nature. In the present day, however, a notary or notary public is one who confirms and attests the truth of any deeds or

NOTARY—*continued.*

writings, in order to render the same available as evidence of the facts therein contained in any other country. Some of the chief duties of notaries are connected with mercantile transactions, as in noting bills of exchange and promissory notes which have been presented for payment and been dishonoured, the noting of a foreign bill being, like the notice of dishonour of an inland bill, a necessary preliminary to bringing an action upon it against the indorsers and (usually) against the drawer.

See titles DISHONOUR, NOTICE OF; FOREIGN BILL.

NOTE OF A FINE. The note of a fine was an abstract of the writ of covenant to levy fine and of the concord, naming the parties, the parcels of land, and the agreement.

See titles CONCORD; FINE.

NOTE, PROMISSORY: See title PROMISSORY NOTE.

NOTES OF JUDGE. Are available for the Court of Appeal upon any appeal from the High Court, in an action in which the evidence has been taken *virâ voce* (Order LVIII., 12); but the litigants have no right to such notes, although the judge may as a matter of courtesy supply them.

NOTICE. This is a head of equity of great importance in the two principal respects following, namely:—

- (1.) As perfecting the assignment of *choses in action*; and
- (2.) As affecting or not affecting subsequent interests.

In regard to both these branches notice may be either actual or constructive, with this difference, that actual notice is the more common of the two in respect of the former branch, and constructive notice the more common in respect of the latter. For, firstly, *actual* notice is any express intimation given by a person interested, or claiming to be interested, in the *chose in action* to the person having present control over it, on purpose to bind him as to such control, and thereby to complete, as far as possible, the rights of the person giving the notice. And, secondly, *constructive* notice is notice implied or inferred from the proof of surrounding circumstances,—an insecure form of notice, which the person claiming a *chose in action* should in no case rely upon. Notice has been inferred from two states of circumstances in particular, viz. (1.) Where actual notice of some general charge has been given, and if the fact had been inquired into, the person receiving such notice would have been naturally led on to notice of other things, but he has neglected all in-

NOTICE—*continued.*

quiry, wherefore of these other things he is taken to have had constructive notice; and (2.) Where the circumstances are such as shew the person charged with constructive notice to have wilfully, and not negligently merely, abstained from inquiry for the purpose of avoiding notice. For the first species of constructive notice see *Biscoe v. Banbury (Earl)* (1 Ch. Ca. 287); and for the second species, *Birch v. Ellames* (2 Anstr. 427). And there is a third species of constructive notice arising from the relation of the parties, as being that of principal and agent, client and solicitor, and such like, where the transaction is either contemporaneous with, or shortly subsequent to, another transaction communicating notice (*Fuller v. Bennett*, 2 Hare, 394), the subject matter of the notice having been a material part of the earlier transaction (*Wyllie v. Pollen*, 32 L. J. (Ch.) N. S. 782).

Considering the subject of Notice in its two branches,—

And, *Firstly*, Notice as perfecting the assignment of *choses in action*. In order that third parties may be bound it is necessary, with regard to a *chese in action*, to give notice to the person in whose hands it is, or when realising itself will be, such notice being, in the case of a *chese in action* which does not admit of actual delivery, equivalent in its effect to the actual delivery of a chattel in possession which admits of delivery (*Ryall v. Rowles*, 1 Ves. 348). Therefore,—

(a.) In order to take a *chese in action* out of the order and disposition of the creditor in case of his bankruptcy, it is necessary to give notice to the debtor (*Ryall v. Rowles*, *supra*).

(b.) In the case of a policy of assurance, notice must be given to the insurance office (*Thompson v. Tomkins*, 2 Dr. & Sm. 8).

(c.) In the case of an assignment of freight, notice must be given to the charterer (*Brown v. Tanner*, L. R. 2 Eq. 806).

(d.) In the case of an assignment of a legacy, general or specific, the executors not having yet assented to it, notice to the executors must be given (*Browne v. Savage*, 4 Dr. 635).

(e.) In the case of an assignment of the costs of a suit not yet ordered to be paid, notice should be given to the trustees or other the parties to whom they will be payable (*Day v. Day*, 1 D. & J. 144).

(f.) In the case of an assignment of shares in a company, notice must be given to the company (*Ex parte Boulton*, 1 D. & J. 163; and see generally the cases of *Dearle v. Hall*, *Loveridge v. Cooper*, 3 Russ. 1, 30).

If such notice has been given, as soon as the assignee knows to whom the same is to

NOTICE—continued.

be given, the assignee, if not otherwise in default, will not lose the benefit of it (*Feltham v. Clark*, 1 De G. & Sm. 307), upon the maxim, *lex neminem cogit ad vana seu inutilia peragenda*.

Where for any reason notice cannot be given, then the assignee must perfect his title in some other way; e.g., where the sole trustee of stock has died without legal representatives a *distringas* should be served on the Bank of England (*Etty v. Bridges*, 1 Y. & C. Ch. 486); and where a fund is in Court, a stop order over it should be left at the Paymaster General's Office (*Greening v. Beckford*, 5 Sim. 195; Chancery Funds Act, 1872 (35 & 36 Vict. c. 44), and rules thereunder), a mere notice to the Paymaster-General being insufficient (*Warburton v. Hill*, Kay, 470); but a notice to the trustees (if any) before payment into Court would be good for the purpose of conferring priority as against a stop order subsequently obtained (*Livesay v. Harding*, 23 Beav. 141).

Chattel interests in real estate, being equitable, are not *choses in action* within the meaning of the rules above stated (*Wiltshire v. Rabbits*, 14 Sim. 76); and being legal, the law will of course prevail without regard to the giving of notice. But the proceeds of the sale of real estate are not a chattel interest in real estate within the above stated rules as to notice (*Lee v. Howlett*, 2 K. & J. 531).

And, *Secondly*, Notice as affecting or not affecting subsequent interests. A purchaser for value without notice of a prior equitable estate or interest, and, *à fortiori*, of a mere equity, obtaining the legal estate either at the time of his purchase or subsequently thereto, and apparently, whether by fair means or by a fraud (*Culpepper's Case*, Freem. 123; *Pilcher v. Rawlins*, L. R. 7 Ch. App. 259), is entitled to priority in Equity as well as at Law; but not in case of a breach of trust (*Saunders v. Dehew*, 2 Vern. 271; *Mumford v. Stohwasser*, L. R. 18 Eq. 556). But the legal estate, where it is obtained fraudulently, must have been actually obtained,—i.e., conveyed (*Eyre v. Burmester*, 10 H. L. C. 90); although, where it may be obtained by fair means and without fraud, the right to a conveyance of it is sufficient (*Willoughby v. Willoughby*, 1 T. R. 763). And even where a purchaser for value without notice neither has the legal estate nor the best right to call for it, Equity will do nothing to prejudice him upon the application of an adverse party asking the aid of Equity (auxiliary jurisdiction) (*Burlace v. Cook*, Freem. 24); although, upon the application of an adverse party asking his legal rights (concurrent jurisdiction), and

NOTICE—continued.

not merely the assistance of the Court of Chancery towards establishing these rights at Law, Equity is bound and compellable to declare and decree him his rights, however much to the prejudice of the purchaser for value (*Williams v. Lambe*, 3 Bro. C. C. 264; *Collins v. Archer*, 1 Russ. & My. 284). And as between persons who are successive equitable claimants, Equity takes them according to their priorities of date, without regard to notice or the absence of notice (*Phillips v. Phillips*, 31 L. J. (Ch.) 325), unless in the case of the gross negligence of a prior claimant being the occasion of the prejudice sustained by a subsequent one (*Rice v. Rice*, 2 Dr. 73).

On the other hand, a purchaser for value with notice of a prior equitable estate, or interest, or even of an equity, cannot, by getting in the legal estate, whether at the time of or subsequently to his purchase, and whether by fair means or fraudulent, obtain priority over such prior claim, but the purchaser will in such a case be held a trustee for the prior claimant to the extent of such prior claim (*Birch v. Ellames*, 2 Anst. 427). And notice will bind the subsequent purchaser, even although the prior charge is defective, or would even (as from neglect to register or re-register) be void at Law (*Le Neve v. Le Neve*, Amb. 436); although conversely the absence of notice will save him, even although, *semble*, the prior charge be registered (*Morecock v. Dickens*, Amb. 678), unless in Ireland (6 Anne, c. 2), or with reference to British ships (*Hughes v. Morris*, 2 De G. M. & G. 349); the same rules apply to subsequent mortgagees; but with reference to judgment creditors the following peculiar rules have been established:—

(a.) Judgment creditors, *as between themselves*, take rank according to the order of the dates of their several registrations, without regard to the question of notice, which as between them is immaterial (*Benham v. Keane*, 1 J. & H. 685; 3 & 4 Vict. c. 82, s. 2).

(b.) An unregistered judgment does not affect a subsequent purchaser for value or mortgagee, and here also without regard to the question of notice (*Benham v. Keane*, 1 J. & H. 685; 18 & 19 Vict. c. 15, s. 5).

(c.) An unregistered judgment affects a subsequent *cestui que trust* having notice of it (*Benham v. Keane*, *supra*).

(d.) A registered judgment which has been also duly re-registered affects a subsequent purchaser for value or mortgagee having notice of it (*Simpson v. Morley*, 2 K. & J. 71; but see 27 & 28 Vict. c. 112); but not a subsequent purchaser for value or mortgagee not having notice of it (*Robinson v. Woodward*, 4 De G. & Sm. 562).

NOTICE—continued.

(e.) A registered judgment which has been otherwise duly perfected does not affect a purchaser whose contract is prior in date to the judgment, although the conveyance should be subsequent (*Brown v. Perrott*, 4 Beav. 585), without reference to the question of notice.

(f.) A registered judgment which has been otherwise duly perfected does not affect a prior voluntary settlement (*Beavan v. Oxford (Earl)*, 6 De G. M. & G. 507); and, *a fortiori*, does not affect a prior purchase for value or mortgage, without reference to the question of notice.

And with reference to *tacking* the following peculiar rules have been established as between mortgagees and judgment creditors:—

(a.) If one who is a judgment creditor to begin with buys in a first mortgage, he shall not tack the judgment to that mortgage so as to gain a priority over a second mortgagee who was such at the date of his judgment, and without reference to the question of notice (*Brace v. Marlborough (Duchess)*, 2 P. Wms. 491).

(b.) If one who is a first legal mortgagee to begin with buys in or obtains a judgment for a further sum, and had no notice of any subsequent charge at the time of getting hold of such judgment, he shall tack the judgment to his mortgage and obtain priority over the subsequent charge (*Brace v. Marlborough (Duchess)*, *supra*).

And with reference to the successive assignees of *choses in action* the following rules have been established:—

(a.) As between two or more particular assignees (being of course equitable),—

(aa.) If both or all the notices are given before the *choses in action* has realised itself, so as to be ready to be delivered actually, in the form of money or other proceeds, then priority of notice gives no priority of title (*Buller v. Plunkett*, 1 J. & H. 441). But

(bb.) If otherwise, the successive dates of the successive notices establish the successive priorities, or the one priority, as the case may be, this being the general effect of notice in such cases.

(b.) As between the trustee in bankruptcy or a general assignee on the one hand, and a particular assignee on the other,—By the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 15, it is provided that *things in action* (other than debts due to the bankrupt in the course of his trade or business) shall not be deemed goods and chattels within the meaning of the order and disposition clause (*In re Irving, Ex parte Brett*, 7 Ch. Div. 419; *In re Bainbridge, Ex parte Fletcher*, 8 Ch. Div. 218); and this provision appears to have com-

NOTICE—continued.

pletely dispensed with the giving of notice to secure priority as against the trustee in bankruptcy. Prior to that Act, the following rules had been established as between a trustee in bankruptcy or general assignee on the one hand, and a particular assignee on the other:—

(aa.) If the particular assignee were of a date prior to the bankruptcy of the debtor, and had also given notice prior thereto, he retained his priority, but failing such notice lost it, in favour of the trustee in bankruptcy or general assignee who gave notice, the particular assignment not being fraudulent;

(bb.) If the particular assignee was of a date posterior to the bankruptcy of the debtor, but had given notice of his assignment before the trustee in bankruptcy or general assignee had given notice of the bankruptcy or general assignment, the particular assignee (the particular assignment not being fraudulent) acquired priority over the trustee in bankruptcy, or general assignee, who had omitted to give such notice (*In re Barr's Trusts*, 4 K. & J. 219; *In re Atkinson*, 2 De G. M. & G. 140); but by the Bankruptcy Act, 1849, s. 141, and the decision in *Re Mary Coombe* (1 Giff. 91), he was deprived of such priority over the trustee in bankruptcy.

And in all these cases, notice before actual payment of the purchase-money, whether or not the notice be also before the contract, and whether before or after the conveyance is executed, is binding upon the subsequent purchaser or mortgagee (*Tourville v. Naish*, 3 P. Wms. 307); and even where notice is not given until after payment of the purchase-money, provided the conveyance has not yet been executed, the purchaser or mortgagee is equally bound (*Wigg v. Wigg*, 1 Atk. 382). Therefore the only notice which the purchaser or mortgagee may disregard is notice coming to him both after payment of the purchase or mortgage money and after execution of the conveyance.

But a subsequent purchaser or mortgagee of lands with notice of a prior voluntary settlement may safely disregard it, such settlement being void against him under the 27 Eliz. c. 4 (*Doe v. Manning*, 9 East, 59); and the purchaser may even compel a specific performance of the contract (*Daking v. Whimper*, 26 Beav. 568). The benefit of the stat. 27 Eliz. c. 4, does not, however, extend to one who purchases or takes a mortgage of lands from the heir-at-law or devisee of the voluntary settlor, or from a person claiming under a subsequent voluntary settlement, or indeed from any person other than the voluntary settlor himself (*Doe v. Rusham*, 17 Q. B. 723;

NOTICE—continued.

Lewis v. Rees, 3 K. & J. 132; *Richards v. Lewis*, 11 C. B. 1035).

NOTICE OF ACTION. When it is intended to sue certain particular individuals it is sometimes, as in the case of actions against justices of the peace, constables, and officers acting under the Highway Acts and Public Health Acts, necessary to give them notice of the action some time, usually one month, before.

NOTICE TO ADMIT. Regarding the admission of documents in actions and other legal proceedings, either party may give to the other a notice to admit (saving all just exceptions) the documents specified in the notice; and the admitting party usually admits these documents by signing an admission at the foot of the notice; and an affidavit by the solicitor or his clerk of the due signature of the admissions is sufficient evidence thereof (Order XXXII., 4).

See title DISCOVERY.

NOTICE TO INSPECT DOCUMENTS:

See title DISCOVERY, sub-title INSPECTION OF DOCUMENTS.

NOTICE IN LIEU OF SERVICE. In lieu of personally serving a writ of summons (or other legal process) the Court occasionally allows the plaintiff (or other party) to give notice in lieu of service, such notice being such as will in all probability reach the party (Orders IX. and X.). This notice is peculiarly appropriate in the case of a foreigner out of the jurisdiction, whom it is desired to serve with a writ of summons (10 Ch. Div. 550).

NOTICE OF OBJECTIONS TO PATENT.

By the 5 & 6 Will. 4, c. 83, s. 5, it is provided, that in any action brought against any person for infringing any letters patent, the defendant on pleading thereto shall give to the plaintiff, and in any *scire facias* to repeal such letters patent the plaintiff shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action, and no objection shall be allowed to be made on behalf of such defendant or plaintiff respectively at such trial, unless he prove the objections stated in such notice. The object of this notice, or particular of objections, as it is sometimes called, is to point out to the plaintiff the real nature of the objections to the patent which the defendant intends to set up upon the trial as an answer to the plaintiff's action, in order that the plaintiff may be prepared with the necessary evidence to meet such objections. It is somewhat analogous to a particular of set-off,

NOTICE OF OBJECTIONS TO PATENT—continued.

and, like it, is rendered necessary on account of the generality of the defendant's pleas.

See title PATENTS.

NOTICE TO PRODUCE. In general notice to produce any document in the possession or power of the opposite party is required; and such notice must be given in order to the admission of secondary evidence of the contents of the document (*Reg. v. Elworthy*, L. R. 1 C. O. R. 105). But where, from the nature of the proceedings, as in the case of trover for a bond, the party in possession of the document necessarily has notice that he is to be charged with the possession of it, a notice to produce is unnecessary (*How v. Hall*, 14 East, 274). Also, a counterpart executed by the defendant may be read by the plaintiff without a notice to produce the original (*Burleigh v. Stibbs*, 5 T. R. 465); and in an action for seamen's wages, secondary evidence of the ship's articles is admissible under 17 & 18 Vict. c. 104, s. 164, without any notice to produce them.

Generally, however, a notice to produce any notice on which the action is founded is unnecessary; but it is usual in business to have two copies of the notice to produce, and to serve one and retain the other, indorsing on the latter the time and mode of the service of the former. And by the C. L. P. Act, 1852, s. 119, where there has been a notice to admit the notice to produce, an affidavit of the attorney or his clerk of the service of the notice to produce and of the time when served, with a copy of it annexed, is sufficient evidence of the service of the original and of the time of service.

NOTICE TO QUIT. As between landlords and tenants, where there is no express stipulation as to the length of notice to quit the tenements occupied by the tenant, it is a general presumption of law that in the case of tenancies from year to year a half-year's notice must be given, such notice to expire at the end of the current year of the tenancy (*Bridges v. Potts*, 17 C. B. (N.S.) 332; but under the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), s. 51, wherever that Act applies, the notice is now a twelvemonth's notice where formerly it was a half-year's notice. And in the case of quarterly, monthly, and weekly tenancies, the safest course is to give a notice corresponding to the tenancy, but there is hardly any rule of law upon the subject. The like rules apply as to the tenant giving notice to determine his tenancy, which also is sometimes abusively called a notice to quit. The landlord's

NOTICE TO QUIT—continued.

notice may be afterwards waived, e.g., by his subsequently distraining for rent.

NOTICE, THIRD PARTY: See title THIRD PARTY NOTICE.

NOTICE TO TREAT. Under the Lands Clauses Act, 1845, when a public company for the purposes of its undertaking requires lands, it gives to all the parties interested in such lands a notice to treat for the purchase thereof by the company; such notice cannot, in the general case, be afterwards withdrawn; and the effect of it is, to constitute an inchoate contract between the company and the proprietors interested, the purchase-money to be afterwards ascertained or agreed according to the mode provided by the Act.

See title LANDS CLAUSES CONSOLIDATION ACT, 1845.

NOTICE OF TRIAL: See title TRIAL, NOTICE OF.

NOTORIOUS, MATTERS DEEMED. Like matters noticed by the Courts, or of which the Courts are said to take judicial notice, need not be proved. But the law of England is slow to admit anything without proof, merely because it is deemed notorious.

NOVATION. The acceptance of a new debt or obligation in satisfaction of a prior existing one. Thus, it is said that a surety is discharged by the novation of the debt; for he can no longer be bound for the first debt, for which he was surety, since it no longer subsists, having been extinguished by the novation; neither can he be bound for the new debt into which the first has been converted, since this new debt was not the debt to which he acceded.

A novation may arise in either of two ways:—

(1.) As in the case of a *renewal bill*, where the person of the debtor remains the same, but the amount or terms are increased or altered;

(2.) As in the case of an *amalgamation of companies*, where the person of the debtor is altered, but the other terms of the contract remain the same, the new company which is substituted for the old one taking over all the liabilities (together with the rights) of the latter.

It is essential to every *novatio* that the creditor should have assented thereto.

Justinian (in his Institutes iii. 29 (30), *Quibus Modis Obligatio Tollitur*, s. 3) enacted, that, unless the parties expressly stated in the writing that their intention was to make a *novatio*, the new obligation, although substituted for, should not put an end to, the old obligation, but the

NOVATION—continued.

creditor should have the benefit of both securities. But this is not the rule of the English Law.

NOVEL DISSEISIN: See title ASSIZE OF NOVEL DISSEISIN.

NOVELTY, WANT OF. In an action for the infringement of an alleged patent, a very common defence is that the alleged patent is void for want of novelty. The want of novelty is a fatal defect, under the statute 21 Jac. 1, c. 3, and usually invalidates the entire patent, although other parts of the invention are new. See Johnson's Patentee's Manual.

NOXA CAPUT SEQUITUR. Where a slave did any damage, his master became liable therefor in a *noxal action* to the injured; and this liability attached to the master for the time being, i.e., followed the principal (*caput*). The master might deliver up the slave as a *noxa*, and so discharge himself of liability.

NOXALIS ACTIO: See title NOXA CAPUT SEQUITUR.

NUDUM PACTUM. An agreement to do or pay anything on one side, without any consideration or compensation therefor on the other, is called a nude pact or naked agreement (*nudum pactum*), and when not under seal is totally void in law, and a man cannot be compelled to perform it upon the maxim, "*Ex nudo pacto non oritur actio.*" Pacts performed a great part in Roman Law, and it was a rule of that law that a *nudum pactum*, although not sufficient (in general) to support an action, was always sufficient to furnish an exception, i.e., plea or defence.

See titles MORAL OBLIGATION; PACTS.

NUISANCE (from the Fr. *nuire*, to hurt). Any thing which unlawfully annoys or does damage to another is a nuisance. A nuisance is either public or private. A public or common nuisance is such as affects or interferes with the king's subjects in general; a private nuisance is such as only affects or interferes with an individual in his individual capacity. A private nuisance may be remedied by action (*Hill v. Metropolitan [Hampstead] Smallpox Hospital*, 4 Q. B. Div. 433), or in some instances by abatement; a public nuisance producing private damage by action, or (making the Attorney-General a party) by information in Chancery or by indictment at Common Law.

See title INJUNCTION.

NUL TIEL RECORD. A plea pleaded in that form of trial which is called trial by the record. This form of trial is only used

NUL TIEL RECORD—continued.

in one particular instance, and that is where a matter of record is pleaded in any action, as a fine, a judgment, or the like, and the opposite party pleads "*nul tiel record*," i.e., that there is no such matter of record existing; whereupon issue is joined, which is called an issue of *nul tiel record*, and in such cases the Court awards a trial by inspection and examination of the record (Stephen on Pleading, 112).

NULLITY OF MARRIAGE. The decree for this, like the decree for divorce, is in the first instance a decree *nisi* only, to be or not afterwards made absolute in the usual way.

See title DIVORCE.

NULLUM TEMPUS ACT: See title next following.

NULLUM TEMPUS OCCURRIT REGI. Literally means, that no time bars the Crown of its rights to property. But this Common Law maxim has had its operation restricted by the Nullum Tempus Act (9 Geo. 3, c. 16), whereby sixty years are made a bar to the Crown. A like limit was fixed by 7 & 8 Vict. c. 106, for the Prince of Wales as Duke of Cornwall regarding his duchy lands; and the last-mentioned statute was amended by the stat. 24 & 25 Vict. c. 62.

NUN: See title MONK.

NUNC PRO TUNC. When a party has omitted to take some step which he ought to have taken, as to file an affidavit, for instance, the Court will sometimes permit him to do it after the proper time has passed by for that purpose, and will allow it to have the same effect as if it had been regularly done; and this in the case of the affidavit is called filing it *nunc pro tunc*; or in the case of entering up judgment, is called entering it *nunc pro tunc*; i.e., doing it "now for (i.e., instead of) then." By r. 56, H. T. 1853, all judgments, whether interlocutory or final, were to be entered of record of the day of the month and year, whether in term or vacation, when signed, and were not to have relation to any other day; but it was competent to the Court or a judge to order a judgment to be entered *nunc pro tunc*. Under that rule, a judgment was frequently allowed to be entered *nunc pro tunc*, where the signing of it had been delayed by the act of the Court, and usually in the case of the death of a party, e.g., if a party died after special verdict, or after a special case had been stated for the opinion of the Court, or after a motion in arrest of judgment, or for a new trial, or after a demurrer set down for argument and pending the time taken for argument, or whilst the Court was considering of its judgment; but no such indulgence

NUNC PRO TUNC—continued.

was given where the neglect to enter up judgment was attributable to the *laches* of the plaintiff or of those representing him, or by reason of any proceeding in error, or the like. The power of the Court to order or permit a thing to be done *nunc pro tunc*, whether filing an affidavit or entering a judgment or order, seems to be inherent in the Court even by the Common Law, without the aid of any statute.

See title JUDGMENT, ENTRY OF.

NUNCUPATIVE WILL. Was a will which depended merely upon oral evidence, having been declared or dictated by the testator previous to his death, before a sufficient number of witnesses, and afterwards reduced into writing. All wills, however, must now be reduced into writing at the time they are made (1 Vict. c. 26, s. 1). In the interval between the Statute of Frauds (29 Car. 2, c. 3) and the New Wills Act (1 Vict. c. 26) nuncupative wills were good for estates not exceeding £30 in all, where the will was pronounced before three witnesses and was reduced into writing within six days after it was made, or was proved within six months of the making; but before the Statute of Frauds they were valid without limit as to estate, just as they always were in Roman Law if made in the presence of seven witnesses (Just. ii. 10, 14).

NUNQUAM INDEBITATUS. Literally, "never indebted." This is a common defence to an action of debt on simple contract.

NUPER OBIT, WRIT OF. A writ that lay for a co-heir who had been deformed by his or her co-parcener of lands or tenements, of which their grandfather, father, brother, or other common ancestor had lately died seised in fee simple (F. N. B. 197; Cowel).

NUPER VICECOMITEM. Literally the late sheriff. A writ of execution called by this name issues where goods have been taken by a late (*nuper*) sheriff (*vicecomes*) on a *fi. fa.*, and he has returned that some remain on his hands for want of buyers; and the new sheriff is by this auxiliary writ directed to compel the late sheriff to sell the goods at all costs and hazards.

NUPTIAS NON CONCUBITUS SED CONSENSUS FACIT: See title CONSENSUS NON CONCUBITUS.

NURTURE, GUARDIANS FOR. Are the father or mother until infants attain the age of fourteen years; and in default of father or mother, the ordinary in former times usually assigned some discreet person to take care of the infant's personal

NURTURE, GUARDIANS FOR—*contd.*

estate, and to provide for its maintenance and education. But this duty is now discharged by the High Court, Chancery Division, which appoints a guardian for that purpose.

See titles GUARDIANS; INFANTS.

O.

OATHS. Have been very generally in use as a security that a witness will speak the truth; but in recent times, in the case of persons holding conscientious views of the impropriety of oaths, a solemn promise or declaration that they will speak the truth, and the whole truth, has been substituted for them (33 & 34 Vict. c. 49). Since the case of *Omychund v. Barker* (1 Atk. 21) it has been usual in England to swear each witness according to the forms of his own religion, the English form being upon the Holy Gospels. Before an oath can be administered, it must be shewn (if any doubt of the fact should exist), that the witness is aware of the sanctity of the oath, or generally that God will punish falsehood. Oaths have, however, been the subject of considerable abuse in law, particularly the so-called *Decisory Oath*, which in the absence of other evidence to the contrary, was permitted to settle the question in dispute; also, the so-called *Suppletory Oath*, which was administered by the judge, and was allowed to have a similar effect (*Longworth v. Yelverton*, L. R. 1 Sc. App. 218).

See title DECLARATIONS, STATUTORY.

OATHS, VOLUNTARY: See title VOLUNTARY OATHS.

OBLIGATION. An obligation or bond is a deed whereby a person obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at an appointed day; and he who so obliges himself, or enters into such a bond, is termed the obligor, and the party to whom he so obliges or binds himself, is termed the obligee.

Such is the use of the term "obligation" in English Law; but the word is commonly used in a much more general sense in jurisprudence as denoting any liability incurred by one person to another in virtue either of an agreement of the parties or their disagreement; and an obligation is said to arise either *ex contractu* or *quasi* so, or *ex delicto* or *quasi* so.

Again, obligations are of many varieties,—being either first perfect (*i.e.*, actionable, *civiles*) according to the laws of the particular country, or secondly, imper-

OBLIGATION—*continued.*

fect (*i.e.*, *naturales*, or moral) according to the same laws. And as a general rule, all systems of law (other than the English Law) allow to such latter varieties of obligation a partial legal efficacy, *e.g.*, making them good by way of defence to an action at any rate. For the effects which the Roman Law allowed them, see Brown's Savigny, title *Naturalis Obligatio*.

See titles CONTRACTUS; DELICTO, ACTIONS EX.

OBLIGATION SOLIDAIRE. This, in French Law, denotes joint and several liability in English Law, but is applied also to the joint and several rights of the creditors parties to the obligation.

See titles JOINT LIABILITY; JOINT OWNERSHIP.

OBSCENE PRINTS, &c.: See title PUBLIC MORALS.

OBSTRUCTION. Is the word properly descriptive of an injury to any one's incorporeal hereditament, *e.g.*, his right to an easement, or profit à prendre; an alternative word being *disturbance*. On the other hand, infringement is the word properly descriptive of an injury to any one's patent rights or to his copyright. But *obstruction* is also a very general word in law, being applicable also to every hindrance of a man in the discharge of his duty (whether official, public, or private).

OCCUPANCY is defined to be the "taking possession of those things which before belonged to nobody;" hence the title which a person so acquires in things is called title by occupancy. Occupancy (as the word is used in English Law) is frequently divided into general and special occupancy. *General* occupancy occurred where a person was tenant *pur autre vie*, and died during the life of the *cestui que vie*, in which case the person who first entered on the land after his death might lawfully retain possession thereof, as long as the *cestui que vie* lived by right of occupancy, because it belonged to nobody. *Special* occupancy occurred where an estate was limited to a man and his heirs, or the heirs of his body, during the life of another person, by which the heir or heirs of the body of such grantee might enter on the death of the ancestor, and hold possession as special occupant, having an exclusive right, by the terms of the original contract, to occupy the lands during the residue of the estate granted. General occupancy, in the sense before described, was abolished by the Statute of Frauds, and the remnant of the estate was made distributable among the creditors (if any), and the surplus remaining over was (after 14 Geo. 2, c. 20)

OCCUPANCY—continued.

to be distributed among the next of kin of the deceased grantee. The whole law is now regulated by the 1 Vict. c. 26, which re-enacts the provisions of both the two previous statutes as regards occupancy; and under the statute 6 Anne, c. 18, the tenant occupying *pur autre vie* may be ordered at the instance of the remainderman or reversioner to produce the body of the *cestui que vie*.

See title ESTATE PUR AUTRE VIE.

Occupancy, in a larger sense, has played a great part in international law and in jurisprudence. In international law, it is regarded as the title to the ownership of newly-discovered countries, and also (under the particular name of hostile capture) as the title to the ownership of newly-conquered countries. In jurisprudence, it is put forward, at least very commonly, as the foundation and origin of all property, whether in lands or in goods; but an objection is taken to it as such in Maine's *Ancient Law*, upon the ground that occupancy, in order to be a foundation of property, is an *advised* taking possession of a thing, and the notion of advisedness is too abstract for an early age. Probably, this objection refutes itself; and, after all, to quote the words of Savigny, property has had its origin in "adverse possession ripened by prescription."

OCCUPANT: *See title OCCUPANCY.*

OCCUPATIO: *See title OCCUPANCY.*

OCCUPATION, USE AND : *See title USE AND OCCUPATION.*

OCCUPIER OR OWNER. For certain purposes, the occupier of lands is to be deemed the owner thereof, *e.g.*, in the case of lands taken under the Lands Clauses Consolidation Act, 1845, where any question of title arises after payment or deposit of the purchase-money (s. 79; *Re Evans*, 42 L. J. Ch. 357). And in general the incidence of all rates is by the express provision of the Rating Acts (*e.g.*, 43 Eliz. c. 2, s. 1), upon the occupier, with or without a remedy over for the whole or some portion thereof against the owner; but this remedy over is in general contracted away, excepting as regards income or property tax.

ODIO ET ATIA, WRIT OF. An old writ which was directed to the sheriff to inquire whether a man committed to prison on suspicion of murder was committed on just cause of suspicion, or only out of malice. And if upon an inquisition it were found that he was committed of malice, then another writ was directed to the sheriff to bail him (*Les Termes de la Ley*).

OFFENCE. Offences are either capital or not capital; capital offences are such as draw down the punishment of death on the offender, such as high treason, felony, &c. Offences not capital are those of a less grave character, and which are generally termed misdemeanors.

OFFER. An offer is usually the first step towards an agreement or contract; and when such offer is accepted, the agreement or contract as such is complete. Any variation between the terms of the acceptance and of the offer is however fatal to the acceptance, creating a want of that *assensus ad idem* which is one of the essential requisites to every contract. An offer may always be withdrawn before acceptance (*Dickinson v. Dodds*, 2 Ch. Div. 463); and occasionally a time is fixed within which the offer is to be accepted, if at all; and in all cases the acceptance must be made within a reasonable time. When an offer is made by letter it continues open until the arrival of the letter; and when in such a case, the acceptance is by letter, the contract is complete on the posting of the letter of acceptance (*Adams v. Lindsell*, 1 B. & Ald. 681); and it does not matter whether the letter of acceptance (being sufficiently addressed) arrives late or does not arrive at all (*Dunlop v. Higgins*, 1 H. L. C. 381). An offer may be withdrawn within the time allowed for its acceptance, provided it is withdrawn before acceptance (*Cooke v. Oxley*, 3 T. R. 653). An offer is revoked by the death of the person making it; and an offer being once refused cannot afterwards be accepted, but a renewed offer may be made (*Honeyman v. Marryat*, 21 Beav. 14). An offer as such cannot, *semble*, be assigned; but the offer when accepted (*i.e.*, the contract or agreement completed by such acceptance) may be assigned.

See title CONTRACTS.

OFFICE. An office is defined to be the right to exercise a public or private employment, and to take the fees and emoluments belonging thereto; and it is frequently considered in law a species of incorporeal hereditament.

OFFICE COPIES. Are copies of affidavits, &c., made in the public office having the custody thereof, and stamped with the seal of such office. Such copies are by the practice of the Courts receivable in evidence; and in certain cases, they are by statute made as good evidence as the original documents, *e.g.*, office copy of bargain and sale enrolled, by statute 10 Anne, c. 18, s. 3.

See title ORIGINAL EVIDENCE.

OFFICE FOUND: *See title INQUISTION OF OFFICE.*

OFFICE, INQUEST OF. An inquisition or inquest of office is an inquiry made by the king's officer, his sheriff, coroner, or escheator, by virtue of his office (*virtute officii*), or by a writ sent to him for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods, or chattels, &c. This inquiry is made by a jury formed of an indefinite number of persons.

See titles INQUEST; INQUISITION OF OFFICE.

OFFICERS OF JUSTICE. Is a general name applicable to all degrees of persons concerned in the administration of the law, but it is commonly confined to the lower degrees of such persons, and almost exclusively to those who execute the processes of the Courts, *e.g.*, writs of *fi. fa.*, of attachment, of sequestration, and the like.

OFFICIAL PRINCIPAL. This was the name given to a judicial officer of high ecclesiastical authority in the province of Canterbury, and who was appointed by and under the authority of the archbishop. He had extraordinary jurisdiction in almost all ecclesiastical causes, and all appeals from bishops and their surrogates were directed to him. His ordinary jurisdiction extended throughout the whole province of Canterbury; but his citation, except upon appeal, or by letters of request, was confined to his own diocese. This office was at one time separate from that of the Dean of the Arches' Court of Canterbury; but as the two Courts met at the same place (formerly Bow Church, *de Arcubus*), and the Dean of the Arches frequently performed the duties of the official principal, in the course of time they became, and ever afterwards remained, completely united and identified. The Court of the Official Principal was therefore called the Arches Court of Canterbury, and was of very ancient origin, having subsisted before the time of Henry II. It was held in the hall belonging to the College of Civilians, or Doctors of the Civil Law, at Doctors' Commons. The duties of the Official Principal or Dean of Arches were latterly discharged until recently by the Judge of the Court for Ecclesiastical Causes, an office which was combined with that of the Judge of the High Court of Admiralty; but under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), a special Judge has been appointed for this portion of the ecclesiastical jurisdiction.

See titles ARCHBISHOP; ARCHES, COURT OF; COURTS, ECCLESIASTICAL.

OFFICIAL REFEREE: See title REFEREES.

OFFICIO, OATH EX. An oath formerly administered to persons by which they were compelled to confess, accuse, or purge themselves of certain criminal or quasi-criminal (*i.e.*, heretical) charges. This oath was made use of in the Spiritual Courts even in matters of civil right. It was abolished with the High Commission Court by stat. 16 Car. 1, c. 11.

See title HIGH COMMISSION.

OLD STYLE: See title YEAR.

OLERON, LAWS OF. The laws reputed to have been made by Richard I., when at Oleron, relating to maritime affairs (*Les Termes de la Ley*: Co. Litt. 260).

OMNE MAJUS CONTINET IN SE MINUS. "The greater includes the less," a maxim of law as of ordinary life, and the application of which only very exceptional circumstances can exclude.

OMNIA PRÆSUMUNTUR CONTRA SPOLIATOREM. A maxim available in the estimate of damages, and also in judging of the evidence adduceable in support of or in opposition to a demand. The effect of the maxim is to assess the damages at the highest, and to read the evidence (or want thereof) most strongly against the destroyer (*spoliator*).

OMNIA PRÆSUMUNTUR RITE ESSE ACTA. Literally, all acts are presumed to have been rightly observed; meaning by acts the *preliminaries* to a fuller act which is proved to have been legally completed. The presumption applies in favour of titles to properties and to all other written documents.

OMNIS RATIHABITIO RETROTRAHITUR. Literally, every ratification of an act relates back, and thereupon becomes equivalent to a previous request to do the act (*et mandato priori æquiparatur*).

See titles CONTRACTS; RATIFICATION.

ONCE A MORTGAGE ALWAYS A MORTGAGE. This phrase means that an indenture which is intended in the first instance to operate as a deed of mortgage only, and not as a purchase deed, cannot by any clause or agreement therein be made to operate as a purchase or otherwise than as a mortgage upon any specified event.

See title MODUS ET CONVENTIO VIN-
CUNT LEGEM.

ONUS PROBANDI. This means the *Burden of Proof*. It is a general rule that he who asserts a fact is bound to prove it; and it is not ordinarily required of any one to prove a negative, *ei qui dicit non qui negat incumbit probatio*. But what is at first sight a negative may be in reality an affirmative assertion, and in respect of it

ONUS PROBANDI—*continued.*

the *onus probandi* would rest on the person asserting it (*Williams v. E. I. Co.*, 3 East, 193), unless the matter was peculiarly within the knowledge of the other party, *e.g.*, killing game without being duly qualified (*Spieres v. Parker*, 1 T. R. 144), or selling beer without a licence (*R. v. Harrison*, Paley, Conv. 45, n.).

The *onus probandi* may be shifted by some presumption of law, *e.g.*, by the presumption of innocence (*Williams v. E. I. Co.*, *supra*); or of legitimacy (*Banbury Peerage Case*, 2 Selw. N. P. 709); or of value in the case of an acceptance to a bill (*Mills v. Barber*, 1 M. & W. 425); or of sanity (*Sutton v. Sadler*, 26 L. J. (C.P.) 284); however, in numerous cases of a criminal nature, the Legislature has expressly enacted that the burden of proving *authority, consent, lawful excuse*, and the like, shall lie on the defendant, *e.g.*, in the case of a person being found by night with implements of housebreaking (24 & 25 Vict. c. 96, s. 58).

A test frequently, but not always, available for determining upon whom the burden of proof rests, is,—to ask which party would succeed if no evidence were given on either side, and then the *onus probandi* will rest upon the other party (*Mills v. Barber*, 1 M. & W. 427). For example, in an action for not executing a contract in a workmanlike manner, the onus rests on the plaintiff (*Amos v. Hughes*, 1 M. & Rob. 464). Wherefore, usually, the party on whom the *onus probandi* lies, as developed on the pleadings, must begin; and the right to begin is conversely a test of the party on whom the *onus probandi* rests; but there are exceptions to this general rule (*Mercer v. Whall*, 5 Q. B. 447).

OPENING A COMMISSION. Entering upon the duties under a commission, or commencing to act under a commission, is so termed. Thus the judges of assize and *nisi prius* derive their authority to act under or by virtue of commissions directed to them for that purpose; and, when they commence acting under the powers so committed to them, they are said to open the commissions, and the day on which they so commence their proceedings is thence termed the commission day of the assizes.

OPENING PLEADINGS. In trials, it is the practice for the plaintiff's counsel to state briefly the substance and effect of the pleadings in the cause, in order that the jury may know what are the issues about to be tried, and this is termed "opening the pleadings."

OPENING A RULE. The act of restoring or recalling a rule, which has been

OPENING A RULE—*continued.*

made absolute, to its conditional state, as a rule *nisi*, so as to re-admit of cause being shewn against the rule. Thus, when a rule to shew cause has been made absolute under a mistaken impression that no counsel had been instructed to shew cause against it, it is usual for the party at whose instance the rule was obtained to consent to have the rule opened, by which all the proceedings subsequent to the day when cause ought to have been shewn against it are in effect nullified, and the rule is then argued in the ordinary way.

OPERATIVE WORDS. In a deed or other instrument, are those words which express (and purport to give) the effect, *i.e.*, operation, of the deed or instrument, *e.g.*, doth hereby grant and convey. The operative words are distinguished from the recitals, premises, covenants, conditions, and such like.

OPINION EVIDENCE: See title EXPERTS, EVIDENCE OF.

OPTIMUS LEGUM INTERPRETES CONSUETUDO. Literally, custom is the best interpreter of laws, wherefore a uniform and invariable interpretation of any particular statute, extending over centuries, is not to be destroyed or impugned upon any grounds of argument whatsoever, notwithstanding the interpretation does not commend itself as the right one (*Morgan v. Crawshaw*, L. R. 5 H. L. C. 304).

See title CONTEMPORANEA EXPOSITIO, &c.

OPTION. The archbishop has a customary prerogative when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by the bishop, in lieu of which it is now usual for the bishop to make over by deed to the archbishop, his executors, and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, *as the archbishop himself shall choose*, which is, therefore, called his option (Cowel).

OPTION TO PURCHASE. A lease of lands or houses not unfrequently creates in the lessee a right (to be exercised at his option) to purchase the premises in lease at any time during the currency of the lease at the price therein specified upon giving to the lessor the notice in that behalf therein specified. Such an option passes upon the due notice being given into a complete contract of purchase, and may be specifically enforced (*Crawford v. Toogood*, 13 Ch. D. 153).

OPTIONIS LEGATUM: See title LEGATUM OPTIONIS.

ORATOR. The plaintiff in a cause or

ORATOR—*continued.*

matter in Chancery, when addressing or petitioning the Court, used to style himself "orator," and when a female, "oratrix." But the phrase has long gone into disuse, and the customary phrases are now plaintiff and petitioner.

ORCINUS LIBERTUS. A freedman, who obtained his liberty by the direct operation of the will or testament of his deceased master, was so called,—being the freedman of the deceased (*orcinus*), not of the *Hæres*.

ORDEAL. The most ancient species of trial was that by ordeal, which was distinguished by the appellation of *judicium Dei*, and sometimes by that of *vulgaris purgatio*, to distinguish it from the canonical purgation, which was by the oath of the party. It was of two kinds: *fire ordeal* and *water ordeal*; the former being confined to persons of rank, the latter being open to the common people. *Fire ordeal* was performed either by taking up in the hand a piece of red-hot iron of one, two, or three pounds' weight, or else by walking barefoot and blindfold over nine red-hot plough-shares laid lengthwise, at unequal distances, and if the party escaped unhurt he was adjudged innocent, if otherwise, he was condemned as guilty. *Water ordeal* was performed either by plunging the bare arm up to the elbow in boiling water, or by casting the suspected person into a river or pond of cold water; and if in the former instance his arm was unburnt, or if in the latter instance he floated without any effort to swim, it was deemed evidence of his innocence; if otherwise, of his guilt. The ordeal was abolished in the reign of Henry III., when the more rational process of trying the guilt or innocence of an accused person by means of evidence laid before the jury was substituted for it.

See title JURY, TRIAL BY, HISTORY OF.

ORDER. As opposed to judgment or decree, denotes usually something of an interlocutory character, upon which only certain limited modes of execution may issue, *e.g.*, attachment, for disobedience to the order. But many judgments and decrees (especially in the Chancery Division of the High Court) contain also orders, as well as declarations, as portions thereof.

See title INTERLOCUTORY.

ORDER OF DISCHARGE. Under the Bankruptcy Act, 1869, a bankrupt who pays up 10s. in the pound is entitled to be discharged from his bankruptcy; and the Court makes an order of discharge in that case. The Court makes the like order where, in the case of a bankrupt paying

ORDER OF DISCHARGE—*continued.*

less than 10s. in the pound, his creditors pass a special resolution to give him his discharge upon the ground of special circumstances. An undischarged bankrupt enjoys a respite of three years after the close of his bankruptcy, but may afterwards have execution issued against him for the unpaid proportion of his debts.

ORDER AND DISPOSITION. Where goods are left in the order and disposition of a trader, that is to say, within his possession or power to deal with them, and they are so left by the consent of the true owner, and the trader becomes bankrupt while having such goods in his order and disposition, the goods vest in the trustee in bankruptcy of the trader, as a sort of penalty upon the true owner, and become available for payment of the debts of the trader in the bankruptcy.

See title REPUTED OWNER.

ORDERS OF THE DAY. Any member of the House of Commons who wishes to propose any question, or to "move the House," as it is termed, must, in order to give the House due notice of his intention, state the form or nature of his motion on a previous day, and have it entered in a book entitled the order book; and the motions so entered, the House arranges, shall be considered on particular days, and such motions or matters, when the day arrives for their being considered, are then termed the "orders of the day" (May on Parl.).

ORDERS AND RULES. When any statute of very wide operation is enacted, it has become usual in modern times to enact also various more or less elaborate orders and rules for working out its provisions, *e.g.*, the Judicature Acts, 1873-75, the Bankruptcy Act, 1869.

ORDINANCE OF PARLIAMENT. Sir Edward Coke says that an Ordinance of Parliament is to be distinguished from an Act of Parliament, inasmuch as the latter can be only made by the king and a threefold consent of the State, whereas the former may be ordained by one or two of them. At the time that the right of the Commons to participate in legislation was yet only in growth a distinction was taken, for the first time, in the reign of Edward III. between ordinances and statutes, the former being experimental Acts passed for a time only, and, as it were, on trial, and which might afterwards be, and often were, converted into statutes, *i.e.*, permanent Acts, or else might be continued for a time, or discharged altogether. The "Ordinances of the Staple," passed by Edward III. in council in 1354, prohibiting

ORDINANCE OF PARLIAMENT—*continued.*

under penalty of death the export of English wool from England, are an example, and were confirmed in the then next session of Parliament.

ORDINANCES OF THE STAPLE: *See* title **ORDINANCE OF PARLIAMENT.**

ORDINARY. In the Civil Law signifies any judge who has authority to take cognizance of causes in his own right, and not by deputation. But in the Common Law it signifies the bishop of a diocese, though more frequently a commissary or official of the bishop or other ecclesiastical judge who has judicial authority within his jurisdiction.

ORDINARY OF NEWGATE. A divine who is appointed to attend the condemned criminals in that prison to prepare them for death, &c.

ORDINATION. Is the admission of qualified persons to the office of clergymen (whether bishop, priest, or deacon) *i.e.*, to holy orders. The power of ordination lies in the bishop; and the ordination takes place according to the form prescribed in the Book of Common Prayer. By stats. 13 Eliz. c. 12, and 44 Geo. 3, c. 43, the age of twenty-three years is fixed for deacons, and the age of twenty-four years for priests; and the ordaine declares in accordance with the stat. 28 & 29 Vict. c. 122, his assent to the Thirty-Nine Articles, &c. And usually the ordaine has or is in the immediate prospect of having a title, *i.e.*, the presentation to some living.

ORIGINAL EVIDENCE. Is a phrase used in contrast to the phrase *derivative evidence*, and denotes evidence that has an independent probative force of its own, and which is unaffected with any of the infirmities attaching to derivative evidence.

See titles **DOCUMENTS, PROOF OF; EVIDENCE; HEARSAY; PRIMARY EVIDENCE; SECONDARY EVIDENCE.**

ORIGINAL or SUBSTITUTIONAL GIFT: *See* title **SUBSTITUTIONAL OR ORIGINAL.**

ORIGINAL WRIT. An original writ was the process formerly in use for the commencement of personal actions. It was a mandatory letter from the king, issuing out of Chancery, sealed with the great seal, and directed to the sheriff of the county wherein the injury was committed, or was supposed to have been committed, requiring him to command the wrongdoer or accused party either to do justice to the plaintiff, or else to appear in Court and answer the accusation against him. This writ is now disused, the writ

ORIGINAL WRIT—*continued.*

of summons being the process prescribed by the Uniformity of Process Act for commencing personal actions; and under the Judicature Act, 1873, all suits, even in the Court of Chancery, are commenced by such writs of summons.

See titles **WRIT; SUMMONS, WRIT OF.**

ORPHANAGE PART. That portion of an intestate's effects which his children were entitled to by the custom of London. This custom appears to have been a remnant of what was once a general law all over England, namely, that a father should not by his will bequeath the entirety of his personal estate away from his family, but should leave them a third part at least, called the children's part, corresponding to the "bairns' part" or *legitim* of Scotch Law, and also (although not in amount) to the *legitima quarta* of Roman Law (Just. ii. 18). This custom of London was abolished by the stat. 19 & 20 Vict. c. 94.

See title **CUSTOMS OF LONDON.**

OUSTED. To be removed or put out; thus, ouster of the freehold signifies being put out of possession of the freehold; ousted of an estate for years, signifies being turned out from the occupation of the land during the continuance of the term.

See title **OUSTER.**

OUSTER. Called also dispossession, is the general name for all wrongs to corporeal real property, depriving the rightful owner of the possession or enjoyment thereof. Its five principal varieties are the following:—

(1.) Abatement,—which consists in the entry by a stranger upon the death of the tenant in fee simple, in exclusion of the heir or devisee of such tenant.

(2.) Intrusion,—which consists in the entry by a stranger upon the death of the tenant for a particular freehold estate, in exclusion of the remainderman or reversioner.

(3.) Deforcement,—which consists in the refusal of a particular tenant (*e.g.*, a lessee for years) to deliver up the possession upon the determination of his particular interest to the person entitled to the remainder or reversion upon such determination.

(4.) Discontinuance,—which consists in the wrongful holding over of the grantee or feoffee of a tenant in tail, in exclusion of the heir in tail, under the terms of his deed of grant or of feoffment, where that deed expresses to convey to him the fee simple and the same has not been duly enrolled so as to bar the estate tail.

(5.) Disseisin,—which consists in the wrongful deprivation of an owner in

OUSTER—continued.

possession of his lands, *i.e.*, in the wrongful deprivation of such person of his actual seisin and possession.

For the like torts in the case of incorporeal real property, there are also various technical names, such as *Disturbance*, *Obstruction*, *Subtraction*, and the like.

OUSTER LE MAIN. When the heir male arrived at the age of twenty-one, or the heir female at the age of sixteen, they might sue out their livery of *ouster le main*; that is, the delivery of their lands out of their guardians' hands.

See titles **LIVERY**; **WARDSHIP**.

OUT OF COURT. He who has no legal status in Court is said to be "out of Court," *i.e.*, he is not before the Court. Thus, when the plaintiff in an action, by some act of omission or commission, shews that he is unable to maintain his action, he is frequently said to put himself "out of Court." Sometimes a person who is out of Court is said to have no *locus standi*.

See title **LOCUS STANDI**.

OUTER BAR. Barristers at law are divided into two classes, *viz.*, queen's counsel, who are admitted within the bar of the Courts, in seats specially reserved for themselves; and junior counsel, who sit without the bar; and the latter are thence frequently termed barristers of the "outer bar," or "utter bar," in contradistinction to the former class.

See title **UTTER BARRISTERS**.

OUTLAWRY. The process of putting a man out of the protection of the law, so that he was incapable of bringing any action for redress of injuries; and it was also attended with a forfeiture of the party's goods and chattels, a consequence which was in no way affected by the Forfeiture for Felony and Treason Abolition Act, 1870 (33 & 34 Vict. c. 23). However, now, under the stat. 42 & 43 Vict. c. 59 (commonly called the Civil Procedure Acts Repeal Act, 1879), outlawry in all *civil* proceedings is abolished.

OUTSTANDING LEGAL ESTATE. Where a mortgage debt charged on real estate is paid off, but no re-conveyance of the estate is executed, then the legal estate (if the mortgage was a legal one) remains in the mortgagee, and passes to his heirs or devisee, and (under the Vendor and Purchaser Act, 1874) may be conveyed even by his legal personal representative. It may be got in by a subsequent mortgagee for his protection in certain cases.

See title **TACKING**.

OUTSTANDING TERMS: See title **TERMS OF YEARS, OUTSTANDING**.

OUVERTURE DES SUCCESSIONS. In French Law denotes the right of succession which arises to one upon the death, whether natural or civil, of another. Such successor must not be either as yet unconceived, or a child *non viable*, or one civilly dead; and he must also be clear of certain moral delinquencies, for which see Code Civil, 727. Bastards, in case their parent leaves legitimate offspring, have one-third of the goods which, as a legitimate child, they would have received; and if the parent leaves no legitimate offspring, but ascendants or collaterals (being brothers or sisters), then one-half; and if the parent leaves neither legitimate offspring nor ascendants nor collaterals (being brothers or sisters), then three-fourths: and in case of a total failure of inheritable relations, then the whole. The widow surviving takes the succession where the parent leaves no inheritable relations or bastards, and failing her the state.

OVERT ACT. An overt act signifies an open or manifest act, such as can be manifestly proved.

In charges of treason, it is necessary in order to a conviction to substantiate either one overt act by at least two witnesses, or two overt acts of the same character by one witness apiece.

See title **TREASON**.

OWNER OR OCCUPIER: See title **OCCUPIER OR OWNER**.

OWNERSHIP. In English Law, exists in personal property only,—an estate (and not ownership) existing in real property. But the person entitled to an estate in real property is commonly called the owner thereof, and he may or may not also be the occupier thereof.

See title **ESTATE**.

OXGANG. A term in old law, which was used to signify as much land (being arable) as an ox-team could till.

See titles **HIDE**; **PLOWLAND**.

OYER OF DEEDS AND RECORDS. Hearing of deeds and records. Thus, when either party in an action alleged any deed, he was in general obliged to make *profert* of such deed; that is, to produce it in Court simultaneously with the pleading in which it was alleged. When oral pleading was in practice, the deed was actually produced in Court; but afterwards *profert* consisted merely of a formal allegation that the party shewed the deed in Court, it being, in fact, retained in his own custody. When *profert* was thus made by one of the parties, the other, before he pleaded in answer, was entitled to demand *oyer of the*

OYER OF DEEDS AND RECORDS—continued.

deed, that is, to hear it read; and this, either for the purpose of enabling him to ascertain the genuineness of the alleged deed, or of founding on some part of its contents (not set forth by the adverse party), some matter of answer *Oyer of records* was of the same nature, being a demand to hear any record read which had been alleged in the pleading of the opposite party. By the Common Law Procedure Act, 1852, s. 55, it ceased to be necessary to make *profert* of any deed or other document mentioned or relied on in any pleading; and if *profert* was made, it was not to entitle the opposite party to crave *oyer* of, or set out upon *oyer*, such deed or other document. But this provision affects the form of pleading only, and not also the rules of evidence, or the modes of proving any deed or other document.

See titles NOTICE TO ADMIT; NOTICE TO INSPECT; NOTICE TO PRODUCE.

OYER AND TERMINER (from the Fr. *ouïr*, to hear, and *terminer*, to determine). A commission of oyer and terminer is a commission under the king's great seal, directed to certain persons, among whom two or more Common Law judges are usually appointed, empowering them to hear and determine treasons, felonies, robberies, murders, and criminal offences in general.

See title JUSTICES OF OYER AND TERMINER.

O, YES. Is said to be a corruption of the French, *oyez*, i.e., hear ye; and is sometimes used in Courts by the public crier, to command attention when a proclamation is going to be made.

See title CRIER.

P.

PACTA PRIVATA JURI PUBLICO DEROGARE NON POSSUNT. Private agreements may not derogate from the public law: therefore, agreements contrary to public policy are for that reason void, and may (if necessary) be relieved against. This maxim operates to check that other maxim, viz., *modus et conventio vincunt legem*.

PACTS. Are agreements, and are of many varieties,—being either (1.) *Nuda pacta*, i.e., pacts without any consideration to clothe them with the attributes of a contract; or (2.) *Vestita pacta*, i.e., pacts clothed with such a consideration. And again, pacts may be (3.) *Pacta adjecta*, i.e., pacts added to a contract, and in that case either (a.) *Adjecta ex continenti*, i.e., as part

PACTS—continued.

and parcel of the contract and *contemporaneously* therewith; or (b.) *Adjecta ex intervallo*, i.e., not contemporaneously with, but some interval of time after, the contract proper; and an action may be supported upon pacts made contemporaneously, but only a defence upon pacts made after an interval of time.

PAGUS. The shire in early Saxon times.

See title MARK.

PAINE, FORT ET DURE (Fr., punishment, strong and severe). A special punishment for those who, being arraigned for felony, refused to put themselves upon the ordinary trial of the country, and were, therefore, considered as mute in the interpretation of the law. This punishment was vulgarly called pressing to death.

See title MUTE.

PAINTINGS, COPYRIGHT IN. Under the stat. 25 & 26 Vict. c. 68, it is provided that the author, being a British subject or resident within the dominions of the Crown, of any original painting, drawing, and photograph which shall not have been sold or disposed of before the commencement of the Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying, such painting or drawing, and the design thereof, or such photograph and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death; but when any painting or drawing or the negative of any photograph is, for the first time after the passing of the Act sold or disposed of, or made or executed for or on behalf of any person for a good or a valuable consideration, the person so selling or disposing of, or making or executing the same is not to retain the copyright thereof unless it is expressly reserved to him by agreement in writing, but the copyright is to belong to the vendee or assignee of such painting or drawing or of such negative of a photograph, or to the person for or on whose behalf the same has been made or executed, provided there is an agreement in writing to that effect. The copyright must be registered; also every assignment thereof. The Act imposes a penalty for infringement not exceeding £10 for each offence, and also confiscates the repetitions, or copies, or imitations; and also punishes with fine and imprisonment the fraudulent affixing of names or initials to paintings to represent them as original works (*Ex parte Graves*, Law Rep. 3 Ch. App. 642).

PAIRING OFF. Members of the House

PAIRING OFF—*continued.*

of Commons cannot vote upon any question unless they are themselves present when the question is put. When, therefore, a member wishes to absent himself from the House, and at the same time is anxious not to diminish the strength of his party by the loss of his vote during his absence, he seeks out some member of the opposite party who is also anxious to absent himself, and by mutual agreement the two (or "pair" of) members arrange to be absent at the same time, the effect of which, of course, is, that on all questions which occur during their absence, a vote is neutralised on each side; and thus the relative numbers on any given division are precisely the same as if both members were present. This system is known by the name of "pairs," and members acting under this arrangement are thence said to "pair off" upon any question in which a division of the House takes place during their absence.

PAIS. A trial *per pais* signifies a trial by the country, or, as it is more commonly called, by jury. An assurance by matter *in pais* is an assurance transacted between two or more private persons *in pais* (in the country), i.e., upon the very spot to be transferred. Matter *in pais* seems to signify matter of fact, probably so called because matters of fact are mostly triable by the country; e.g., estoppels *in pais* are estoppels by conduct, as distinguished from estoppels by deed or by record.

See title ESTOPPELS.

PALACES, ROYAL. The privilege of palace is attached to any place which is *de facto* the sovereign's residence; and in a case of *Att.-Gen. v. Dakin and Others* (L. R. 2 Ex. 290) (which was an information of intrusion filed against the sheriffs and their officers for executing a *fi. fa.* in a suite of private apartments at Hampton Court Palace) it was stated that actual personal residence of the sovereign at the time is not necessary to confer the privilege, if there is an intention to resume residence, or no inconsistency between such resumption and the present use of the palace.

PANDECTS. The books of the Civil Law compiled by Justinian are so called. The word literally translated means a universal collection or compilation of passages, and denotes the *universality* of the subjects treated of in the *Corpus Juris Civilis*; whereas the word *Digest*, which in England is the more common of the two words, means a methodical arrangement, and denotes the *method or order* which is observed in the arrangement of the same compilation.

PANEL. The slip of parchment on which the sheriff returns the name of the jurors to serve on a jury, is so called under the C. L. P. Act, 1852, s. 104.

See title IMPANEL.

PANIER. Is an attendant or domestic, who waits at table and gives bread (*panis*), wine, and other necessary things to those who are dining. The phrase was in familiar use amongst the Knights Templars, and from them has been handed down to the learned societies of the Inner and Middle Temples, their modern representatives, whose buildings once belonged to that distinguished order, and who have retained a few of their customs and phrases. "From the time of Chaucer to the present day, the lawyers have dined together in the ancient hall, as the military monks did before them, and the rule of their order requiring two and two to eat together, and all the fragments to be given in brotherly charity to the domestics, is observed to this day, and attendants at table in the dining hall are still called 'paniers.'"

PANNAGE. Signifies the money which the agisters of the forest collect for the feeding of swine within the forest; and sometimes it signifies the food itself (*Les Termes de la Ley*). In the recent case of *Chilton v. Corporation of London* (7 Ch. Div. 562), a right of pannage was stated to be simply a right vested by express or implied grant in an owner of pigs, or an owner of land who keeps pigs, to go into the wood of the grantor and eat the acorns or beech-mast which have fallen to the ground; and that right does not prevent the owner of the wood from lopping the trees in the ordinary course of management or from cutting them down for timber when ripe.

PARAMOUNT. The supreme lord of a fee was so called, in contradistinction to the mesne lord (F. N. B. 135; Cowel). The sovereign is the universal lord paramount, of whom all lands are held in England.

See titles FEUDAL SYSTEM; LORD AND VASSAL; MESNE, sub-title MESNE-LORD.

PARAPHERNALIA (from the Greek *παρά*, besides, and *δωρη*, dower, i.e., something to which the wife is entitled over and above her dower). Under the term "paraphernalia" are included such apparel and ornaments of the wife as are suitable to her condition in life. Thus, pearls and jewels, worn by the wife, although articles of mere ornament, have been held to fall within the term "paraphernalia," as in the case of *Mangey v. Hungerford* (2 Eq. C. Ab. 156), where the widow claimed and obtained her

PARAPHERNALIA—*continued.*

gold watch and several gold rings as paraphernalia, which had been given to her at the funerals of relations. The legal property in the wife's paraphernalia is in the husband, who may dispose of them during his life, but not by will; and they are liable to the husband's debts both during his life and after his death. See Snell's Principles of Equity, 5th ed. ch. xxi. s. 2.

PARAPHERNAUX, BIENS. In French Law all the wife's property which is not subject to the *régime dotal* is called by this name; and of these the wife has the entire administration; but she may allow the husband to enjoy them, and in that case he is not liable to account.

See titles PIN-MONEY; SEPARATE ESTATE; PARAPHERNALIA; RÉGIME DOTAL.

PARAVAIL. Tenant paravail signified the lowest tenant of land, being the tenant of a mesne lord; he was so called because he was supposed to make *avail* or profit of the land for another (Cowel; 2 Bl. 60).

PARCELS. Are those words in a deed or will which specify and describe the lands or tenements comprised therein. The descriptions usually consist of the names, acreages, occupying tenants, boundaries, and abutments.

PARCENARY. The holding of lands jointly by parceners or coparceners.

See title COPARCENERS.

PARCENERS: See title COPARCENERS.

PARDON. The Crown, in exercise of its prerogative of mercy, may pardon after conviction either of treason or of felony. But such pardon may not be given in anticipation of a conviction, and so as to be pleaded in defence to a prosecution (see title DANBY, IMPEACHMENT OF). The pardon relates of course only to the particular conviction for which it is given (*Reg. v. Harrod*, 2 C. & K. 294).

PARENT AND CHILD: See titles FATHER AND CHILD; MOTHER AND CHILD.

PARI RATIONE. Means "for the like reason" or "by like mode of reasoning."

PARIBUS, IN, MATERIEBUS, EADEM EST RATIO. Means literally, that in like subject-matters, the rule of law should be the same, or the like argumentation should hold good. This is the maxim underlying the application of the decisions of the Court to new cases, the *ratio decidendi* of the previous decisions being applicable whenever the circumstances of the new case correspond, and being excluded in whole

PARIBUS, IN, MATERIEBUS, EADEM EST RATIO—*continued.*

or in part or being modified when these circumstances are different.

See titles INTERPRETATION; RATIO DECIDENDI; RATIO LEGIS.

PARISH. Was originally the area within the charge of one spiritual person, e.g., parson, vicar, or other minister having cure of souls therein (5 Rep. 67 a). England was divided into parishes about the year 636 A.D. (according to Camden), and about the year 1179 by the council of Lateran (according to Hobart); they certainly existed in England in the time of King Edgar (about the year 970), and probably the division of the county into parishes was a gradual process. The boundaries of ancient parishes were usually the boundaries of a manor, or of a group of manors. Every parish had its church sufficiently endowed with tithes, and some parishes had also chapels (see title CHAPELS). Various new parishes have been erected in comparatively recent times under the New Parishes Acts, 1843 and 1844 (6 & 7 Vict. c. 37, and 7 & 8 Vict. c. 94, popularly known as Sir Robert Peel's Acts), and the New Parishes Act, 1856 (19 & 20 Vict. c. 104, popularly known as Lord Blandford's Act), under which Acts new districts may be constituted as parishes. But to the present day large parts of England continue to be extra-parochial (2 Rep. 44; 20 Vict. c. 19; 25 & 26 Vict. c. 61, s. 32).

PARISH UNION: See title POOR.

PARK. This word commonly signifies an inclosure; but to constitute a legal park, or rather a park in the eye of the law, it must have been made so by the king's grant, or at least by immemorial prescription (*Les Termes de la Ley*).

See titles CHASE; GAME; DEER; WARREN.

PARLIAMENT, HOUSES OF. The year assigned by Carte for the division of Parliament into two houses is 17 Edward 3, and that is the most probable date. But Hallam argues for a much earlier date; and he instances 11 Edward 1 as a year in which the Houses were divided; the Commons and Spiritual Peers having in that year sat at Acton Burnell, while the Temporal Peers sat at Shrewsbury. It appears, however, that the separation in 11 Edward 1 was due to a special cause, that is to say, the Temporal Peers in their sitting at Shrewsbury were trying David Prince of Wales (otherwise called Llewellyn), on a charge of treason; and upon such a trial the Spiritual Peers, and *à fortiori* the Commons, were not entitled to be present. The other instances which Hallam puts forward

PARLIAMENT, HOUSES OF—continued.

might possibly be explained in like manner upon their special circumstances; and therefore any such occasional separations must not be suffered to impugn the authority of Carte, or the correctness of the date which he assigns. But, in fact, an earlier separation of Lords and Commons was not needed; for the Commons, even when they met under the same roof as the Lords always sat apart from the Lords in the lower end of the hall, and not then assuming to discharge any duties beyond the grant of money or supplies, there was no urgent reason in early times why they should sit in a separate house. For the composition and privileges and powers of the House of Lords, *see* titles **HOUSE OF LORDS**; **HOUSE OF LORDS, JURISDICTION OF**; **PEERS**; **PEERS, QUALITY OF SPIRITUAL**; **LIFE-PEERAGES**; **REPRESENTATIVE PEERS**. For the composition of and mode of election to the House of Commons, *see* titles **ELECTORAL FRANCHISE**; **ELECTIONS, PARLIAMENTARY**; **PLACE-BILL**; **REPRESENTATION IN PARLIAMENT**; **HOUSE OF COMMONS**; **MEMBER OF PARLIAMENT**; and for its powers and privileges, *see* titles **MONEY-BILLS**; **MINISTERS**; **CABINET MINISTRY**; **CONSTITUTION, GROWTH OF**; **PRIVILEGE OF PARLIAMENT**. For the summoning of Parliament, *see* titles **SUMMONS TO PARLIAMENT**; **NEW WRIT**; **CONVENTION PARLIAMENT**; for its prorogation and dissolution, *see* titles **DISSOLUTION OF PARLIAMENT**; **PROROGATION OF PARLIAMENT**.

PARLIAMENTARY AGENTS. Persons who act as solicitors in promoting and carrying private bills through Parliament. They are usually attorneys or solicitors, and do not usually confine their practice to this particular department.

PARLIAMENTARY ELECTIONS: *See* title **ELECTIONS, PARLIAMENTARY**.

PARLIAMENTARY TAXES. Such taxes as are imposed directly by Act of Parliament, *i.e.*, by the Legislature itself, as distinguished from those which are imposed by private individuals or bodies under the authority of an Act of Parliament. Thus, a sewers rate, not being imposed directly by Act of Parliament, but by certain persons termed commissioners of sewers, is not a parliamentary tax; whereas the income tax, which is directly imposed, and the amount also fixed, by Act of Parliament, is a parliamentary tax.

See titles **TAXATION, HISTORY OF**; **TAXATION, VARIETIES OF**.

PAROCHIAL: *See* title **PARISH**.

PAROL. This word literally signifies verbal, in contradistinction from that which

PAROL—continued.

is written. Thus, a parol agreement signified an agreement by word of mouth, in contradistinction from a written agreement; but at the present day it signifies an agreement by word of mouth, or by writing under hand only, in contradistinction from an agreement by deed, *i.e.*, by writing under hand and seal. The pleadings in an action were also denominated the parol, because they were formerly conducted *vivâ voce* in Court, and were not mere written allegations as at present. Parol evidence is the phrase commonly used to denote extrinsic evidence, *i.e.*, evidence outside of the written document which it is used to explain.

See titles **CONTRACTS**; **EXTRINSIC EVIDENCE**; **PAROL DEMURSER**.

PAROL DEMURSER: *See* title **PAROL DEMURS**.

PAROL DEMURS. In many real actions brought by or against an infant under the age of twenty-one years, and also in actions of debt brought against him, as heir to any deceased ancestor, either party might suggest the non-age of the infant, and pray that the proceedings might be deferred till his full age, or that the infant might have his age, and that "the parol might demur," that is, that the pleadings might be stayed; and then they would not have proceeded till the infant's full age, unless it was apparent that he could not be prejudiced thereby. This parol demurring was abolished by the stat. 11 Geo. 4, & 1 Will. 4, c. 47, as to proceedings under that statute, being chiefly decrees for the sale of real estate to pay debts. The parol demurring is not to be confounded with a parol demurrer, which was a demurrer put in for the first time at the trial or hearing of the action.

PAROL EVIDENCE. In connection with instruments in writing (whether that writing be required by statute or not), the general rule is that parol evidence is not admissible to vary them, but is admissible to explain them, and for certain other purposes, as to which *see* title **EXTRINSIC EVIDENCE**. In cases of alleged *satisfaction in equity* of legacies by portions or of portions by legacies, the rule is that for the purpose of *contradicting* the plain or natural effect of the instrument or instruments, parol evidence is excluded where there is no *prima facie* presumption of law (*i.e.*, of Equity) contrary to that effect (*Hall v. Hill*, 1 Dr. & War. 94); but that for the purpose of *confirming* the plain or natural effect thereof, parol evidence is admitted where there is any such presumption contrary to that effect (*Kirk v. Eddowes*, 3 Hare, 509).

PAROL VARIATION: See titles **EXTRINSIC EVIDENCE**; **SPECIFIC PERFORMANCE**.

PARSON, in its legal acceptation, signifies the rector of a parochial church. He is called parson, *persona*, because, by his person, the church, which is an invisible body, is represented (Co. Litt. 300 a, s. 528).

PARSON IMPARSONÉE. When a clerk is not only presented, but instituted and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata*, or parson *imparsonée* (Co. Litt. 300).

PARTAGE. This is, in French Law, the partition of English Law, and is demandable as of right.

See title **PARTITION**.

PARTIAL LOSS. The losses which arise from the various perils insured against by underwriters in marine insurance may be either *total* or *partial*; they are *total* when the subject-matter of the insurance is wholly destroyed, or injured to such an extent as to justify the owner in abandoning to the insuring underwriter; and *partial* when the subject-matter insured is only partially damaged, or when (in the case of an insurance on goods) the owner of them is called upon to contribute to a general average. Total losses are either *actual*, e.g., when the subject-matter is totally annihilated in fact, or *constructive*, e.g., when the subject-matter is either actually lost to the *assurées*, or is beneficially lost to them, or notice of abandonment has been given to the underwriters. (Maude and Pollock's *Merchant Shipping*, 3rd ed. p. 402.)

PARTICULAR ESTATE. A limited interest in lands or tenements, as distinguished from the absolute fee simple therein, is usually so termed; and he who holds or enjoys such a limited interest therein is thence sometimes called the particular tenant. Thus, if A. has the absolute fee simple in certain lands, and he demises them to B. for a term of seven years, or life, the legal interest which B. would thus acquire therein would be called the particular estate with reference to A.'s estate in fee simple; i.e., it would be a particle or portion carved out of A.'s fee simple.

See titles **REMAINDER**; **REVERSION**.

PARTICULARITY. Is a defect in pleading, and consists either in pleading details where general allegations would suffice, or in pleading details in excess of what is sufficient where some amount of detailed allegation is required.

PARTICULARITY IN TORTS. It is commonly alleged that privity is not ne-

PARTICULARITY IN TORTS—*contd.*

cessary in torts as it is in contracts; and therefore that a master may sue for an injury done to his servant, although not on a contract made with the servant. But if privity is not necessary in torts, some degree of *particularity* is undoubtedly required in order to support an action (*Langridge v. Levy*, 2 M. & W. 519; 4 M. & W. 337; *George v. Skivington*, L. R. 5 Exch. 1). And so in all cases of fraud producing damage the fraud must be directed against the party damaged thereby; and if a fraud is intended upon A., and the damage is sustained by B. (who was never in the contemplation of the intending fraudulent person), B. has no action for such fraud as for a tort committed upon him by such fraudulent person (*Dashwood v. Jermyn*, 12 Ch. Div. 776).

See titles **FRAUD**; **PRIVITY OF CONTRACT**.

PARTICULARS OF DEMAND: See title **BILL OF PARTICULARS**.

PARTICULARS OF INFRINGEMENT. By the Patent Law Amendment Act, 1852, s. 41, the plaintiff in an action for the infringement of letters patent is required to deliver particulars of the breaches complained of in the action; and no evidence is allowable at the trial in support of any alleged infringement not contained in these particulars. Any order issuing out of the Chancery Division for the trial of issues of infringement, always provides for the delivery of such particulars by the plaintiff. And further or better particulars may be required, in case those first furnished are insufficient.

See title **PARTICULARS OF OBJECTIONS**.

PARTICULARS OF OBJECTIONS: See title **NOTICE OF OBJECTIONS TO PATENT**.

PARTICULARS OF SALE. A description of the property sold, when land or goods are sold by auction.

See title **CONDITIONS OF SALE**.

PARTIES TO ACTION. The plaintiff may join as defendants to his action all or any of the persons severally or jointly and severally liable on any one contract (Order xvi., 5); also, all or any of the persons some or one of whom he believes (but is uncertain which) is or are liable, whether on contract or in tort (Order xvi., 6). Also, all persons may be joined as plaintiffs, in whom, whether jointly, severally, or alternatively, the right to the relief claimed is alleged to exist (Order xvi., 1). The defects of non-joinder and of misjoinder will also usually be remedied upon terms (see titles **MISJOINDER**; **NON-JOINDER**). An unknown heir-at-law or unascertained next of kin may be repre-

PARTIES TO ACTION—continued.

sented in any action involving a question of construction (Order xvi., 9a) by a nominee-defendant; also, trustees and executors represent their respective beneficiaries (Order xvi., 7); also, one or more persons out of a numerous class having the same or the like interests, may represent the entire class (Order xvi., 9); also, in an administration action, one beneficiary may represent the others of like character (Order xvi., 11).

See titles COUNTER-CLAIM; THIRD PARTY NOTICE.

PARTIES, or PRIVIES. "Parties" to a deed or contract are those with whom the deed or contract is actually made or entered into. By the term "privies," as applied to contracts, is frequently meant those between whom the contract is mutually binding, although both are not literally parties to such contract. Thus, in the case of a lease, the lessor and lessee are both parties and privies, the contract being literally made between the two, and also being mutually binding; but if the lessee assign his interest to a third party, then a privity arises between the assignee and the original lessor, although such assignee is not at all a party to the original lease.

See title PRIVIES.

PARTITION. The dividing of lands held by joint tenants, coparceners, or tenants in common, into distinct portions, so that they may hold them in severalty; and the instrument by which this partition or division is effected is called a deed of partition (4 Cruise, 83). A partition is usually effected by action in the Chancery Division, after the decree in which the parties execute to each other the requisite mutual conveyances of each other's shares. But if the parties can agree among themselves to make a partition, there is no occasion to resort to the Court at all. Since the Partition Act, 1868 (31 & 32 Vict. c. 40), as amended by the Partition Act, 1876 (39 & 40 Vict. c. 17), the Court may in certain cases specified in the Acts decree a sale in lieu of a partition.

See title CONVEYANCES, sub-title *Partition*.

PARTNERS, VARIETIES OF. Partners may be either actually and openly members of a firm; or they may be *dormant* (i.e., undisclosed) partners; or, without being partners in fact, they may be either (1.) *ostensible* partners, and as such liable to a certain limited extent, although not entitled to any profits of the partnership; or (2.) *nominal* partners, from the continued use of their name in the style or

PARTNERS, VARIETIES OF—contd.

firm of the partnership, but they are not liable to any extent for such use of their name, unless guilty of fraud or negligence.

PARTNERSHIP. This is a voluntary contract, whereby two or more persons agree to put their money or labour, or both together in some lawful business, and to divide the profits arising from the business. No third party can be introduced into the partnership without the consent of all; but he may be taken as a sub-partner of one or more of the partners (*Ex parte Barrow*, 2 Rose, 255). Upon the death of a partner, he may not by his will introduce a successor to his share (*Pearce v. Chamberlain*, 2 Ves. 33), unless the partnership agreement authorizes him to do so (*Stuart v. Bute (Earl)*, 3 Ves. 212; 11 Ves. 657).

In the absence of stipulation, *the shares of the partners*, both in the capital and in the profits, are presumed to be equal, and the losses to be similarly divisible (*Peacock v. Peacock*, 16 Ves. 49); but the presumption is rebuttable (*Stewart v. Forbes*, 1 Mac. & G. 137). A partner is not entitled to interest on the capital which he brings in (*Hill v. King*, 1 N. R. (L. C.) 161), but he is entitled to interest on advances made in excess of his share of capital (*Ex parte Chippendale*, 4 De G. M. & G. 36), five per cent. being the customary rate (*Ex parte Bignold*, 22 Beav. 167).

The true criterion of a partnership is, that each member of it stands in the relation of a principal to the other members, who in that regard are his agents (*Coz v. Hickman*, 8 H. C. 268); consequently a person may share profits without being a partner, as well by the Common Law, as under the Act 28 & 29 Vict. c. 86, and may in that manner escape all liability for losses. On the other hand, a person who is not a partner may, by holding himself out as one, become liable for losses, although not entitled to share in profits (*Ex parte Watson*, 19 Ves. 461); but merely continuing the name of a deceased partner in the style, does not charge the executor with liability on contracts made since the death of his testator by the surviving partners (*Devaynes v. Noble (Houlton's Case)*, 1 Mer. 616).

The liability of a partner extends to all acts of his co-partners reasonably within the scope of the partnership business (*Sandilands v. Marsh*, 2 B. & Ald. 672), although beyond the agreed powers of the co-partners (*Hawken v. Bourne*, 8 M. & W. 710); and such liability commences with the *de facto* commencement of the partnership, notwithstanding the partnership articles may not be signed till afterwards

PARTNERSHIP—continued.

(*Buttley v. Lewis*, 1 Man. & G. 155), but it does not commence sooner as to third parties, notwithstanding by special agreement it commences sooner as between the co-partners (*Vere v. Ashby*, 10 B. & C. 288). However, no contract of one or more partners will bind the other or others if it be in a matter wholly unconnected with the partnership (*Ex parte Agace*, 2 Cox, 312); and no partner can bind the partnership by executing a deed (*Harrison v. Jackson*, 7 T. R. 207), unless he have been authorized by deed to execute it (*Horsley v. Rush*, 7 T. R. 209), or unless the deed be one of release as distinguished from one of grant (*Aspinall v. London and North-Western Ry. Co.*, 11 Hare, 325), the transaction being, of course, one within the scope of the partnership (*Ex parte Bosanquet*, 1 De G. 432). Also, ordinarily, one partner cannot bind the firm by a guarantee for collateral purposes (*Brettel v. Williams*, 4 Ex. 623), unless the other partners are proved to have sanctioned it (*Sandilands v. Marsh*, 2 B. & Ald. 672); also, one partner's part payment of the principal or interest of a debt does not save the Statute of Limitations, as against the other partners, M. L. A. Act, 1856 (19 & 20 Vict. c. 97), s. 14, altering the former law (*Whitcomb v. Whiting*, Doug. 651); also, one partner cannot bind the firm by a submission to arbitration (*Stead v. Salt*, 10 Moo. 389). Neither can a partner in a non-mercantile firm ordinarily draw or accept bills or notes, or give a receipt for money so as to bind the firm (*Harman v. Johnson*, 2 El. & Bl. 61; *Dickinson v. Vulpy*, 10 B. & C. 128); and a partner in a mercantile firm even cannot borrow money for the purpose of increasing the fixed capital of the firm (*Fisher v. Tayler*, 2 Hare, 218). And with reference to the duration of the liability of partners, the liability of a retiring or deceased partner ceases with the cessation of the partnership as to him, provided notice by circular letter and in the *Gazette* has been given (*Kirwan v. Kirwan*, 2 C. & M. 617; *Newsome v. Coles*, 2 Camp. 617), but only as to contracts subsequent to the date of his interest ceasing (*Wood v. Braddick*, 1 Taunt. 104; *Pinder v. Wilks*, 5 Taunt. 612); a dormant partner does not require to give such notice, excepting to the customers who knew his connection with the firm (*Evans v. Drummond*, 4 Esp. 89). And it is competent for the creditors (although not also for the continuing partners, unless with the consent of the creditors) to accept the liability of the continuing partner and to discharge the ceasing partner (*Lyth v. Ault*, 7 Ex. 669, overruling *Lodge v. Dicus*, 3 B. & Ald. 611).

PARTNERSHIP—continued.

Partnerships are usually carried on under *agreements in writing* (whether under hand and seal or under hand only), but a mere parol agreement suffices, and may even be substituted at any time for the written one (*England v. Curling*, 8 Beav. 129); and where a partnership is continued after the term specified in the writing, it is a partnership at will upon the old footing, so far as applicable (*Clark v. Leach*, 1 De G. J. & S. 490); and the same is the case when a new partner is taken in without any fresh writing (*Austen v. Boys*, 24 Beav. 598).

One partner could not sue another at Law in respect of a partnership matter, and therefore could not have any account there (*Bovill v. Hammond*, 6 B. & C. 149), unless upon a special covenant for breach thereof (*Brown v. Tapscott*, 6 M. & W. 119), or for a balance of account upon an implied promise to pay (*Wray v. Milestone*, 5 M. & W. 21). But even at Law, one partner might sue another for a matter *dehors* the partnership (*French v. Styring*, 2 C. B. (N.S.) 357), for example, for money advanced or work done before the partnership, although towards the formation of the partnership (*Venning v. Leckie*, 13 East, 7). But in Equity (and therefore now at Law also under the equitable jurisdiction), the partner has the following remedies against his co-partner:—

I. Specific performance,—

- (a.) Of contract for partnership for a specified term of years, when there have been acts of part performance (*Scott v. Rayment*, L. R. 7 Eq. 112); but not usually—
- (b.) Of agreement for reference (*Street v. Rigby*, 6 Ves. 818), unless the submission is in writing and may be made a rule of Court.

II. Injunction,—

- (a.) Against wilfully excluding a co-partner's name from the style, contrary to agreement (*Marshall v. Colman*, 2 Jac. & W. 266);
- (b.) Against one partner engaging in another business, contrary to agreement (*Somerville v. Mackay*, 16 Ves. 382);
- (c.) Against wilfully excluding a co-partner from the exercise of his rights as such (*Dietrichsen v. Cabburn*, 2 Ph. 59);
- (d.) Against a sudden dissolution working irreparable damage (1 Lindl. Partnership, 232, 3rd ed.).

III. Decree for dissolution, including the taking of accounts and the

PARTNERSHIP—continued.

appointment of a receiver, with a view to the dissolution,—

- (a.) Where the co-partnership originated in fraud (*Rawlins v. Wickham*, 1 Giff. 355);
- (b.) Where a co-partner is guilty of gross misconduct in partnership matters (*Smith v. Jeyes*, 4 Beav. 503);
- (c.) Where a co-partner is continually breaking the partnership agreement (*Waters v. Taylor*, 2 V. & B. 299);
- (d.) Where the incompatibility of tempers is extreme (*Baxter v. West*, 1 Dr. & Sm. 173);
- (e.) Where a co-partner whose personal skill was indispensable to the partnership becomes insane (*Jones v. Noy*, 2 My. & K. 125).

IV. Receiver,—towards dissolution (*Hall v. Hall*, 3 Mac. & G. 79).

V. Accounts,—without dissolution;

- (a.) Where a partner has been excluded; and
- (b.) Where the partner complaining would be entitled to ask for a dissolution (*Fairthorne v. Weston*, 3 Hare, 387).

VI. Discovery,—in aid of an action at Law, and even of a compulsory reference to arbitration (*British E. I. Co. v. Somes*, 5 W. R. 813).

Moreover, the jurisdiction in Equity was, in general, much more available, and also more advantageous than that at Law, as will be seen from the following instances:—

- (1.) Upon the decease of a co-partner the creditors could only proceed at Law against the survivors, but in Equity they might proceed against the estate of the deceased (*Vulliamy v. Noble*, 3 Mer. 593);
- (2.) In the case of two firms having a common partner, neither firm could sue the other at Law, (*Bosanquet v. Wray*, 6 Taunt. 597), but in Equity each might sue the other (*Mainwaring v. Newman*, 2 B. & P. 120);
- (3.) In the case of a co-partner purchasing a share in the partnership, he could not at Law sue his co-partners to recover it, but in Equity he might (*Wright v. Hunter*, 5 Ves. 792);
- (4.) The lands of a co-partnership were at Law liable only as lands, but in Equity they were liable as personal estate (*Baring v. Noble*, 2 Ry. & M. 495); and
- (5.) Generally, a co-partner could not

PARTNERSHIP—continued.

obtain either specific performance, an injunction, a decree for dissolution, the appointment of a receiver, or an order to account at Law, although he might (as above mentioned) have all these in Equity.

A partnership depending for its commencement upon the consent of the partners, depends upon the same consent for its continuance; and therefore the dissolution of a partnership may be brought about by any sufficient dissent of the partners to its continuance,—namely, in the following variety of ways:—

I. Dissolution by act of the partners themselves,—

- (1.) Consent of all to dissolve (*Hall v. Hall*, 12 Beav. 414);
- (2.) Dissent of one, where partnership is at will (*Master v. Kirton*, 3 Ves. 74; *Chavany v. Van Sommer*, 3 Wood. Lect. 416, n.);
- (3.) Efflux of term of co-partnership (*Featherstonhaugh v. Fenwick*, 17 Ves. 278).

II. Dissolution by operation of law,—

- (1.) By conviction of a partner for felony;
- (2.) By the marriage of a partner, being a female (*Nerot v. Burmand*, 4 Russ. 247);
- (3.) By one partner's general assignment (*Heath v. Sanson*, 4 B. & Ad. 172);
- (4.) By execution creditor of a partner seizing his share or part thereof (*Fox v. Hanbury*, Cowp. 445);
- (5.) By bankruptcy of a partner (*Crawshay v. Collins*, 15 Ves. 218), the dissolution taking effect upon adjudication, but dating backwards to act of bankruptcy (*Dutton v. Morrison*, 17 Ves. 193);
- (6.) By hostilities between two countries of co-partners, where they are foreigners to each other (*Griswold v. Waddington*, 16 Johns. (Am.) 438);
- (7.) By death of a partner (*Gillespie v. Hamilton*, 3 Madd. 254);

III. Dissolution by decree of Court of Equity, for the reasons enumerated above.

Immediately upon a dissolution being made, the power of the partners, either together or individually, to enter into any new engagement ceases (*Ex parte Williams*, 11 Ves. 5); nevertheless each partner may actively assist in the winding-up of the business, and therefore may give a valid receipt for any debt of the partnership received by him (*Fox v. Hanbury*, Cowp.

PARTNERSHIP—continued.

445), and may even compound debts provided the composition be fair and honourable (*Beak v. Beak*, Ca. t. Finch. 190). And in case of a dissolution by death or bankruptcy, the surviving or solvent partners cannot insist upon taking the partnership effects at a valuation (*Cook v. Collingridge*, Jac. 607), but all the property of the firm as well real as personal must be sold (*Crawshaw v. Maule*, 1 Sw. 495), although at the sale the partners may bid (*Chambers v. Howell*, 11 Beav. 6), having first obtained the leave of the Court, where the sale is by direction of the Court (*Rowland v. Evans*, 30 Beav. 302).

The creditors of the partnership, not being execution creditors, have no direct lien on the partnership effects, but have an indirect lien through the direct lien of the partners themselves thereon (*Ex parte Ruffin*, 6 Ves. 119); consequently the partnership (or, as they are called, joint) creditors have the first claim on the partnership (i.e., joint) property for the payment of their debts, the partners themselves having that right, in exoneration *pro tem.* or *pro tanto* of their respective private (i.e., separate) estates, and on the other hand the separate creditors of each partner have the first claim on the separate estate of that partner; then, if the partnership is solvent and the individual partners also solvent, there is an end of the rights of creditors, their debts being paid. But if, on the one hand, the partnership is insolvent, the joint creditors may thereafter come down on the respective separate estates of the individual partners whether living or dead; and if, on the other hand, any one or more of the individual partners are insolvent, his or their respective separate creditors may thereafter come down upon the partnership estate to the extent of his or their respective shares therein; and it makes no difference whether the estate is administered out of Court or in Court, and if in Court whether in a Court of Equity or in a Court of Bankruptcy (*Ridgway v. Clare*, 19 Beav. 111). But although the order above described is the natural order of payment, yet any joint creditor may in the absence of a bankruptcy proceed in the first instance against the separate estate, and any separate creditor against the joint estate, occasioning a certain amount of disorder thereby, which disorder, however, is afterwards removed in the general settlement of the accounts (*Wilkinson v. Henderson*, 1 My. & K. 582), the principle of settlement being the principle of marshalling derived from the natural order of payment mentioned above, and the whole doctrine resting upon the principle of Equity, that every partnership debt is not

PARTNERSHIP—continued.

only a joint but also a several debt (*Burn v. Burn*, 3 Ves. 573), unless it be the result of some arbitrary joint convention of the partners (*Sumner v. Powell*, 2 Mer. 30).

By the Bankruptcy Act, 1869, s. 37, if any bankrupt is at the date of the order of adjudication liable in respect of distinct contracts as member of two or more distinct firms, or as a sole contractor and also as member of a firm, the circumstance that such firms are in whole or part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of such contracts against the properties respectively liable upon such contracts; and by the Rules in Bankruptcy made in pursuance of the Bankruptcy Act, 1869, G. R. 76, any separate creditor of any bankrupt is at liberty to prove his debt under any adjudication of bankruptcy made against such bankrupt jointly with any other person or persons; and under every such adjudication distinct accounts are to be kept of the joint estate and also of the separate estate or estates of each bankrupt, and the separate estate is to be applied in the first place in the satisfaction of the debts of the separate creditors; and in case there is an overplus of the separate estate, such overplus is to be carried to the account of the joint estate. And in case there is an overplus of the joint estate, such overplus is to be carried to the accounts of the separate estates of each bankrupt in proportion to the right and interest of each bankrupt in the joint estate.

But where a retiring partner, upon the dissolution of a partnership, assigns all his interest in the partnership property to the remaining partner, and the assignment is *bonâ fide*, that assignment converts the joint property of the partnership into the separate property of the remaining partner, so as that so much of the then partnership property as remains in specie upon the subsequent bankruptcy of the surviving partner vests in the trustee in bankruptcy of the latter as his separate estate, and is liable accordingly (*Ex parte Ruffin*, 6 Ves. 119). But the assignment must be complete (*Ex parte Williams*, 11 Ves. 3), for if anything remains still to be done to render it complete, the conversion of joint into separate property does not take effect (*Ex parte Wheeler* (Buck. 25); moreover, the property must not be suffered to remain in the order and disposition of the old partnership (*Ex parte Burton*, 1 Glyn & J. 207). The effect of the conversion is of course to give the separate creditors a claim upon the property (*Ex parte Freeman*, Buck. 473); it does not deprive the joint creditors of their right to be paid also (*Ex parte*

PARTNERSHIP—*continued.*

Peake, 1 Madd. 358). Moreover, the assignment requiring to be *bonâ fide*, the insolvency of the partners, either collectively or individually, at the date of the assignment would render it fraudulent (*Ex parte Mayen, In re Edwards, Woods & Greenwood*, 34 L. J. (Bkcy.) 25), unless the *bona fides* of it is otherwise proved (*Ex parte Peake, In re Lightoller*, 1 Madd. 346).

PART-OWNERSHIP. Must always be distinguished from partnership, the distinction being fertile in consequences. For example, the real estate of partners is treated as personal estate, and is distributable accordingly; but the real estate of part-owners continues real estate, and is descendible accordingly. Also, one co-owner is not of necessity the agent of the other or others, whereas a partner necessarily is (1 Lindl. on Partnership, 3rd ed. p. 59).

PART-PAYMENT. Where portion of a debt (not already barred by statute) is paid, that revives the whole debt, and the Statute of Limitations begins to run afresh as regards the residue of the debt from the date of such part-payment; but not, *quære*, if the debt is already barred at the date of such part-payment (*Nash v. Hodgson*, 5 De G. M. & G. 474). Part-payment by one co-contractor (i.e. co-debtor) does not revive the statute as against the others (19 & 20 Vict. c. 97, amending the law as laid down in *Whitcombe v. Whiting*, Doug. 652).

PART-PERFORMANCE: See title SPECIFIC PERFORMANCE.

PARTY, GOVERNMENT BY: See titles TOBY and WHIG.

PARTY AND PARTY, BETWEEN: See titles COSTS; TAXATION OF COSTS.

PARTY-WALL. Is a partition wall; i.e., a wall dividing two messuages. An ancient party-wall, the origin of which is unknown, is presumed to belong (together with the land on which it stands) to the owners of the two adjoining messuages in equal moieties as tenants in common (*Cubitt v. Porter*, 8 B. & C. 257); but where a party-wall is known to have been built at the joint expense of the adjoining owners, and it stands half on the land of each, it belongs (one half of it) in several ownerships to each, and constitutes in fact two distinct walls (*Murley v. McDermott*, 8 A. & E. 135, 143). A party-wall may not be dangerously undermined (4 M. & G. 714).

See titles FENCES AND DITCHES; REPAIRS. Peculiar provisions exist under statute regarding party-walls within the metropolis (18 & 19 Vict. c. 122).

See title METROPOLITAN BUILDINGS.

PASS, TO. To be transferred, to be conveyed, e.g., by a conveyance of a house do the fixtures pass? i.e., do they go, or are they conveyed as part and parcel of the house? Again, does the fee pass under the word "estate"? i.e., does the fee simple in land become transferred under the term "estate"?

PASSAGE, COURT OF. Is an inferior Court, for the Borough of Liverpool, held before the mayor and bailiffs or one of them, in the presence and with the assistance either of the permanent assessor (a barrister-at-law of seven years' standing) or of the recorder of the borough. Its jurisdiction (which is, roughly speaking, that of a county court for the borough) is defined by the stat. 4 & 5 Will. 4, c. xcii.; and it has received a limited admiralty jurisdiction under the stats. 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51.

PASSING ACCOUNTS. When an auditor appointed to examine into any accounts certifies to their correctness, he is said to "pass" them; i.e., they pass through the examination without being detained or sent back for inaccuracy or imperfection. And the accounting party himself is also said to pass his accounts when he obtains the Court's approval of them.

See title RECEIVER.

PASSING RECORD. When the proceedings were entered upon the *nisi prius* record, it used to be taken to the master's office and there examined by the proper officer, who then signed it; and the record was then said to be "passed." But by the C. L. P. Act, 1852, s. 102, the record of *nisi prius* is not to be sealed or passed, but is to be delivered to the proper officer of the Court in which the cause is to be tried, to be by him entered and to remain until disposed of.

See title TRIAL, ENTRY FOR.

PASSENGER ACTS. Are the Acts (chiefly the Passenger Act, 1855 (18 & 19 Vict. c. 119), amended by the Acts of 1863, 1870, and 1872), regulating the carriage of passengers by sea, and providing for their safety and comfort. They impose upon shipowners and captains numerous duties that are unknown to the Common Law.

PASSENGERS, CARRIAGE OF. Unless where any particular passenger travels with a free pass or otherwise "at his own risk" (*McCawley v. Furness Ry. Co.*, L. R. 8 Q. B. 57), the carrier (whether person or company) is liable for negligence or unskilfulness producing damage or (under Lord Campbell's Act) death (*Crofts v. Waterhouse*, 3 Bing. 319); but the contributory negligence or unskilfulness of the passengers may relieve the carrier (*Martin*

PASSENGERS, CARRIAGE OF—*contd.*

v. Great Northern Ry. Co., 16 C. B. 179). As regards the luggage of passengers (being articles properly so called, and not including merchandise), it appears that the carrier is in the general case liable for its safe delivery on the platform of arrival (*Richards v. London, Brighton, and South Coast Ry. Co.*, 7 C. B. 839), and in certain cases even for its safe transfer to the agent of the passenger at the station or point of arrival (*Willoughby v. Horridge*, 12 C. B. 742); and conditions of an unreasonable character exempting the company from liability for the loss or damage of luggage are void (*Cohen v. South Eastern Ry. Co.*, 1 Exch. Div. 217; 2 Exch. Div. 253), excepting as regards the carriage thereof on railways not belonging to the company (*Zuns v. South Eastern Ry. Co.*, L. R. 4 Q. B. 539); and see *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470). But the passenger must travel with his luggage (*Becher v. Great Eastern Ry. Co.*, L. R. 5 Q. B. 241), and must not take it (excepting at his own risk) into the carriage with him (*Talley v. Great Western Ry. Co.*, L. R. 6 C. P. 44).

PASSENGER'S LUGGAGE: See title PASSENGERS, CARRIAGE OF.

PAST MEMBERS, LIABILITY OF: See title CONTRIBUTORIES.

PASTURE, COMMON OF. Is of four kinds, viz., (1.) Appendant; (2.) Appurtenant; (3.) *Pur Cause de Vicinage*; and (4.) *In gross*. (1.) Common of pasture *appendant* arose at first of necessity, and therefore was limited to such cattle as were necessary or useful in agriculture; consequently, it cannot be claimed for all kinds of beasts (Cro. Jac. 580). This common is *appendant* in general to arable land only, and not to a house, meadow, or pasture (1 Roll. Abr. 397 E. 28, 29). This common is either *sans nombre* or *stinted*, that is to say, it is *sans nombre*, when for all cattle *levant* and *couchant*; and it is *stinted*, when for a specified number, usually less than the cattle *levant* and *couchant*. (2.) Common of pasture *appurtenant* may arise at the present day, and may extend to all beasts, but of a limited number, although the limit is not necessarily or even usually that of cattle *levant* and *couchant*. (3.) Common *in gross* exists apart from any corporeal hereditament, and arises by grant only; it may be either for a specified number of cattle or *sans nombre*; but common *sans nombre* cannot be exercised to the detriment or exclusion of the other commoners. (4.) As regards common *pur cause de vicinage*, see title VICINAGE. There is a species of common called common of shack, e.g., in

PASTURE, COMMON OF—*continued.*

Norfolk, and arises in this way, viz., when fields of arable land belonging to different owners lie intermixed, the different owners turn in their cattle after the harvest to feed promiscuously, each owner excusing the others of their mutual trespasses. Shack is probably a corruption of the French word *chaque* (each). This common is limited by the principle of levancy and couchancy as regards each owner.

See title INCORPOREAL HEREDITAMENTS.

PATENT AMBIGUITY. This is an ambiguity which arises upon the words of the will, deed, or other instrument, as looked at in themselves, and before they are attempted to be applied to the object or to the subject which they describe. The term is opposed to the phrase Latent Ambiguity. The rule of law is, that extrinsic or parol evidence, although admissible in all cases to remove a latent ambiguity, is admissible in no case to remove a patent one.

See titles EXTRINSIC EVIDENCE; LATENT AMBIGUITY.

PATENTS. In consequence of the abuse of the prerogative in granting monopolies, the statute 21 Jac. 1, c. 3, was passed, which, after declaring that the letters patent theretofore granted were contrary to the laws of this realm, and therefore utterly void and of none effect, went on to provide and enact that any declaration in the Act before mentioned should not extend to any letters patent for the term of *fourteen years* or under theretofore made, or thereafter to be made, of the sole working or making of any manner of *new manufacture* within this realm to the *first and true inventor* or inventors of such manufactures, which others at the time of the granting of such letters patent did not use, so they be not contrary to the law nor mischievous to the state by raising of the prices of commodities at home, or hurt of trade, or generally inconvenient. Upon this statute, the whole patent law is to the present day substantially founded. The *first and true inventor* is the person who first seeks protection for an invention which has either originated with himself or has been obtained from a foreign country, the invention in the latter case not having been the subject of an expired foreign patent. A *new manufacture* may be either an entirely new article, or a better article, or a cheaper article to the public (*Crane v. Price*, 1 Webst. Pat. Ca. 408); and novelty in the combination of the parts will support a valid patent (*Brunton v. Hawkes*, 1 Carp. Rep. 410; *Harrison v. Anderston Foundry Co.*, 1 App. Ca. 574). It is competent upon petition to the Crown to

PATENTS—continued.

obtain an extension of patent right after the expiration of the fourteen years allowed by the statute of James for such further period as the Privy Council shall think it fit or proper for the due remuneration of the inventor. This extension is permitted under the statutes 5 & 6 Will. 4, c. 83, and the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83).

See titles NOTICE OF OBJECTIONS TO PATENT; PARTICULARS OF INFRINGEMENT; SPECIFICATION; &c.

PATER EST QUAM NUPTIÆ DEMONSTRANT. Means literally that he is the father whom the existing marriage indicates as such; and this maxim it is which prevents an apparent father from bastardizing the issue born under cover of his marriage. The evidence of access or of non-access between married people living together is excluded for public reasons of decency and morality (Roll. Abr. Bastard, B. ; Co. Litt. 244 a.) But the maxim does not exclude proof of non-access, where the husband is proved to have been absent from (and the wife present within) the four seas during the entire period of gestation (*Morris v. Davis*, 5 Cl. & F. 163; and see *Banbury Peerage Case*, 1 S. & S. 155; *Barony of Saye and Sele*, 1 H. L. C. 507).

See title NON-ACCESS.

PATRIA POTESTAS. Children born in lawful wedlock and also children adopted were, in Roman Law, within or under the *potestas* (i.e., power or control) of their father (*pater*); and as incident to such *potestas*, the father acquired all the property of his children, and had originally the power of life and death over their persons (*vix necisque potestatem*). But the power was greatly relaxed, both as regarded the child's property, and also (and principally) as regarded his person by the later Roman Law, and especially by the legislation of the Emperors.

See title PECULIUM.

PATRON. He who has the right, title, power, or privilege of presenting to an ecclesiastical benefice.

See title ADVOWSON.

PAUPER: See title POOR.

PAUPERIES. In Roman Law, was damage done by some domesticated animal during some sudden wilfulness, occasioned, e.g., by heat. The owner was liable.

See title NOXA.

PAUPERIS, FORMÂ: See title FORMÂ PAUPERIS.

PAWN: See titles PAWNBROKERS; PLEDGE.

PAWNBROKERS. Are a species of paid bailees, and their liabilities in respect of negligence are determined accordingly. If left to the Common Law, the rights of pawnbrokers would be the rights of ordinary pawnees or pledgees; but owing to certain abuses to which the trade of pawnbroking is exposed, the Legislature has thought fit to control it by statutory provision. The principal Acts upon the subject in force until recently were the 39 & 40 Geo. 3, c. 99, and 23 & 24 Vict. c. 21; but both these statutes, together with many minor ones, have been repealed, and the whole law of pawnbrokers has been consolidated by the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93). That Act divides loans into two classes:—

(1.) Loans above 10s. and not above 40s., on which class of loans a charge of one penny is allowed for the ticket, and one halfpenny per two shillings per calendar month by way of profit, all fractions of two shillings or calendar months (unless under a fortnight) being chargeable at the same rate; and

(2.) Loans above 40s. and not above £10, on which class of loans a charge of one penny is allowed for the ticket, and one halfpenny per half-crown per calendar month by way of profit, all fractions of half-crowns or calendar months being chargeable at the same rate.

The statute (s. 16) directs that every pledge shall be redeemable within twelve months from the day of pawning, exclusive of that day, with seven days of grace. And by s. 17, a pledge pawned for 10s. or under, if not redeemed within that time becomes the absolute property of the pawnbroker; but by s. 18, a pledge for above 10s. continues redeemable beyond that time until the actual sale thereof. The sale shall be only by public auction (s. 19), and the pawnbroker is to account for the surplus (if any), allowing for costs of sale and set-off. The Act does not prohibit special contracts between the pawnbroker and his customer (s. 24). Upon production of the ticket and payment of all sums owing on the pledge within the period for redemption, the pawnbroker is bound to deliver up the same; and by s. 27, he is made liable for all damage or destruction occasioned by fire. Section 29 makes provisions for cases in which the ticket has been lost (*Singer Manufacturing Company v. Clark*, 5 Exch. Div. 31).

By the Common Law (*Morley v. Attenborough*, 3 Ex. 500), a pawnbroker could not retain goods illegally pawned, e.g., stolen goods, nor could the purchaser from him retain same, as against the true owner: but under s. 30 of the Act of 1872, upon conviction of the thief, the Court may (in

PAWNBROKERS—continued.

its discretion) either allow the pawnbroker to retain the goods as a security for the money advanced or order the restitution thereof to the true owner.

See title **PLEDGE**.

PAYEE. Is the person to whom payment has been, or is to be, made. For example, in the case of a bill of exchange or a promissory note, the person in whose favour the order or promise contained in the instrument is expressed to be made, is the payee thereof.

See title **BILL OF EXCHANGE**.

PAYMASTER GENERAL. Is an officer of the government, the first appointment of whom it is difficult to specify, but his duties have been from time to time defined and extended by various statutes, principally 57 Geo. 3, c. 41 (as to militia payments), 5 & 6 Will. 4, c. 35 (as to ordnance, navy, &c., payments), 11 & 12 Vict. c. 55 (as to civil service payments, &c.), and 35 & 36 Vict. c. 44 (as to accounts of Accountant-General of the Court of Chancery), these several statutes having transferred to the Paymaster General the duties of the several particular offices and officers specified therein.

PAYMENT. This is the normal mode of discharging any obligation. In the case of several distinct debts owing between the same creditor and debtor, if the debtor makes a general payment, the doctrine of the **APPROPRIATION OF PAYMENTS** is called into activity (see that title).

PAYMENT OF MONEY INTO COURT. When the defendant, in an action brought for a given sum, admits either the whole or a part of the plaintiff's claim, he often, with the view of preventing the plaintiff from further maintaining his action, pleads what is termed a "plea of payment into Court," by which he alleges that he brings a sum of money into Court ready to be paid to the plaintiff if he will accept the same, and that the plaintiff has no claim to a larger amount; and this plea is accompanied by an actual payment of the specified sum into the hands of the proper officer of the Court, where the plaintiff, or usually his attorney, may, upon application, obtain it. Should the plaintiff, after this, proceed with the action, he does so at the peril of being defeated, and having the costs to pay, unless he should, upon the trial, prove that a further sum still remains due to him from the defendant. By the C. L. P. Act, 1852 (15 & 16 Vict. c. 76), s. 70, in extension of a similar provision contained in the 3 & 4 Will. 4, c. 42, s. 21, it was lawful for the defendant in all actions (except actions for assault and battery,

PAYMENT OF MONEY INTO COURT—continued.

false imprisonment, libel, slander, malicious arrest or prosecution [criminal conversation], or debauching of the plaintiff's daughter or servant), and, by leave of the Court or a judge, upon such terms as seemed fit, for one or more of several defendants, to pay into the Court a sum of money by way of compensation or amends. Such payment into Court admitted the plaintiff's ground of action, and the plaintiff was entitled to have the money in any event; but, *semble*, the Court might control or direct the application of the money (*Carr v. Royal Exchange Insurance Company*, 34 L. J. (Q. B.) 31). Under the present practice, if the payment into Court is made before the defendant delivers his statement of defence he is to notify the fact of payment to the plaintiff, but otherwise he is to plead same in his statement of defence (Order xxx. 1, 2); and the defendant may, along with the plea of payment into Court, plead (without any leave so to do) pleas of an independent and *prima facie* inconsistent character (*Burdon v. Greenwood*, 3 Exch. Div. 251).

PEACE, ARTICLES OF THE. Where a person says that his life is endangered through the hostility of some one, he may exhibit articles of the peace (being a formal statement of the danger) to the Court or a magistrate, who will thereupon require the party informed against to give security to keep the peace. But the Court must satisfy itself that there is on the face of the articles a reasonable ground of fear. The articles are put in upon oath, and the defendant cannot controvert the allegations contained therein, even by affidavit (*Rex v. Doherty*, 13 East, 171).

See title **SUPPLICAVIT, WRIT OF**.

PEACE, BILL OF: See title **BILL OF PEACE**.

PEACE OF GOD AND THE CHURCH. Anciently meant to signify that rest and cessation which the king's subjects had from trouble and suit of law between the terms (Cowel).

PECULIAR, PARISH OR CHURCH. This was the phrase used to designate a particular parish or church that had jurisdiction within itself for granting probates of wills, &c., exempt from the Ordinary or Bishop's Courts. The *Court of Peculiars* was a Court annexed to the Court of Arches, and had jurisdiction over all those parishes dispersed through the province of Canterbury, in the midst of other dioceses, which were exempt from the ordinary jurisdiction and subject to the metropolitan only, in which Court all ecclesiastical causes arising within these peculiar or exempt jurisdictions were

PECULIAR, PARISH OR CHURCH—
continued.

originally cognizable (*Les Termes de la Ley*).

PECULIUM. In Roman Law, was the permissive property of slaves and of children in the *potestas* of their masters or fathers. The *peculium* of the slave was and continued to be his purely on sufferance of his master; but as regards the *peculium* of children, the following distinctions were taken, that is to say:— (1.) *Profectitium Peculium*, that arising from (*profectum*) the property of the father committed to the child for the purposes of trade, remained the father's in full *usufruct* and *dominium*; (2.) *Adventitium Peculium*, that accruing to the child from adventitious sources or from his own labour alone, belonged in *usufruct* only to the father, and belonged in *dominium* to the child; and (3.) *Castrense or Quasi Castrense Peculium*, that coming to the child as the reward of military services or of attendance at the palace, belonged to the child in full *usufruct* and *dominium* both, so that he could make a will of it; but as regarded this last mentioned *peculium*, the father (if he emancipated the child) became *ipso facto* entitled to the *usufruct* in one equal half part thereof, although otherwise the child's right thereto was not affected.

PECUNIÂ CONSTITUTÂ. In Roman Law, money owing (even upon a moral obligation) upon a day being fixed (*constituta*) for its payment, became recoverable upon the implied promise to pay on that day, in an action called *de pecuniâ constitutâ*,—the implied promise not amounting (of course) to a *stipulatio*.

See title STIPULATIO.

PECUNIÂ NON NUMERATÂ. In Roman Law, when a bond had been given for the repayment of money which at the time of giving the bond it was the intention of the obligor to borrow, and the obligee (although in possession of the bond) refused in fact to advance the money, then to an action on the bond, the defence might be pleaded that the money had never been in fact advanced (*exceptio de pecuniâ non numeratâ*); and the onus of disproving this defence was thrown on the plaintiff (the obligee) for two years after the date of giving the bond; but after that period, the onus of proving it was left with the defendant (the obligor), because (of course) he might have been active earlier to obtain the delivery up of the bond, upon the ground of the fraud that had been practised upon him.

PECUNIARY CAUSES. These were causes in the Spiritual Courts arising

PECUNIARY CAUSES—continued.

either from the withholding of ecclesiastical dues, or from the doing or neglecting some act relating to the church whereby some damage accrued to the plaintiff; for instance, the subtraction and withholding of tithes from the parson or vicar; the non-payment of ecclesiastical dues to the clergy, as pensions, mortuaries, compositions, and the like.

PECUNIARY LEGACIES: *See* title LEGACIES.

PEDANEI JUDICES: *See* title JUDICES PEDANEL.

PEDIGREE, PROOF OF. In actions of ejectment and some other actions, it is required to prove the heirship or other relationship of the claimant. This proof usually consists of certificates of births, baptisms, marriages, and deaths or burials, together with one or more affidavits of the identity of the parties whose names appear in the certificates. Failing such certificates or in aid of them, family reputation is admissible in evidence; and a paper writing in the handwriting of a deceased member of the family purporting to give a genealogical account of the family is admissible, although never made public by the writer, although erroneous in many particulars, and although professing to be founded partly on hearsay (*Monckton v. Attorney-General*, 2 Russ. & My. 147); but not if it is shewn to have been compiled from certificates (*Davies v. Lowndes*, 6 Man. & Gr. 471).

PEERAGE. The first order of nobility introduced into England after the Norman Conquest was that of *Baron by Tenure*, a dignity attached to the possession of certain lands held directly from the Crown, conditionally upon the performance of honorary services to the king, *e.g.*, the Earldom of Arundel (Duke of Norfolk) is enjoyed by virtue of the tenure of Arundel Castle. But Barons by tenure have practically ceased, and to them have succeeded successively *Barons by Writ* and *Barons by Letters Patent*,—the earliest instance of the creation of a Baron by writ being in 49 Hen. 3, and of a Baron by letters patent being in 1387.

See title BARONY.

PEERS. Those who are impanelled in an inquest upon any man for the convicting or clearing him of any offence for which he is called in question. The jury was so called from the Latin *pares*, *i.e.*, equals, because it is the custom of this country to try every man by his equals, that is to say, by his peers (*judicio parium suorum*). The word "peer" seems also not merely to have signified one of the same

PEERS—continued.

rank; but it was also used to signify the vassals or tenants of the same lord, who attended him in his Courts and adjudicated upon matters arising out of their lord's fees, and were thence called peers of fees (Cowel; *Les Termes de la Ley*). Whence also apparently the king's barons, who sit in the House of Lords, are called his *peers*, being (or having at any rate been) to some extent and for some purposes the equals of the sovereign.

See also titles **BARON**; **BARONY**; and **LORDS, HOUSE OF**; and next title.

PEERS, QUALITY OF SPIRITUAL.

For the general nature of *Barony*, in the case of the Temporal Peers or Lay Lords, as they may be called, see title **BARONY**. With reference to the *Spiritual Peers*, or Bishops, as they now are, their title of peerage seems to rest upon the following bases or basis:—

In early times the title of the prelates to sit in the House of Peers was cumulative, resting on one or more of the following grounds:—

- (1.) Their learning.
- (2.) The custom of Western Europe (inclusive of England) to admit the clergy to their supreme councils; and
- (3.) The tenure of lands by barony.

Probably, however, the third of these three grounds was the chiefest, as the absence of it is in some instances (*e.g.*, that of the Prior of St. James, at Northampton, in 12 Edw. 2, and that of the Abbot of Leicester in 25 Edw. 3) made a ground of exemption to the prelate from attendance in Parliament; it is certain, however, that the third ground was not a *sine quâ non* in the Spiritual Peerage, as many spiritual peers were in the House upon the grounds of their learning and of the custom of Europe alone, or upon one of such grounds; and that, or those, are the present titles of these spiritual peers to sit in the House of Lords.

To all intents and purposes the spiritual peers were (with one exception) upon a level with the temporal peers for the time being, but they must necessarily have been (in most if not all cases) life peers only. The one exception to this general equality consisted in the following peculiarity, namely, the spiritual had not (nor have they) the right of being present during the trial or (at any rate) upon the judgment (whether of condemnation or of acquittal) of a temporal peer, or of being themselves tried (like a temporal peer) by their peers. This point of inferiority, however, has never been assented to by the spiritual peers themselves; *e.g.*, in

PEERS, QUALITY OF SPIRITUAL—continued.

25 Edw. 3, upon the trial of a certain temporal peer, the spiritual peers, upon retiring, remonstrated that they had full right to remain; and again, *e.g.*, in 1357, the Bishop of Ely claimed to be tried by the Lords, but that claim was disallowed, and he went before a jury; and the same was the case with Bishop Fisher in the reign of Henry VIII., which latter case settled the law.

PENAL ACTIONS: See title **PENAL STATUTES**.

PENAL BILL. An instrument formerly in use by which a party bound himself to pay a certain sum or sums of money, or to do certain acts, or in default thereof to pay a certain specified sum by way of penalty, thence termed a penal sum. These instruments have been superseded by bonds in a penal sum with conditions.

See title **PENALTY OF A BOND**.

PENAL STATUTES. Statutes imposing certain penalties on the commission of certain offences; and actions brought for the recovery of such penalties are denominated penal actions. Inasmuch as a penal statute is, to the extent of the penalty, a money-bill, the Commons have exclusive privileges as regards their penal clauses.

See titles **MONEY-BILLS**; **QUI TAM ACTIONS**.

PENALTIES, RELIEF AGAINST.

Whenever a penalty or a forfeiture is inserted in any written instrument, merely to secure the performance of some act, Equity regards the performance of the act as the substantial and principal intent of the instrument, and accordingly relieves (in the general case) against the penalty or the forfeiture upon the substantial performance of the act, or upon the payment of adequate damages for its non-performance. This is the principle underlying the relief given in Equity from the penalty of a bond (see title **PENALTY OF A BOND**); and the same principle has been extended (at least in cases other than those arising upon leases between landlord and tenant) to forfeiture clauses also; and even in the case of leases, Equity will relieve from the forfeiture in a few limited cases, *e.g.*, from forfeiture for the unpunctual payment of rent, or for the technical non-repair (there being a substantial repair) of the premises, and (under statute) from breach of covenant to insure,—in each instance upon equitable terms (see Snell's Equity 5th ed., pp. 337–343).

PENALTY OF A BOND. The sum of money which the obligor of a bond undertakes to pay by way of penalty, in the event of his omitting to perform or carry

PENALTY OF A BOND—continued.

out the terms imposed upon him by the conditions of the bond; but the intention of the parties is that the obligor shall do the act, and not that he shall escape doing it upon paying the penalty (*Howard v. Hopkyns*, 2 Atk. 370). The distinction between a penalty and a sum payable as liquidated damages is this, that the penal sum is generally or always double the amount of the debt secured by the bond, whereas liquidated or ascertained damages, as the name indicates, are intended to denote, and usually denote, the exact amount of the debt. The Courts of Law and also of Equity relieve against penalties upon payment of the principal debt, and interest, and costs; nor will this right to relief be excluded by the parties merely designating that as liquidated damages which is in reality a penalty (*Kemble v. Farren*, 6 Bing. 141), unless where the damages are altogether unascertainable, otherwise than by the amount fixed by the instrument (*Atkyns v. Kinnier*, 1 Ex. 659).

PENALTY, QUESTIONS EXPOSING TO.

In cross-examination of witnesses, and also in involuntary depositions, these questions need not be answered, the privilege of witnesses extending to exempt them from answering such; *sed quære* (*Sidebottom v. Adkins*, 5 W. R. 743).

See title PRIVILEGE OF WITNESSES.

PENDENTE LITE. Pending the suit, whilst the suit is pending.

See title LIS PENDENS.

PENDING ACTION, PLEA OF. Where there is an action depending at the date of the commencement of a second action involving the same subject-matter, and the whole effect of the second action is attainable in the first action, this plea is usually a good defence (*Law v. Rigby*, 4 Bro. O. C. 60, 63). And it is not (in general) necessary to the sufficiency of this plea, that the first action should be between precisely the same parties as the second action, although the parties must of course be substantially the same (*Moor v. Welsh Copper Co.*, 1 Eq. Ca. Abr. 39, pl. 14).

PENETRATION. A term used in criminal law, and denoting (in cases of alleged rape) the insertion of the male part into the female parts to however slight an extent; and by which insertion the offence is complete, without proof of emission (*Arch. Crim. Practice*).

PENSION. That which in the Inner and the Middle Temple is called a parliament, and in Lincoln's Inn a council, is in Gray's Inn termed a pension; that is, an assembly of the members of the society to consult of their affairs.

PENSIONS AND OFFICES: See title OFFICES AND PENSIONS.

PENSION LIST. This is the list of persons receiving pensions from the royal bounty. It is limited to £1200 as the sum which is not to be exceeded in the creation of new pensions in any year.

See title CIVIL LIST, SETTLEMENT OF.

PEPPERCORN RENT. Where only a nominal rent is reserved, the reservation is confined to "one peppercorn."

PER AUTER VIE. For or during the life of another, for such a period as another person shall live.

See title PUR AUTRE VIE.

PER CAPITA, DISTRIBUTION: See title CAPITA, DISTRIBUTION PER.

PER CUI ET POST: See title ENTRY, WRIT OF.

PER CURIAM. A phrase occasionally used in the reports, and meaning that the presiding judge or judges spoke to this or that effect.

PER, IN THE: See title ENTRY, WRIT OF.

PER MY ET PER TOUT. This phrase is applied to joint tenants who are said to be seised *per my et per tout*; that is, by the half or moiety and by all; that is, they each have the entire possession as well of every parcel or piece of the land as of the whole considered in the aggregate. For one of them has not a seisin of one-half or moiety, and the other of the other half or moiety; nor can one be exclusively seised of one acre and his companion of another, but each has an undivided half or moiety of the whole, and not the whole of an undivided moiety.

PER QUÆ SERVITIA, WRIT OF. A judicial writ that issued upon the note of a fine; and which lay for the conusee of a manor or seignior to compel the tenant of the land at the time the fine was levied to attorn to him (*Les Termes de la Ley*).

See title ATTORNMENT.

PER QUOD. When an action is brought by a person for defamation of character, and the offensive words do not apparently and upon the face of them import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened; and this was called laying his action with a *per quod*: thus, if I say that such a clergyman is a bastard, he cannot for that bring any action against me, unless he can shew some special loss by it; but if he can shew such special damage,

PER QUOD—continued.

he may bring his action against me for saying he was a bastard, *per quod* he lost the presentation of such a living. In all actions for slander, other than for slander to a person in his or her profession, trade, or occupation, it is necessary to add this *per quod* clause in effect, although no longer in form, inasmuch as damage is an essential part of the ground of this action.

PER STIRPES, DISTRIBUTION: See title STIRPES.

PERAMBULATIONE FACIENDÂ, WRIT OF. A writ which lies where two lordships adjoin each other, and some encroachments are supposed to have been made, by which writ the parties consent to have their bounds severally determined. It is directed to the sheriff, commanding him to make perambulation and to set down their certain limits (F. N. B. 183).

See title RATIONABILIBUS DIVISIS, WRIT OF.

PEREMPTORY CHALLENGE. Is a privilege allowed to a prisoner in criminal cases, or at least in capital ones, *in favorem vite*, to challenge a certain number of jurors, *without shewing any cause for so doing*.

See title CHALLENGE OF JURORS.

PEREMPTORY MANDAMUS. When a mandamus has issued commanding a party either to do a certain thing or to signify some reason to the contrary, and the party to whom such writ is directed returns or signifies an insufficient reason, then there issues in the second place another mandamus, termed a peremptory mandamus, commanding the party to do the thing absolutely, and to which *no other return will be admitted but a certificate of perfect obedience and due execution of the writs*.

See title MANDAMUS.

PEREMPTORY PAPER. A list of the causes which were enlarged at the request of the parties, or which stood over from press of business in Court to a day which was specified in the paper, *and which day was peremptory*.

PEREMPTORY PLEAS. Pleas in bar were so termed in contradistinction to that class of pleas called dilatory pleas. Peremptory pleas were usually pleaded to the merits of the action with the view of raising a material issue between the parties; whilst dilatory pleas were generally pleaded with the view of retarding the plaintiff's proceedings, and not for the purpose of raising an issue upon which the parties might go to trial and settle the point in dispute. Peremptory pleas were called

PEREMPTORY PLEAS—continued.

also in bar, while dilatory pleas were said to be in *abatement* only.

See title ABATEMENT, PLEAS IN.

PEREMPTORY RULE TO DECLARE.

When the plaintiff in an action was not ready to declare within the time limited, and the defendant wished to compel the plaintiff to declare, he procured what was termed a peremptory rule to declare, which was in the nature of an order from the Court, compelling the plaintiff to declare *peremptorily under pain of judgment of non pros. being signed against him*. But by the O. L. P. Act, 1852, s. 53, rules to declare, or declare peremptorily, were abolished, and instead thereof a notice was to be given requiring the opposite party to declare, otherwise judgment; and under the present practice, the Court would make an order upon the plaintiff to deliver his statement of claim *peremptorily on a day specified*, otherwise judgment dismissing the action.

See title DISMISSAL OF ACTION.

PEREMPTORY WRIT. This was an original writ called from the words of the writ, a *si te fecerit securum*, and which directed the sheriff to cause the defendant to appear in Court *without any option given him*, provided the plaintiff gave the sheriff security effectually to prosecute his claim. The writ was very occasionally in use, and only where nothing was specifically demanded, but only a satisfaction in general; as in the case of writs of trespass on the case, wherein no debt or other specific thing was sued for, but only damages to be assessed by a jury (1 Arch. Pract. 205).

PERFECTING BAIL. Certain qualifications of a property character being required of persons who tender themselves as bail, when such persons have justified, *i.e.*, established their sufficiency by satisfying the Court that they possess the requisite qualifications, a rule of Court is made for their allowance, and the bail is then said to be perfected, *i.e.*, the process of giving bail is finished or completed.

See title JUSTIFYING BAIL.

PERFORMANCE. This, like payment, is the normal and natural mode of discharging an obligation. In Equity practice, it has acquired a somewhat extended and peculiar development. Thus, when a person covenants to do an act, and without making any express reference to the covenant, he does an act which may either wholly or partially be taken as or towards a performance of the covenant, Equity imputes to him the intention, *i.e.*, implies an intention on his part, to perform the covenant. Cases

PERFORMANCE—continued.

of performance in Equity fall under two divisions, viz. :—

- (1.) Covenants to purchase and settle lands, and lands are, in fact, purchased, but no settlement thereof is made (*Willcocks v. Willcocks*, 2 Vern. 558); and
- (2.) Covenants to leave personal property, and the covenantee in fact receives property left by reason of the covenantor's intestacy (*Blandy v. Widmore*, 1 P. Wms. 323).

The rules applicable to both these groups of cases are the same, viz. :—

(1.) When the lands purchased or personal property left by intestacy are of less value than the intention of the covenant, they go in part towards a performance (i.e., are a performance *pro tanto*) of the covenant (*Lechmere v. Carlisle (Earl)*, 3 P. Wms. 211); and

(2.) The omission of immaterial requisites to the due performance of the covenant will count for nothing, e.g., the omission or neglect to obtain the trustee's consent to the purchase, or to purchase the lands through the trustees as agents (*Sowden v. Sowden*, 1 Bro. C. C. 582); but

(3.) There is no performance in these cases if the covenant is broken in the lifetime of the covenantor (*Oliver v. Brickland*, 3 Atk. 420).

See title SATISFACTION IN EQUITY.

PERILS OF THE SEA. This phrase, as used in policies of marine insurance, does not apply to *all* perils which may happen on the sea, but to such of those accidents only as are caused by the violence of the wind or waves, by thunder and lightning, by driving against rocks, by the stranding of the ship, and the like. The phrase has been extended to include losses by pirates, by accidental collisions, by the swell of the tide in a dry harbour (*sed quære*), by the wilful but not barratrous act of the crew in throwing the ballast overboard, by a stranding rendered necessary by leakage produced by the careless loading of the cargo. The phrase does not extend to injuries done to the vessel while in a graving dock (*Maude and Pollock*, 261, 263).

PERIODICALS: See title NEWSPAPERS.

PERJURY is defined by Coke to be a crime committed when a lawful oath is administered in some judicial proceeding to a person who swears wilfully, absolutely, and falsely in a matter material to the issue or point in question. And under various modern statutes, offences against veracity of the like sort, although not on

PERJURY—continued.

oath, are rendered indictable and punishable as perjury, e.g., in the case of the declarations substituted for oaths. The Common Law penalty for perjury was fine and imprisonment at the discretion of the Court; the statute law penalty was under 2 Geo. 2, c. 25, s. 2, transportation or imprisonment with hard labour in the house of correction, for any term not exceeding seven years; and now penal servitude is, under 20 & 21 Vict. c. 3, and 27 and 28 Vict. c. 47, substituted for transportation, the term of seven years remaining unaltered. Two witnesses are required to ensure a conviction for perjury.

See title SUBORNATION OF PERJURY.

PERMISSIVE WASTE: See title WASTE.

PERMUTATIO. In Roman Law, is the innominate contract of Exchange or Barter. For want of a price in money, this contract could not be classified with *emptio venditio*, that is, sale proper, but it most nearly resembled that contract.

See title INNOMINATE CONTRACTS.

PERNANCY. Pernancy signifies taking, receiving, enjoying, &c. Thus, the pernancy of the profits of an estate means the receipt or enjoyment of the profits; and he who is so in the receipt of the profits is termed the pernor of the profits.

PERPETUAL CURATE. Under the statute 31 & 32 Vict. c. 117, the incumbent of the church of any parish or new parish, not being a rector, is to be designated a vicar, and his benefice a vicarage, if he is authorized to publish banns in the church and to solemnize marriages, churchings, and baptisms therein, and if he is entitled to the entire fees arising from the performance of such offices.

See titles RECTOR; VICAR.

PERPETUAL ENTAIL: See title ESTATE TAIL, PERPETUAL.

PERPETUATING TESTIMONY OF WITNESSES. When a party to a suit in Equity is desirous of preserving the evidence of witnesses concerning a matter which cannot be immediately investigated in a Court of Law, or when he is likely to be deprived of the evidence of material witnesses by their death or departure from the realm, it was usual to file a bill in Equity to perpetuate and preserve the testimony of such witnesses; and the Court then usually empowered certain persons to examine such witnesses, and to take their depositions. The evidence so taken was then available on any future trial, if the witness or witnesses should in the meantime have died, but not otherwise.

See title DE BENE ESSE.

PERPETUITY. Various attempts have from time to time been made to keep land in a certain line or family in perpetuity, but the law disliking a perpetuity has frustrated every such attempt. The most noteworthy attempts have been the following:—

- (1.) Restraints imposed upon tenants in tail to prevent them from suffering a common recovery or a fine,—an attempt which was frustrated in *Mildmay's Case* (6 Rep. 40);
- (2.) Successive life estates, with a proviso for the creation of an ever-fresh succession of them,—an attempt which was frustrated in *Marlborough (Duke) v. Godolphin* (1 Eden, 404); and
- (3.) The creation of executory interests under the Statutes of Uses and of Wills (27 Hen. 8, c. 10, and 32 Hen. 8, c. 1),—an attempt which was frustrated in *Cadell v. Palmer* (1 Cl. & F. 372), which case also established the Rule of Perpetuities in its present form, and which is in these words,—

Rule of Perpetuities or of Remoteness.—

An executory interest cannot be created so as to take effect unless within a life or lives in being, twenty-one years afterwards, and (but only where gestation actually exists (*Cadell v. Palmer, supra*)) the period of gestation; or (where no life or number of lives is mentioned) within twenty-one years alone (*Palmer v. Holford*, 4 Russ. 403), and (but only where gestation actually exists) the period of gestation. Moreover, all interests subsequent to and depending upon an executory interest which exceeds the limits of the rule are also void, notwithstanding in themselves they may be within the limits of the rule (*Palmer v. Holford, supra*; *Robinson v. Harcastle*, 2 Bro. C. C. 22).

The rule is applicable to personal as well as to real estate.

In the application of the rule possible and not actual events are to be considered; so that if the executory interest which is given might by *possibility* exceed the limits of the rule, in other words would not *necessarily* take effect as a *vested* interest (if at all) within these limits, and whether as to all or as to one even of the beneficiaries, the interest is void. And not only must the interest vest, but the respective vested interests of the respective takers (where they are more than one) must also be ascertainable,* within the limits of the rule, otherwise the gift is void (*Curtis v. Lukin*, 5 Beav. 147); but it is not necessary that

PERPETUITY—*continued.*

the interest having vested should also be in possession (*Murray v. Addenbroke*, 4 Russ. 407).

The following are the chief examples of interests attempted to be created, but void as being against the rule,—

(1.) An executory interest to arise after an indefinite failure of issue, unless the prior interest can be construed as an estate tail by implication from the words describing the failure of issue, in which latter case the executory interest over would be good (*Doe d. Ellis v. Ellis*, 9 East, 383; *Grumble v. Jones*, Willes, 166, n.), the reason for the validity of the exception being that the gift over may be defeated by the estate tail being barred at any time before the event occurs on which the executory interest is to spring into being (*Nicolls v. Sheffield*, 2 Bro. C. C. 215; *Morse v. Lord Ormonde*, 5 Madd. 99).

(2.) A bequest, after a life estate in A., to the children of A. attaining any age which exceeds twenty-one years (*Leake v. Robinson*, 2 Mer. 363); and in such a case, the whole bequest over is void, although some of the children may have attained the prescribed age within twenty-one years from the death of A.; unless indeed the individual shares of the respective children can be ascertained within the limits of the rule of perpetuities, in which latter case the gift over would be valid as to those children who are within the rule and void only as to the others (*Storrs v. Benbow*, 2 My. & K. 46).

(3.) A devise to a child (not *in esse*) of A. who is *in esse* upon that child attaining some qualification which is not *necessarily* attainable within the limits of the rule, e.g., succeeding to a barony (*Tollemache v. Earl of Coventry*, 2 Cl. & F. 611), or being in holy orders (*Proctor v. Bishop of Bath and Wells*, 2 H. Bl. 358).

(4.) A gift of leaseholds to trustees upon trusts corresponding with lands in strict settlement, and expressed as not to vest in any one who shall be tenant in tail in possession till he shall attain the age of twenty-one years (*Ibbetson v. Ibbetson*, 5 My. & Cr. 26; *Lord Dungannon v. Smith*, 12 Cl. & F. 546); but it is otherwise if the gift is expressed not to vest in any tenant in tail *by purchase* under the settlement till such tenant attain the age of twenty-one years, and this latter is the common limitation (*Christie v. Gosling*, L. R. 1 H. L. 279; *Harrington v. Harrington*, L. R. 5 H. L. 87).

(5.) The literal exercise of powers of appointment (not being *general*) in favour of objects who if inserted (as they must be considered as being) in the instrument (whether deed or will) creating the power,

* *Mogg v. Mogg*, 1 Mer. 654, cannot be considered law.

PERPETUITY—continued.

would take interests beyond the limits of the rule, as calculated from the date of the operation of the creating instrument (*Devonshire (Duke) v. Lord G. Cavendish*, 4 T. R. 741); nevertheless such a power is not void in its creation, and the donee of it may, by using discretion, exercise it in a valid manner (*Attenborough v. Attenborough*, 1 K. & J. 296).

(6.) The creation of powers of sale or management of estates exercisable generally during the minorities of persons entitled to the settled estates (*Ferrand v. Wilson*, 4 Hare, 373), such persons not being expressed to be entitled *by purchase* under the settlement; nevertheless, such powers, if intended for the payment off of incumbrances on the settled estates, would be valid (*Briggs v. Oxford (Earl)*, 1 De G. M. & G. 363).

The rule of perpetuities does not apply to executory trusts, or rather the Court of Chancery, in moulding such trusts will take care not to exceed the limits of the rule (*Humberston v. Humberston*, 1 P. Wms. 332); neither does it apply to cases of *cypres*, and for the like reason, that the Court coops up the excess within the lawful period of limitation (*Nicholl v. Nicholl*, 2 W. Bl. 1159). And there are also the following further exceptions to the application of the rule:—

(1.) Gifts to charities, *e.g.*, contingent limitations over from one charity to another charity (*Christ's Hospital v. Grainger*, 1 Mac. & G. 460): but not of course a gift or gift over in the like case from a charity to an individual (*Hope v. Gloster (Corporation)*, 7 De G. M. & G. 647).

(2.) Lands whereof the reversion or remainder subsists in the Crown (34 & 35 Hen. 8, c. 20), not being put into the Crown in fraud of the rule (*Johnston d. Anglesea (Earl) v. Derby (Earl)*, 2 Show. 104).

(3.) Any provision for the payment of the debts of the settlor (*Briggs v. Oxford (Earl)*, *supra*), including therein a provision to indemnify a purchaser against an incumbrance (*Massey v. O'Dell*, 10 Ir. Ch. Rep. 22).

See title ACCUMULATIONS.

PERPETUITY OF THE KING. That fiction of the law which for certain political purposes ascribes to the king in his political capacity the attribute of immortality: for though the reigning monarch may die, yet by this fiction the king never dies; that is, the office is supposed to be re-occupied for all political purposes immediately on his death.

PERQUISITES. Such advantages and profits as come to a manor by casualty,

PERQUISITES—continued.

and not yearly; as escheats, heriots, reliefs, estrays, and such like things. The word "perquisite" is also used by some of the old law writers to signify anything obtained by industry, or purchased with money, in contradistinction to that which descends from an ancestor (Cowel; *Les Termes de la Ley*.) It is also, at the present day, used of the casual profits of any office, even of a menial character.

PERSON. Is the aspect or quality of an individual or aggregate, to which or by reference to which certain rights or liabilities attach themselves to him.

See title STATUS.

PERSONA DESIGNATA. Is a person individually regarded and individually described. The description may be either by his proper name or by his official designation (*Owen v. London and North Western Ry. Co.*, L. R. 3 Q. B. 54).

PERSONAL. Anything connected with the person, as distinguished from that which is connected with the land. *Personal Actions*, for instance, signify such actions as are brought for recovery of some debt, or for damages for some personal injury; in contradistinction to the old real actions, which related to real or landed property, &c. And, again, *Personal Estate*, chattels, &c., signify any moveable things of whatever denomination, whether alive or dead; as furniture, money, horses, and other cattle, &c., for all these things may be transmitted to the owner wherever he thinks proper to go, and may therefore be said to attend his person, according to the maxim *Mobilia ossibus inhaerent*.

PERSONAL ACT OF PARLIAMENT: See title PRIVATE ACT OF PARLIAMENT.

PERSONAL LAW. As opposed to territorial law, is the law applicable to persons not subject to the law of the territory in which they reside. It is only by permission of the territorial law, that personal law can exist at the present day; *e.g.*, it applies to British subjects resident in the Levant and in other Mahomedan and barbarous countries. Under the Roman Empire, it had a very wide application.

PERSONAL PROPERTY. Property of a personal or moveable nature, as opposed to property of a local or immoveable character, such as land, or houses, and which are termed real property.

See title PERSONAL.

PERSONAL REPRESENTATIVES: See title REAL REPRESENTATIVE.

PERSONAL SERVICE: See title SERVICE OF WRITS, &c.

PERSONALTY. Signifies generally any personal property, in contradistinction to realty, which signifies real property. An action was said to be in the personalty when it was brought for damages out of the personal estate of the defendant.

PERSONATION. Under the stat. 37 & 38 Vict. c. 36, this offence when committed with the intention to obtain property is punishable with penal servitude for life or for any period not less than five years, or with imprisonment not exceeding two years with or without hard labour, and with or without solitary confinement. Personation for other fraudulent purposes is also checked and punished by numerous other statutes, *e.g.*, the personation of seamen (28 & 29 Vict. c. 124), of soldiers (7 Geo. 4, c. 16, and 2 Will. 4, c. 53), of owners of stock or shares (24 & 25 Vict. c. 98; 26 & 27 Vict. c. 73; 30 & 31 Vict. c. 131; 33 & 34 Vict. c. 58), of bail (24 & 25 Vict. c. 98), and of voters (35 & 36 Vict. c. 33, the Ballot Act, 1872).

PETIT SERJEANTY. A species of tenure, which (like Grand Serjeanty) was one by office, which office was, *semble*, originally of an inferior order (held by king's huntsmen, &c.), but was afterwards of as high an order as any other. The service consisted in rendering to the king some implement of war or of the chase.

See title SERJEANTY; TENURE.

PETIT TREASON: *See title TREASON.*

PETITION OF APPEAL. Prior to the Judicature Acts, 1873-75, a petition was the form and mode of appealing from the High Court of Chancery to the Court of Appeal in Chancery; but since these Acts, the appeal to the Court of Appeal is by motion only. (*See title MOTIONS, VARIETIES OF*). But appeals from the Court of Appeal to the House of Lords are still to be made by petition only, and which petition signed by two counsel, and addressed to the House, being first duly printed on parchment, must be lodged at the Parliament Office at Westminster for presentation to the House.

See title APPEALS, CIVIL, VARIETIES OF.

PETITION OF RIGHT. Where a subject claims any real or personal property as against the Crown, or claims damages against the Crown, the proceeding which he is to adopt is a petition of right, the form of which and the procedure under which is now regulated in all respects by the stat. 23 & 24 Vict. c. 34; the form of the petition is given in the schedule to the Act. The Act, of course, does not enlarge but only simplifies the remedies

PETITION OF RIGHT—continued.

against the Crown (*Tobin v. The Queen*, 16 C.B., N.S., 310).

See title MONSTRANS DE DROIT.

PETITION OF RIGHTS. A Parliamentary declaration of the liberties of the people assented to by King Charles I., in 1629. It is to be distinguished from the Bill of Rights, 1689, which was passed into a permanent constitutional statute.

See title BILL OF RIGHTS.

PETITION, SUBJECT'S RIGHT TO. Was denied by James II., but affirmed by the Court in the case of the Seven Bishops (*see title BISHOPS, CASE OF THE SEVEN*); and the right was re-formulated in the Bill of Rights (*see title BILL OF RIGHTS*). But violent and tumultuous petitioning is forbidden by the stat. 13 Car. 2, which was put in force on the threatened presentation of the Chartist Petition in 1848; and that statute is in fact still in force.

PETITIONERS: *See title ABHORRERS.*

PETITIONING CREDITOR. The creditor at whose instance an adjudication of bankruptcy is made against a bankrupt. The debt of the creditor so petitioning required formerly to amount to £100, but if it amount to £50 that is now sufficient (Bankruptcy Act, 1869).

PETITIONS. Are of various kinds, the principal varieties of which are the following:—(1.) Petitions to Parliament, *see that title*; (2.) Petitions to the House of Lords, *see title PETITION OF APPEAL*; (3.) Petitions to the High Court (Chancery Division), *see title PETITIONS IN CHANCERY*; and (4.) Petitions of Right, *see that title*.

PETITIONS IN CHANCERY. All proceedings in the Court of Chancery were originally petitions, or proceedings in the nature thereof, even the bill whereby formerly an action was commenced, having been a petition in all essential respects. But latterly petitions in Chancery came to be of a much more summary character than actions commenced by bill, and to the present day they are much more speedy than actions commenced by writ. These petitions are sometimes opposed and sometimes unopposed, and sometimes they are mere matters of course, in which latter case they are called *Petitions of Course*, and are not usually mentioned in Court, but are summarily disposed of at the chambers of the judge. Almost everything that is done on petition may also be done on motion or summons, and the petition, just like the motion or summons, must be supported with affidavit evidence, proving its allegations. These petitions to the High Court in its Chancery (or any

PETITIONS IN CHANCERY—contd.

other) division are either made in a suit or under a statute, or both; but where no suit is pending and no statute gives the right of proceeding upon petition, then an action is the only course open to the suitor, unless in certain matters regarding *infants*, which may be done on petition without either action or enabling statute.

PETITIONS OF COURSE: See title PETITIONS IN CHANCERY.

PETITIONS TO PARLIAMENT: See title PETITION, SUBJECT'S RIGHT TO.

PETTY BAG OFFICE. Is an office which belongs to the Common Law Courts in Chancery, and out of which all writs *in matters wherein the Crown is interested* do issue. Such writs, and the returns to them, were in former times preserved in a little sack or bag (*in parva baga*), whereas other writs, relating to the business of the subject, were originally kept in a hamper, or big basket (*in hanaperio*); and thence has arisen the distinction of the Hanaper Office and the Petty Bag Office, which both belong to the Common Law side of the Court in Chancery (5 & 6 Vict. c. 103).

See title HANAPER.

PETTY JURY: See titles GRAND JURY; JURY.

PETTY LARCENY: See title LARCENY.

PETTY SESSIONS. A petty session is sometimes kept in corporations and counties at large by a few justices periodically for dispatching the smaller business of the neighbourhood between the times of the general sessions; as for licensing ale-houses, passing the accounts of the parish officers, and so forth. A special petty session (called sometimes a special session) may and sometimes must be called together (upon due notice to *all* the magistrates) for the transaction of some particular or special subject-matter (Martin and Greenwood; Stone).

See title SESSIONS.

PETTY TREASON: See title TREASON.

PEWS. In a church the chief pew in the chancel belongs to the rector (spiritual or lay), and the disposal of the other pews belongs to the ordinary and to the church-wardens as his deputies. The rents and profits derived from the letting of pews are applicable firstly to the payment of the necessary charges of the church, and secondly as to the surplus, are payable to the minister; and this source of the minister's revenue is an interest within the meaning of the stat. 13 Eliz. c. 20, so as not to be mortgageable (*Ex parte Arrowsmith, In re Leveson*, 8 Ch. Div. 96).

PHOTOGRAPHS, COPYRIGHT IN: See title PAINTINGS, COPYRIGHT IN.

PICKETTING: See title MOLESTATION.

PIER: See title HARBOURS.

PIGNORIS CAPIO. Literally, the taking of a pledge; this was one of the old *Legis Actiones* in Roman Law, and was available as a summary remedy in certain cases by military custom, and in a certain few other cases by statute. It operated like distraining.

See title LEGIS ACTIONES.

PIGNUS: See titles HYPOTHECA; PLEDGE.

PILOTAGE. The act of steering or guiding a ship by the pilot or helmsman, either during an entire voyage, or on the departure from, or on the approach to, port. The dangerous navigation of the coasts and of the rivers of England has led to the appointment of qualified persons, who receive a license to act as pilots within a certain district, and who enjoy the monopoly of conducting vessels out of, and up, the various rivers, and to and from the various ports of the country. By different Acts of Parliament the master of every ship engaged in foreign trade must put his ship under the charge of a local pilot so licensed, both in his outward and in his homeward voyage. The power of appointing these "duly licensed pilots" is mainly, vested in the corporation of the Trinity House, Deptford, whose jurisdiction extends from Orfordness to London Bridge, from London Bridge to the Downs, from the Downs westward to the Isle of Wight; and all bodies or persons having the power of appointment in other places (as the commissioners of the Cinque Ports, the Trinity Houses of Hull, Newcastle, and Liverpool) are, to some extent, subject to their authority. Home-trade passenger ships, having a certified master or mate, need not employ pilots; and further, a master or mate may himself hold a pilotage certificate (Merchant Shipping Act, 1854, s. 340). Where the master is bound by Act of Parliament to place his ship under the command of a licensed pilot, he is relieved from the liability for any damage which is done by it while so under the pilot's command; but the master does not enjoy this or any exemption from liability, where the pilotage is not compulsory but voluntary. The rates of charge for pilotage are regulated partly by statute and partly by usage, but also by the corporation of the Trinity House; moreover, all pilotage authorities are subject to the control of the Board of Trade, in common with most other parts of the Law of Merchant Shipping.

PIN-MONEY. An allowance set apart by a husband for the personal expenses of his wife; i.e., for her dress and pocket-money. It is not a gift from the husband to the wife out and out, but is to be considered like money set apart for a specific purpose; it is due to the wife in virtue of a particular arrangement, and is payable by the husband by force of that arrangement only, and for that specific purpose and no other (*Howard v. Digby*, 8 Bligh's Rep. N. R. 269). Consequently, if pin-money should not be duly paid by the husband, and should be found to be in arrear at his death, his wife surviving him can claim only one year's arrears of it (*Aston v. Aston*, 1 Ves. Sen. 267); also, the husband may find his wife in apparel, instead of paying her this apparel-money, as it may be called (*Howard v. Digby*, *supra*).

PIRACY. Is either municipal or international. (1.) *Municipal* piracy is, e.g., infringement of copyright and such like offences against the municipal law of any particular country. (2.) *International* piracy is some offence adequate in degree (e.g., robbery) committed on the high seas by persons not subject at the time to any civilized community. Such piracy is justifiable everywhere.

See title REBEL OR BELLIGERENT.

PISCARY. The right or privilege of fishing. Thus, *free fishery*, which is a royal franchise, is the exclusive right of fishing in a public river. *Common of piscary* is the right of fishing in another man's water. *Several fishery* resembles free fishery, only that he who has a several fishery must also be (or at least derive his right from) the owner of the soil, which in a free fishery is not requisite.

See title FISHERY.

PIX OR PYX JURY. A jury consisting of members of the corporation of Goldsmiths of the city of London, assembled upon an inquisition whether the coin of the realm, manufactured at Her Majesty's mint, is of the proper or legal standard; and the jury appointed for the purpose is called a *pix* jury, apparently from a box or box-like measure used in assaying the coin. The legal standard has been fixed at various times by statute; for it seemeth that the royal prerogative doth not extend to either debasing or enhancing the coinage (2 Inst. 577). Under the Coinage Act, 1870 (33 & 34 Vict. c. 10), s. 12, the Crown is authorized to regulate the trial of the *pyx*.

PLACE-BILL. Is the stat. 6 Anne, c. 7, excluding from the House of Commons any person holding an office created since the 25th of October, 1705, or receiving a pen-

PLACE-BILL—continued.

sion during the pleasure of the Crown; the Act also obliged every member accepting a previously existing office to submit himself for re-election, unless the office were merely a higher commission in the army. Under the Reform Act, 1867 (30 & 31 Vict. c. 102), s. 52, mere removal of a minister from an office under the Crown to another does not impose the necessity of re-election. The Place Bill of 1741 excluded from Parliament a large number of officials and clerks in public departments. By the stat. 22 Geo. 3, c. 45, contractors under Government are disqualified: Taswell-Langmead, 643-45.

PLAINT. The instrument or process by which actions are commenced in the county courts. It has been described as a private memorial tendered in open court to the judge, wherein the party injured sets forth his cause of action.

See title COUNTY COURTS.

PLAINTIFF. Is the party instituting an action. When the action is against the Crown he is called the *suppliant*; when the action is in the form of an information, he is called the *informant*. He is called petitioner in an ordinary petition, and prosecutor in a prosecution.

PLANS. Upon the sale of lands a plan may be (and usually is) so incorporated into, as to control, the contract (*Nene Valley Drainage v. Dunkley*, 4 Ch. Div. 1). Old maps, plans, tracings, &c., are frequently admissible in evidence against (but not, *semble*, for) persons claiming under former proprietors by whose direction or for whose use they were made (B. N. P. 283, a); also maps, plans, &c., made or recognised by persons having adequate knowledge, and who were since deceased, may be admissible as evidence of reputation (*R. v. Milton*, 1 C. & Kir. 58).

PLEA. Is used in various senses. In its usual acceptation it signified the defendant's answer to the plaintiff's declaration; and when this answer set forth at large or in detail the subject matter of the defence, it was denominated a special plea, in contradistinction to those direct and concise answers to the declaration termed the general issues. The word was also frequently used to signify suit or action; thus holding pleas meant entertaining or taking cognizance of actions or suits; common pleas signifying actions or suits between man and man, as distinguished from such as were promoted and prosecuted at the suit of the Crown, which were thence denominated pleas of the Crown. At the present day, a plea is used to denote a brief defence to an action or to a counter-claim or other pleading. The principal varieties of pleas

PLEA—continued.

are the following:—(1.) Pleas (or traverses) in denial; (2.) Pleas in confession and avoidance; (3.) Pleas in justification and excuse; and (4.) Pleas in satisfaction and discharge. A plea (unlike a demurrer) must be supported by evidence; and (like a demurrer) it may if allowed put an end to the action, or if overruled the defendant must put in some other defence (if he has any) to the action, otherwise judgment will be given against him.

See title PLEADING.

PLEA SIDE. The plea side of a Court meant that branch or department of the court which entertained or took cognizance of civil actions and suits, as distinguished from its criminal or *Crown* side. Thus the Court of Queen's Bench was said to have a plea side, and a Crown or criminal side, the one branch or department of it being devoted to the cognizance of civil actions, the other to criminal proceedings, and matters peculiarly concerning the Crown. So the Court of Exchequer was said to have a plea side and a Crown side, the one being appropriated to civil actions, the other to matters of revenue. And these distinctions substantially remain.

PLEADING. Is the accurate stating of a case (or of the defence to a case) in a court of justice, civil or criminal. Under the Judicature Acts, 1873-75, every pleading is to be as brief as the nature of the case will admit (Order xix., 2), any undue length being visited with costs; and is to state facts in a simple and natural but accurate manner, and is not to state evidence (Order xix., 4) or admissions, and is to state specifically the relief wanted, but may also ask for general relief (Order xix., 8). Separate and distinct facts, made the basis of separate and distinct claims, are to be kept separate (Order xix., 9). Denials of fact are to be substantial and not evasive—denials *modo et formâ* (if standing alone) being deemed evasive (Order xix., 22). No pleading (unless by way of amendment) is to be inconsistent with a previous pleading of the same party (Order xix., 19). Pleadings in abatement are abolished (Order xix., 11), and where formerly there would have been a new assignment, there is now to be amendment simply (Order xix., 14). Special defences must be specially pleaded, *e.g.*, the statute of limitations (Order xix., 18), the statute of frauds (Order xix., 23), a release (Order xix., 18), and such like. The effect of documents is to be pleaded, and not the very words (unless where the very words are material): fraud, malice, &c., are to be pleaded as facts simply, without shewing the circumstances from which they are inferred; so

PLEADING—continued.

also notice (unless where the precise form or terms of the notice are material); so also the existence of a contract; so also the fact of a relation having subsisted between the parties (Order xix., 24, 25, 26, 27). Presumptions of law are not to be pleaded (Order xix., 28).

PLEADING, DEFAULT OF. For default of pleading judgment may be obtained in certain cases, *e.g.*:—

- (a.) Upon plaintiff's default to deliver (when bound to deliver) a statement of claim:—
 - (1.) Judgment dismissing action with costs (Order xxix., 1).
 - (b.) Upon defendant's default to deliver a defence or demurrer to a foregoing statement of claim:—either
 - (2.) Such judgment as the plaintiff is entitled to on his statement of claim (Order xxix., 10); or
 - (3.) Judgment for the recovery of land (Order xxix., 7), with or without mesne profits or arrears of rent (Order xxix., 8), and with or without damages for breach of covenant (Order xxix., 8); or
 - (4.) Judgment for the value of goods detained (Order xxix., 4), with or without pecuniary damages (Order xxix., 4); or
 - (5.) Judgment for pecuniary damages (Order xxix., 4); or
 - (6.) Judgment for amount of debt or of liquidated damages (Order xxix., 2);—and
 - (c.) Upon third party's default to deliver (when bound to deliver) any pleading:—
 - (7.) Such judgment as upon the pleadings the opposite party is entitled to (Order xxix., 13).

PLEADING ISSUABLY. Pleading such a plea as was calculated to raise a material issue either of law or of fact. The defendant in an action was entitled, as a matter of right, to a certain number of days to plead; and if he obtained further time, it was granted to him only by way of indulgence, and the Court in so doing usually annexed to its order the condition that the defendant should plead issuably, that is, that he should plead a fair and *bonâ fide* plea, as distinguished from one which was calculated only to embarrass the defendant, and to retard the progress of the action. At the present day, the annexing of this condition is superfluous, because all pleadings are now matters of substance.

See title REJOINING GRATIS.

PLEADING OVER. When a defendant

PLEADING OVER—*continued.*

in his pleadings passed by or took no notice of a material allegation in the declaration, he was said to plead over it. At the present day, such a passing by would amount to an admission by the defendant of the truth of the allegation passed over, unless the allegation was purely a matter of law, or was the allegation of something impossible in law.

PLEADINGS, DELIVERY OF. The mutual allegations or statements which are made by the plaintiff and defendant in an action are now written or printed and delivered between the contending parties, or to the proper officers appointed to receive them. Under the present practice, the plaintiff within six weeks after defendant's appearance delivers to the defendant a statement of claim (which is the first pleading properly so called), and the defendant thereafter and within eight days delivers to the plaintiff his defence (if any) to the claim, and which defence may or may not be accompanied with a counter claim against the plaintiff either alone or in conjunction with other persons; and the plaintiff thereafter and within three weeks, and any third party thereafter and within eight days, delivers to the defendant his reply. Any fourth pleading, if a rejoinder simply joining issue on the reply, is to be delivered within four days. These various times may be extended in a proper case. The delivery of pleadings is to be made to the solicitor or to the party; and in the case of a defendant who has not appeared to the writ of summons, the delivery of pleadings to him is effected by simply filing same.

PLEDGE. Where a person pledges personal property he is called the pledgor, and he must redeem the property within a reasonable time, otherwise the pledgee (not being a regular pawnbroker) may sell upon due notice, and without the necessity of obtaining any judicial decree authorizing him to do so. In the absence of express agreement to the contrary, a pledgee may even before condition broken deliver over the pledge to a purchaser or to a sub-pledgee; and in either case, if the thing pledged is a negotiable instrument, the pledgor will be bound, but if it be a non-negotiable instrument, the pledgor will be bound only to the extent of the pledgee's own right. Accordingly in the case of a non-negotiable instrument, if the purchaser or sub-pledgee upon tender to him by the pledgor of the amount due to the original pledgee should refuse to deliver up the pledge to the original pledgor, the original pledgor may have an action of detinue against the party so refusing. The pledgee

PLEDGE—*continued.*

may use the article pledged, if his user thereof do it no harm, and if he use it simply to meet the expenses of its custody, but not otherwise (*Chitty on Contracts*, 433). Where the pledge is a pawnbroker, he is subject to certain statutory restrictions and regulations (35 & 36 Vict. c. 93, the Pawnbrokers Act, 1872).

See titles **BAILMENT**; **MORTGAGE OF PERSONAL ESTATE**; **PAWNBROKERS**.

PLEDGES. In the ancient law, no person could prosecute a civil action without having two or more persons as pledges for the prosecution; and if judgment was given against the plaintiff, or he deserted his suit, both he and his pledges were liable to amercement *pro falso clamore*. In the course of time, however, these pledges were disused, and two fictitious persons, John Doe and Richard Roe became the common pledges of every suitor, and since the C. L. P. Act, 1852, the use of such pledges has been discontinued altogether.

See title **SECURITY FOR COSTS**.

PLENARY. Is applied to a benefice being full or occupied, and is directly opposed to vacation, which signifies a benefice being void.

PLENARY CAUSES. In the Ecclesiastical Court causes were divided into plenary and summary. *Plenary causes* were those in whose proceedings the order and solemnity of the law was required to be exactly observed, so that if there was the least departure from that order, the whole proceedings were annulled. *Summary causes* were those in which it was unnecessary to pursue that order and solemnity. The present distinction between the contentious and the non-contentious jurisdiction of the Court of Probate seems to be analogous to this old distinction between causes plenary and summary.

PLENE ADMINISTRAT, PLEA OF. A plea pleaded by an executor or administrator, to the effect that he has fully administered, that is, that he has exhausted the assets before such action was brought (*Toller's Exec.* 267).

See title **QUANDO ACCIDENT.**

PLIGHT. An old English word, signifying quality. Thus, to deliver up a thing in the same plight and condition, is a phrase analogous to the phrase "assemble and meet together," the latter of the two words explaining the former of them, but being otherwise tautological. This use of the word "*plight*" is the same as that which occurs of the word "*causa*" in *Just. Inst.* iv. 17, 3. The word applies to real

PLIGHT—*continued.*

and personal property equally, and to any estate, even to a rent-charge or possibility of dower, in land.

PLOUGH-BOTE. An allowance of wood which tenants are entitled to, for repairing their implements of husbandry.

FLOWLAND. Was the same as *Oxgang*.
See title OXGANG.

PLURALITIES. Were forbidden by the Reformation Parliament (1529–30), where the value of the benefice was £8; but the same Parliament reserved power to the king to sell dispensations to hold a plurality of benefices to various chaplains of the king, of the nobility, and of officials; also, to the brothers and sons of temporal peers and of knights and to persons holding the degrees of B.D. or D.D. The right to hold benefices in plurality was further restricted by the stat. 1 & 2 Vict. c. 106, and is now regulated by that Act and the stat. 13 & 14 Vict. c. 98.

See title BENEFICES.

PLURIES WRIT. A writ of summons was termed a *pluries* writ, when two other writs had been issued previously, but to no effect; and it was so termed, because (in allusion to the commands contained in the two previous writs) the words ran thus: "You are commanded as *often* you have been commanded" (Smith's Action at Law, 63). But the *pluries* writ was abolished by the C. L. P. Act, 1852; and now the original writ may be renewed before its expiration under Order VIII., 1.

See title RENEWAL OF WRIT.

PLUS PETITIO. In Roman Law, was a phrase denoting the offence of *claiming more* than was just in one's pleadings. This *more* might be claimed in four different respects, viz., (1.) *Re*, i.e., in amount (e.g., 50*l.* for 5*l.*); (2.) *Loco*, i.e., in place (e.g., delivery at some place more difficult to effect than the place specified); (3.) *Tempore*, i.e., in time (e.g., claiming payment on the 1st of August of what is not due till the 1st of September); and (4.) *Causâ*, i.e., in quality (e.g., claiming a dozen champagne, when the contract was only for a dozen of wine generally). Prior to Justinian's time, this offence was in general fatal to the action; but under the legislation of the emperors Zeno and Justinian, the offence (if *re*, *loco*, or *causâ*) exposed the party to the payment of three times the damage (if any) sustained by the other side, and (if *tempore*) obliged him to postpone his action for double the time and to pay the costs of his first action before commencing a second.

PLUS VALET CONSUETUDO QUAM CONCESSIO. This maxim means literally, that custom is more powerful than grant. Probably, its effect in law is simply this,—that the words of a deed not being inconsistent with the custom will not exclude the custom, which will therefore operate (see title EXTRINSIC EVIDENCE). Probably, also, the maxim may furnish the principle underlying the customary rights of tinnern and such like other miners in Cornwall, &c.,—such customs being concessions from the Crown which override all grants to or by private individuals.

See title PACATA PRIVATA JURIS PUBLICO, &c.

POCKET SHERIFFS. Sheriffs appointed by the sole authority of the Crown, without the interposition of the judges, were so called.

POISONS, SALE OF. Is regulated by the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), and the stat. 32 & 33 Vict. c. 117, amending same; poisons are not to be sold excepting by duly registered pharmaceutical chemists or legally qualified medical practitioners, and the vessel or box containing the poison is to be duly labelled with the distinctive name of the poison and with the word "poison;" and the purchaser must be known to the vendor.

POLICE. With reference to police generally, these are of various orders. (1.) *The high constable* of a county, appointed by the justices of the county at quarter sessions, and not at petty sessions (*Reg. v. Wilkinson*, 10 A. & E. 288); (2.) *Special constables* who are appointed for cases of sudden public tumult, or other like emergency, under the stat. 1 & 2 Will. 4, c. 41, and 5 & 6 Will. 4, c. 43; (3.) *County and district constables*, being the regular officers of police for counties and districts, appointed under the stat. 2 & 3 Vict. c. 93, 3 & 4 Vict. c. 88, and 19 & 20 Vict. c. 69; (4.) *Parish constables*, being principally the officers of police in towns, appointed under the stat. 5 & 6 Vict. c. 109, and some Amendment Acts, and whose duties are regulated by the Town Police Clauses Act, 10 & 11 Vict. c. 89; and (5.) The Metropolitan and The City of London Police, which have their own special statutes.

By the constitution of England, every man is responsible for the preservation of the public peace; and if any one upon being duly called upon by the magistrates to serve as a special constable refuses to do so, the magistrates may and ought to cause him to be indicted (*Reg. v. Vincent*, 9 C. & P. 91). A special constable, when duly appointed, is appointed for an indefinite time, and until, in fact, his services are

POLICE—*continued.*

either determined or suspended; and during the term of his office he has all the authority of an ordinary constable. The office, it appears, may be served by deputy (*Rex v. Clarke*, 1 T. R. 679); but a naturalised foreigner might not serve either as deputy or as principal (*Rex v. Ferdinand de Mierre*, 5 Burr. 2787).

See titles **ARREST**; **CONSTABLE**; **WARRANT**.

POLICY OF ASSURANCE: See title **INSURANCE OR ASSURANCE**.

POLICY, PUBLIC. Is a circumstance entering largely into law, sometimes invalidating private agreements, at other times forming the ground of relief from fraudulent transactions.

POLL. Deeds are sometimes called deeds-poll, in contradistinction to deeds indented or indentures; deeds-poll being shaved or polled even.

See title **DEEDS**.

POLLARDS: See title **UNDERWOOD**.

POLLICITATIO. Is an offer of a tentative character, falling short of a promise.

POLLS, CHALLENGE TO: See title **CHALLENGE OF JURORS**.

POLLUTION PREVENTION ACT. The statute 39 & 40 Vict. c. 75, called the Rivers Pollution Prevention Act, 1876, prohibits the putting of solid matters of a deleterious character into streams; also, the drainage of sewers into streams; but as regards manufacturing and mining pollutions, all proceedings are to be instituted by some sanitary authority, and no such proceedings are to be taken without the consent of the Local Government Board; and the Board, in giving or withholding its consent, is to have regard to the industrial interests involved in the case and to the circumstances and requirements of the locality. And an inspector of the board may (in a proper case) certify that the means used for rendering harmless the polluting matter are the best or only practicable and available means under the circumstances of the particular case; and in case of such certificate having been given, the Court having cognizance of the alleged offence against the Act (*i.e.* the County Court) is to be concluded thereby. But the civil remedy would not in such a case be stayed.

See titles **EASEMENTS**; **INJUNCTION**; **NUISANCE**.

POLLUTION OF STREAM: See title **EASEMENTS**, sub-title *Water*.

PONE, WRIT OF. An original writ, formerly used for the purpose of removing

PONE, WRIT OF—*continued.*

suits from the Court Baron, or County Court, into the superior Courts of Common Law. It was also the proper writ to remove all suits which were before the sheriff by writ of justices (*Les Termes de la Ley*). But this writ is now in disuse, the simple order of the High Court made upon summons at Chambers being sufficient to effect a transfer of the action.

POOR. Upon the dissolution of the monasteries in the reign of Henry VIII., it became necessary to make some provision for the poor, as well those who were properly called *indigent*, *i.e.*, unable, even with labour, to earn their own livelihood, as also those who were properly called *poor*, *i.e.*, unable to live without labour. The oldest Poor Law Act (43 Eliz. c. 2) preserves this distinction; but abuses arising out of it, of which the principal one, perhaps, was the extension of out-door relief to able-bodied paupers, the whole system of Poor Law administration was remodelled by the stat. 4 & 5 Will. 4, c. 76, and has since been still further improved. Under the stat. 4 & 5 Will. 4, c. 76, which continued in force until 31st of July, 1847, the administration of relief to the poor throughout England and Wales was placed under the control of three commissioners, styled, "The Poor Law Commissioners for England and Wales;" but under the stat. 10 & 11 Vict. c. 109, a new board of commissioners, styled, "Commissioners for Administering the Laws for the Relief of the Poor in England," was appointed in their place, and was invested with all the powers and duties of the former commissioners; the style has been since altered by the stat. 12 & 13 Vict. c. 103, to that of the "Poor Law Board," and the Board under that name has been perpetuated by the stat. 30 & 31 Vict. c. 106.

If an order of the Poor Law Board is questioned, its legality is to be determined on removal by *certiorari*; and in default of such removal, a mandamus will go to enforce it (*Reg. v. Oldham Union (Overseers)* 10 Q. B. 700).

Under the stats. 4 & 5 Will. 4, c. 76, and 7 & 8 Vict. c. 101, the Poor Law Board may form unions, and may either separate parishes from, or add parishes to, existing unions, without the consent of the guardians of the union; and the Board may also direct that there shall be a specified number of guardians of each union; but at the same time justices residing in extra-parochial places within unions are *ex officio* guardians of unions. Generally, the guardians act in all matters of importance under the sanction only of the Poor Law Board. The guardians of each union constitute a

POOR—continued.

corporation, and have power to contract, without affixing their seal, in all matters necessarily or properly incident to their office (*Pain v. Strand Union (Guardians)*, 8 Q. B. 326). The clerks of the boards of guardians may, although not certificated attorneys, conduct proceedings before justices at petty sessions, and out of session, on behalf of the boards.

Under the stat. 43 Eliz. c. 2, the churchwardens of every parish, and four, three, or two, substantial householders, to be nominated by the magistrates, were to be overseers of the poor; but under 13 & 14 Car. 2, c. 12, in large parishes there are to be two or more overseers for every township or village; and by stat. 54 Geo. 3, c. 91, the appointment is to be annual.

See title POOR RATE.

POOR LAW BOARD: See title POOR.

POOR LAW GUARDIANS. By Gilbert's Act (22 Geo. 3, c. 83) a parish was enabled to appoint guardians of the poor in lieu of the overseers—these overseers having been the parish churchwardens together with two, three, or four other substantial householders—and by the Select Vestry Act (59 Geo. 3, c. 12), a parish in vestry assembled was enabled to commit the management of the poor to a committee of the parishioners, called a select vestry, which acted as a committee of supervision or inspection over the overseers of the poor. The present guardians of the poor are appointed by the parish (owners of property and ratepayers) at the direction of the Poor Law Board under the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), and the stats. 10 & 11 Vict. c. 109, and 30 & 31 Vict. c. 106.

POOR RATE. By the stat. 43 Eliz. c. 2, commonly called the Poor Law Act, a rate for the relief of the poor was directed to be raised weekly or otherwise by taxation of "every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, or appropriations of tithes, coal mines, or saleable underwoods in each parish;" and by the Rating Act, 1874 (37 & 38 Vict. c. 54), the rate has been extended to all other mines as well. Inhabitaney within the parish implies permanent residence (including sleeping) therein (*Rex v. Nicholson*, 12 East, 330). Parsons and vicars are liable (in respect of their tithes), whether they are resident or not (*Reg. v. Capel*, 12 A. & E. 382). The occupier is the tenant, not the landlord (*Rex v. Welbank*, 4 M. & Sch. 229); and any one of several joint occupiers is liable for the whole amount (*Reg. v. Paynter*, 10 Q. B. 908). Moreover, the occupation must be of a

POOR RATE—continued.

beneficial character, assuming the contract of tenancy to be a provident (and not an unprofitable) one (*Rex v. Parrott*, 5 T. R. 593; *Reg. v. Vange*, 3 Q. B. 255). Underwoods productive of profit *communibus annis* are rateable upon their yearly distributable value (*Rex v. Mirfield*, 10 East, 219). Stock-in-trade and other personal property is exempt from the poor rate (3 & 4 Vict. c. 89); likewise churches and chapels (3 & 4 Will. 4, c. 30). Lands or houses in the occupancy of the Crown or of the public are not rateable (*Amherst v. Somers*, 2 T. R. 372). The mode of assessing the rate is prescribed by the stats. 6 & 7 Will. 4, c. 96 (Parochial Assessment Act), and 25 & 26 Vict. c. 103 (Union Assessment Committee Act), and is upon a hypothetical yearly tenancy, subject to certain allowances and deductions.

See title RATING.

POPULAR ACTIONS. Such actions as are maintainable by any of Her Majesty's subjects for recovery of the penalty incurred under some penal statute. It is called a popular action because it is a proceeding which may be taken not by any one person in particular, but by any of the people who think proper to prosecute it. These are the *Publica* (i.e., *Populica*) *Judicia* of Roman Law.

PORT. A port is a haven, and somewhat more. 1st. It is a place for the arriving and unloading of ships or vessels. 2nd. It hath a superinduction of a civil signature upon it, somewhat of franchise and privilege. 3rd. It hath a ville, or city, or borough, that is, the *caput portus*, for the receipt of mariners and merchants, and the securing and vending of their goods, and the victualling of their ships. So that a port is *quid aggregatum*, consisting of somewhat that is natural, viz., an access of the sea, whereby ships may conveniently come; safe situation against winds, where they may safely lie, and a good shore where they may well unlade; something that is artificial, viz., quays, and wharves, and cranes, and warehouses, and houses of common receipt; and something that is civil, viz., privileges and franchises, viz., *jus applicandi*, *jus mercati*, and divers other additaments given to it by civil authority. A port of the sea includes more than the bare place where the ships unlade, and sometimes extends many miles; as the port of London, in the time of King Edward I., extended to Greenwich; and Gravesend is also within the port of London; so the port of Newcastle takes in all the river from Sparhawk to the sea (*Hale, de Portibus Maris, paro.*, sec. c. 2;

PORT—continued.

Hall on the Sea-shore, 2nd ed., by Loveland).

See title **HARBOURS**.

PORTION DISPONIBLE. In French Law, a parent having one legitimate child may dispose of one-half only of his property; leaving two, one-third only; and leaving three or more, one-fourth only; and it matters not whether the disposition is *inter vivos*, or by will.

PORTIONER. When a parsonage is served by two, or sometimes three, ministers, alternately, the ministers are termed portioners, because they receive but a portion or proportion of the tithes or profits of the living (Cowel). Also, a child receiving a portion is a portioner.

PORTIONS. Is the name given to those provisions that are made by will and in settlement for the children of the testator and of the settlor. Owing to the leaning against double portions, a portion may be satisfied in whole or in part by a subsequent legacy (see title **SATISFACTION IN EQUITY**). Where portions are to be raised by sale or mortgage, they may not be raised until they are immediately payable (*Wynter v. Bold*, 1 S. & S. 507), unless the words of the instrument should authorize their earlier raising.

PORTMOTE, or PORTMOOT (from *portus*, a port, and *gemote*, an assembly). A Court kept in haven towns or ports (*Les Termes de la Ley*).

PORT-REVE (from *port*, a haven or harbour, and *reve*, an officer, minister, or bailiff). The port-reve was the king's bailiff, who looked after the customs and tolls in the port of London, before they were let to feefarm. (Brady on Bor., 16, fol. ed.) This office, it is believed, is not peculiar to the port of London.

POSSE COMITATUS. The *posse comitatus*, or power of the county, was the power given to the sheriff and other of the king's officers by Act of Parliament, namely, the Statute of Winchester, or Winton, to compel the attendance of the inhabitants of the county (with some exceptions), to assist him in preserving the peace, in pursuing and arresting offenders, and in such like acts where assistance was requisite. The *posse comitatus* being thus in a manner organized, was capable of serving as a militia for the defence of the country against the Scots and other foreign invaders.

See title **ARMY**.

POSSESSIO CIVILIS. In Roman Law, was a legal possession, i.e., a possessing accompanied with the intention to be or to

POSSESSIO CIVILIS—continued.

thereby become owner; and as so understood, it was distinguished from *possessio naturalis*, otherwise called *nuda detentio*, which was a possessing without any such intention. *Possessio civilis* was the basis of *usucapio* or of *longi temporis possessio*, and was usually (but not necessarily) adverse possession.

POSSESSIO FRATRIS. Possession or seisin of the brother. It used to be a maxim, that *possessio fratris facit sororem esse hæredem*, that is, that the possession or seisin of a brother would make his sister of the whole blood his heir in preference to a brother of the half blood. The question of the possession or seisin of the ancestor is not, since the Descents Act (3 & 4 Will. 4, c. 106), of any importance in ascertaining who is heir, inasmuch as the descent is now traced from the last person entitled who did not inherit and not from the last person seised. There was no *possessio fratris* of a dignity, so that a half-brother always succeeded in preference to a whole sister.

See title **DESCENTS**.

POSSESSIO LONGI TEMPORIS: See title **USUCAPIO**.

POSSESSIO NATURALIS: See title **POSSESSIO CIVILIS**.

POSSESSION. As regards lands, possession strictly so called was feudal possession, i.e., seisin, which has been defined as possession of a freehold estate. But actual possession for a year or term of years was a sufficient possession to admit of a release of the freehold title being made to the lessee for a year or years, whence the conveyance by lease and release. As regards chattels, possession is mere bodily occupation. Dispossession was called ouster of the possession.

See titles **OCCUPATION; OUSTER; SEISIN**.

POSSESSION MONEY. The man whom the sheriff puts in possession of goods taken under a writ of *fiery facias* is entitled whilst he continues so in possession to a certain sum of money *per diem*, which is thence termed possession money. The amount is 3s. 6d. per day if he is boarded, or 5s. per day if he is not boarded.

POSSESSION OF STOLEN GOODS. Being recently after the larceny, would afford a violent presumption that the possessor either was the thief or was the criminal receiver thereof; but after a long interval, no presumption of guilt at all arises.

See title **RECEIVING STOLEN GOODS**.

POSSESSION VAUT TITRE. In English Law, as in most systems of jurisprudence, the fact of possession raises a *prima facie*

POSSESSION VAUT TITRE—*continued*. title or a presumption of the right of property in the thing possessed; in other words, possession is as good as title (about).

POSSESSION, WRIT OF. Is a writ of execution provided by the Judicature Acts, 1873-75, for the recovery of land. It may be in either of two forms, viz., (1.) for the delivery of the possession by a specified person or persons, or (2.) for the recovery generally of the possession.

See title DELIVERY, WRIT OF.

POSSESSOR, BONÂ FIDE: See title BONÂ FIDE POSSESSIO.

POSSESSOR BONORUM: See title BONORUM POSSESSIO.

POSSESSORY ACTION. An action which has for its object the regaining possession of the freehold, of which the demandant, or his ancestors, has been unjustly deprived by the present tenant or possessor thereof.

See title OUSTER.

POSSIBILITY. An uncertain thing, which may or may not happen; such, for instance, as the chance of an heir apparent succeeding to an estate, or of a relation obtaining a legacy on the death of a kinsman. A possibility is said to be either near or remote; as for instance, when an estate is limited to one after the death of another, this is a near possibility; but that a man shall be married to a woman and then that she shall die, and he be married to another, this is a remote possibility. The rule against Perpetuities and the rule against Remoteness are commonly ascribed to the circumstance that the law (like any other practical person) refuses to act or decide, *i.e.*, determine, upon a double contingency, and waits until the same becomes a simple contingency by the happening of the one event.

See titles PERPETUITY; REMOTENESS.

POSSIBILITY COUPLED WITH AN INTEREST. Is an estate to arise in some person *in esse* upon the happening of some event, the limitation of the estate not being void for offending against the rules of remoteness. It is something like a conditional vested remainder, and has been (improperly) called a contingent remainder. Such an estate was always assignable in Equity, and by the stat. 8 & 9 Vict. c. 106, it was made so at law.

See titles CONTINGENT REMAINDER; POSSIBILITY.

POSSIBILITY OF ISSUE EXTINGUISHED: See title TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED.

POSTEA. Was a formal statement indorsed on the *nisi prius* record of the proceedings at the trial. It took up the story where the *nisi prius* record terminated. It was so called because it commenced with the word *afterwards* (*postea*); and it proceeded to state the appearance of the parties, and of the judge and jury at the place of trial, and the verdict of the jury on the issues joined (8m. Action at Law, 159).

POSTERIORITY. This is a word of comparison and relation in tenure, the correlative of which is the word "priority." Thus, a man who held lands or tenements of two lords was said to hold of his more ancient lord by priority, and of his less ancient lord by posteriority (Old Nat. Bret. 94). But the word has also a more general application in law, and is used as opposed to priority generally.

See title PRIORITY.

POST, CONTRACTS BY: See title OFFER.

POST LITEM MOTAM: See title ANTE LITEM MOTAM.

POST-MAN: See title PRE-AUDIENCE.

POST-NATI, CASE OF THE: See titles ALLEGIANCE; CALVIN'S CASE.

POST-NUPTIAL. An agreement entered into by a father after the marriage of his daughter, by which he engages to make a provision for her, would be termed a post-nuptial agreement.

See titles FRAUDULENT CONVEYANCES; MARRIAGE SETTLEMENTS.

POST-NUPTIAL SETTLEMENTS: See titles FRAUDULENT CONVEYANCES; MARRIAGE SETTLEMENTS; TRUSTS.

POST-OBIT BOND. A post-obit bond is an agreement (on the receipt of money) by the obligor to pay a larger sum exceeding the legal rate of interest upon the death of the person from whom he, the obligor, has some expectations, if he survive him (*Chesterfield v. Janssen*, 2 Ves. 157). Post-obits are a species of fraud upon third parties, viz., the decedents, or persons upon whose deaths the money is to become payable.

See title FRAUD.

POST OFFICE. This is the office for the conveyance or transmission of letters through the kingdom from place to place within it, and also to and from foreign parts. It was first attempted to be established by the Long Parliament, in 1643, and was afterwards established by Cromwell, in 1657, and confirmed by the Act 12 Car. 2, c. 35. One of the reasons inducing the government of the day to establish one General Post Office, was the

POST OFFICE—continued.

facility which it afforded by the opening of letters of discovering secret conspiracies against the government (9 Anne, c. 10); and this right of the government has been reserved in all the subsequent statutes, and is exercised upon a warrant from one of the principal Secretaries of State. The principal statutes at present in force regarding the Post Office, are:—

- (1.) 7 Will. 4 & 1 Vict. c. 38, for the management of the Post Office and the protection of its exclusive privileges;
- (2.) 3 & 4 Vict. c. 96, and 10 & 11 Vict. c. 85, for the establishment of a penny postage;
- (3.) 18 & 19 Vict. c. 27, for the transmission of newspapers;
- (4.) 23 & 24 Vict. c. 111, for the sale of postage stamps; and
- (5.) 33 & 34 Vict. c. 79, for halfpenny post-cards.

POST-OFFICE MONEY ORDERS. The issue of money orders by the Post Office is regulated by the stats. 3 & 4 Vict. c. 96, s. 38, and 11 & 12 Vict. c. 88, ss. 2-4.

POST-OFFICE SAVINGS BANKS. Were established by the stat. 9 Geo. 4, c. 92, and are now regulated partly by that statute and other statutes, but principally by the stat. 24 & 25 Vict. c. 14, by which latter Act the guarantee of the state is given to the savings depositor for any deficiency in the Post Office Fund, and a rate of 2½ per cent. per annum was fixed as interest on the amount of the deposits. There have been two more recent statutes bearing upon the subject, viz., 26 & 27 Vict. c. 14, and 37 & 38 Vict. c. 73, and by the former of these two Acts certain private savings banks (commonly called Trustee Savings Banks) may, upon their closing, be (in effect) merged in the Post Office Savings Banks.

See title SAVINGS BANKS.

POSTHUMOUS CHILDREN. Are children *en ventre* at the date of their title to property accruing. They are considered in law as already born for the purpose of acquiring the title (10 & 11 Will. 3, c. 16), whether in real or in personal property, but not the interim rents or dividends.

POSTLIMINY. In Roman Law, the *jus postliminii* was a rule of law whereby it was assumed or feigned (in certain cases) upon a man's recovery of his civil status that he had never in fact lost it, and the intervening period was deemed a blank. It is a species of *remitter*, and operates a sort of *relation back*.

See titles JUS POSTLIMINII; REMITTER; RELATION BACK.

POSTULATION. Formerly, on the occasion of a bishop being translated from one bishopric to another, he was not elected to the new see, for the rule of the Canon Law was *electus non potest elegi*; and the pretence was, that he was married to the first church, which marriage could not be dissolved but by the pope: and thereupon he (*sc.* the pope) was petitioned, and consenting to the petition, the bishop was translated, and this was said to be by postulation; but this was restrained by 16 Ric. 2, c. 5. (Cowel; Tomlins).

See title TRANSLATION.

POTESTAS: See titles MANUS; MANCIPIUM: PATRIA POTESTAS.

POUND. An inclosure in which things distrained are placed under the protection of the law. It might be either an *open* pound or a *pound close*.

See titles IMPOUND; POUND-BREACH.

POUNDAGE, SHERIFF'S. Is an allowance to the sheriff of so much in the pound upon the amount levied under an execution. The object of this allowance is to remunerate the sheriff for the risk and trouble which are incident to the performance of his duties. Originally, or at Common Law, the sheriff was entitled to no allowance for executing writs, his office being regarded solely as an honorary one, and hence it was that men of wealth and substance were usually elected to fill the post. In the progress of society, however, and on the growth of commerce, the duties of sheriffs being attended with considerable expense, and the office thereby becoming extremely onerous, the Legislature by different Acts of Parliament (29 Eliz. c. 4; 3 Geo. 1, c. 15; and 5 & 6 Vict. c. 98) entitled them to certain fees and dues, amongst which poundage is included.

POUND-BREACH. Is the act of breaking into a pound or inclosure in which things distrained are placed under the protection of the law; and it is an offence in the eye of the law even where the distress has been taken without just cause; for when once impounded, the goods immediately are in legal custody. The punishment for such offence varies according to the nature of the thing distrained; but in case of distress *damage feasant*, it is, by 6 & 7 Vict. c. 30, fixed at a penalty not exceeding £5, and the payment of all expenses (Co. Litt. 47).

POURPRESTURE. The wrongful inclosing another man's property, or the encroaching or taking to one's self that which ought to be in common. It is perhaps more commonly applied to an encroachment upon the property of the Crown, either upon its demesne lands, or

POURPRESTURE—*continued.*

upon its highways, forests, rivers, harbours, or streets (2 Co. Inst. 38, 271).

POURVEYANCE: See titles **PRE-EMPTION**; **PREROGATIVE**.

POWER. A power is an authority which one person gives to another, authorizing him to act for him, and in his stead. Powers by the Common Law were divided into two sorts, naked powers or bare authorities, and powers coupled with an interest. Thus, when a man devises that his executors shall sell his land, this power is a naked one, that is, the power which the testator so gives to his executors to sell his land is simply a power, and does not vest any interest in the land in the executors; whereas, if a man devises lands to his executors to be sold, this is a power coupled with an interest. The word "power" retains the same meaning when coupled with other words; thus, a power of attorney, or letter of attorney, signifies an authority which one man gives to another to act for him; and these powers are perhaps of the most frequent occurrence, being resorted to whenever circumstances are likely to occur to prevent a party doing the act desired to be done himself; as, for instance, if it were necessary that a person should sign a deed next week, but which he could not do, being obliged to set out upon a voyage to a foreign country before that time, in this case he might authorize some other person to do it for him, and the instrument by which he would confer that authority would be a power of attorney. 4 Cruise, 145.

A very common class of powers are powers of appointment over property; and such powers are either general or special. Under a general power, the appointor can appoint to any one he pleases, and therefore even to himself; consequently the appointor's creditors may seize the lands upon execution against, or in the bankruptcy of, the appointor; and the appointor pays succession duty when he appoints the lands. Under a special power, these respects are all reversed,—such a power enabling the appointor to appoint only within the specified class of objects, and not being liable for the appointor's debts. Prior to the Powers Amendment Act, 1874 (37 & 38 Vict. c. 37), special powers, according as they were exclusive or non-exclusive powers, had to be exercised accordingly by excluding or not (if so desired) any of the objects; but since the appointor might after 1830 (1 Will. 4, c. 46) have practically treated a non-exclusive power as if it were exclusive by cutting off one or more of the objects with a shilling, the distinction between exclusive and non-

POWER—*continued.*

exclusive powers has been altogether abolished by the Act of 1874.

Powers are otherwise arranged in the following threefold division, namely:—

I. Powers simply collateral.

II. Powers not simply collateral, but being either—

(1.) Appendant, or annexed to an estate, or

(2.) In gross, not being incident to any estate.

A power simply collateral is one which is not, and has never been, annexed to an estate; all other powers are either so annexed, or having once been so have become disannexed, in which latter case they are said to be powers in gross. Where the donee of a power to appoint lands is also the fee simple owner of the lands, he may convey the lands for any estate, either in exercise of his power, or in virtue of his estate; but having done so in either of these two ways, he cannot afterwards make any conveyance in the other way, which would be in derogation of his first conveyance, which for that reason is said to have either suspended or extinguished his power, according to the quantity of the estate which he has already created. It is evident that such extinguishment or suspension applies only to powers appendant and neither to powers simply collateral nor to powers in gross. Further, the extinguishment or suspension takes place only to the extent that the exercise of the powers would be inconsistent with the estate which is already gone out of the appointor, whether voluntary or involuntary, and not in any case in which their exercise would be consistent with that estate: see generally *Edwards v. Slater*, Tudor's Leading Cases in Conveyancing, pp. 305–329, and notes thereto.

See title **APPOINTMENT**, **POWERS OF**.

POWER OF APPOINTMENT: See title **CONVEYANCES**, sub-title *Appointment*.

POWER OF ATTORNEY: See title **ATTORNEY**, **POWER OF**.

POYNINGS' LAW. An Act of Parliament made in Ireland in the reign of Henry VII., by which it was enacted that all statutes made in England before that time should be in force in Ireland. It was so called because Sir Edward Poynings was lord-lieutenant there at the time it was made (12 Rep. 190).

See title **IRELAND**.

PRACTICE. The rules and course of practice of the Courts, for the actual conduct of litigation to a successful result, relate to the various matters following, that is to say, the commencement of an

PRACTICE—continued.

action by the issue of a writ of summons (its preparation, issue, service, amendment, renewal, &c.), the appearance of the party defendant or defendants, the pleadings (their succession, times of delivery, amendment, &c.), the choice of parties (their amendment, substitution, addition, &c.), the evidence (*vivâ voce* examinations, depositions, affidavits, &c.), the trial (its modes, its conduct, &c.), the judgment (its varieties, mode of entering, &c.), the execution (its varieties, its mode of carrying out, &c.), the costs, the appeal of the case (with the proper Courts to which, and the times within which, the appeals may be brought), &c., &c. These rules also prescribe the matters, principally of a summary character incidental to the main course of the action, which may be done by summons, motion, or petition; also, what matters may be transacted at chambers, and what only or usually in open Court.

PRACTICE COURT, QUEEN'S BENCH. was a Court attached to the Court of Queen's Bench, and presided over by one of the judges of that Court in which points of practice and pleading were discussed and decided. If any doubt arose in the mind of the presiding judge as to any question brought before him, he referred the party to the full Court.

See title BAIL COURT.

PRÆCEPTIONEM, LEGATUM PER: See title LEGATORUM GENERA QUATUOR.

PRÆCIPE. The word *præcipe* is now commonly used for a sort of abstract of a writ of execution, which is made out on a slip of paper and delivered to the proper officer at the time of issuing the writ; and from which abstract or memorandum that officer makes his entry in the book kept for that purpose.

See title EXECUTION, WRIT OF.

PRÆCIPE IN CAPITE, WRIT OF. When one of the king's immediate tenants *in capite* was deforced, his writ of right was called a writ of *præcipe in capite*.

See title DEFORCEMENT.

PRÆCIPE QUOD REDDAT, WRIT OF. A writ of great diversity, extending as well to writs of right as to writs of entry. It was sometimes called a writ of right *close*, when issuing out of Chancery close; sometimes a writ of right *patent*, when issuing out of Chancery patent, or open (Fitz. Nat. Brev. c. 1).

See titles ENTRY, WRIT OF; WRIT OF RIGHT.

PRÆCIPE, TENANT TO THE: See titles FINE; TENANT TO THE PRÆCIPE.

PRÆCIPE, WRIT OF. An original writ in the alternative, commanding the defendant to do the thing required, or to shew cause for not doing it. This writ was used when something certain was demanded by the plaintiff, which it was incumbent on the defendant himself to perform; as to restore the possession of land, to pay a certain liquidated debt, to perform a specific covenant, and the like.

PRÆCIPUT CONVENTIONNEL. In French Law, under the *régime en communauté*, when that is of the conventional kind, if the survivor of husband and wife is entitled to take any portion of the common property by a paramount title and before partition thereof, this right is called by the somewhat barbarous title of the conventional *præciput*, from *præ*, before, and *capere*, to take.

See title RÉGIME EN COMMUNAUTÉ.

PRÆDES LITIS ET VINDICIARUM. In the very ancient Roman Law, were the bail (or security) given by a possessor for the restitution of the land (or other subject-matter of the *lis*) together with its profits (*vindicis*) in case of his failure in the action.

PRÆMUNIENTES CLAUSE: See title CONVOCATION.

PRÆMUNIRE. When any one incurs a *præmunire*, he incurs the penalty of being out of the king's protection, and of having his property forfeited to the king. It is so called from the words of the writ preparatory to the prosecution thereof, viz., "*præmunire facias*," i.e., cause A. B. to be *forewarned* that he appear, &c. This writ itself is frequently called a *præmunire* (3 Inst. 110).

There was also a celebrated Statute of *Præmunire* (15 Ric. 2, c. 5), which was enacted to check the exorbitant power claimed and exercised by the Pope in England; whence the offence of *præmunire* was the particular offence of maintaining the papal power in England as an *imperium in imperio*. The statute enacts, that whoever procures at Rome or elsewhere any translations, processes, excommunications, bulls, instruments, or other things which touch the king, against him, his crown and realm, and all persons aiding and assisting therein, shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to answer to the king and his council, or process of *præmunire facias* shall be made out against them, as in any other case of *Provisors*.

See title PROVISIONS.

PRÆMUNIRE, STATUTE OF: *See* title PRÆMUNIRE.

PRÆSCRIPTIONES. In Roman Law, were forms of words (of a qualifying character) inserted in the formulæ in which the claims in actions were expressed; and as they occupied an early place in the formulæ, they were called by this name,—i.e., qualifications *preceding* the claim. For example, in an action to recover the arrears of an annuity, the claim was preceded by the words “so far as the annuity is due and unpaid,” or words to the like effect (“*cujus rei dies fuit*”).

PRÆSTARE. In Roman Law, meant to make good, and when used in conjunction with the words *dare facere oportere*, denoted obligations of a personal character, as opposed to real rights.

See title REAL ACTIONS.

PRÆSTAT CAUTELA QUAM MEDELA. Prevention is better than cure; wherefore preventive justice is administered by the Courts, issuing injunctions to prevent the continuance or recurrence of damage.

PRÆTORIAN EDICT: *See* title EDICT.

PRAYER OF PROCESS. A prayer or petition with which the bill in Equity used to conclude, to the effect that a writ of subpoena might issue against the defendant to compel him to answer upon oath all the matters charged against him in the bill.

See title SUBPOENA, WRIT OF.

PREAMBLE OF A STATUTE. The introducing clause or section of a statute is so termed. It usually recites the objects and intentions of the Legislature in passing the statute, and frequently points out the evils or grievances which it was the object of the Legislature to remedy. Although the preamble is generally a key to the construction (*Cracknall v. Janson*, 11 Ch. Div. 22), yet it does not always open or disclose all the parts of it; as sometimes the Legislature, having a particular mischief in view, which was the primary object of the statute, merely state this in the preamble, and then go on in the body of the Act to provide a remedy for general mischiefs of the same kind, but of different species neither expressed in the preamble, nor perhaps then contemplated by the framer thereof (*Mann v. Cammel*, Loft. 783). A reference to the preamble is therefore only an insufficient guide to the true interpretation of the statute.

PRE-APPOINTED EVIDENCE. As opposed to *casual* evidence—(i.e., evidence left to chance, i.e., to the circumstances occurring at the time) denotes the evidence pre-

PRE-APPOINTED EVIDENCE—contd. scribed beforehand usually by statute for the attestation of certain classes of documents, e.g., wills.

See title CASUAL EVIDENCE.

PRE-AUDIENCE. The precedence of being heard, which prevailed at the Bar according to the rank which the counsel respectively hold, e.g., Queen's counsel before junior counsel. In the Court of Exchequer there are two junior barristers appointed by the Lord Chief Baron, called the postman and the tub-man (from the places in which they sit), who take precedence in motions, over other junior barristers.

PREBEND. The rents and profits (*prebenda*) belonging to a cathedral church, or the endowment in land or money given to it for the maintenance of the dean, chapter, and spiritual officers connected therewith. A prebendary, vulgarly called a prebend, is one of this ecclesiastical body who are so maintained (Cowel).

PREBENDARY: *See* title PREBEND.

PRECARIUM. In Roman Law, was a species of contract resembling in some respects the contract of *depositum*, but differing from it in this respect, viz., that the depository in *precarium* was the person who requested the deposit to be made to him, unlike the proper *depositum*, in which the depositor was the person making the request. Owing to this difference, the *precarium* would not classify with the real contracts, but fell into the group of innominate contracts.

See title INNOMINATE CONTRACTS.

PRECATORY TRUST. Is a trust created by certain words, which are more like words of entreaty and permission, than of command or certainty. Examples of such words, which the Courts have held sufficient to constitute a trust, are “wish and request,” “have fullest confidence,” “heartily beseech,” and the like. At the present day, the Courts are not disposed (except under exceptional circumstances) to enlarge the number of such phrases, so as to create a trust.

PRECEDENT CONDITION: *See* title CONDITIONS, PRECEDENT AND SUBSEQUENT.

PRE-CONTRACTS OF MARRIAGE. Contracts of matrimony whether *per verba de presenti* or *per verba de futuro* will not be specifically performed, the 27th section of the Act 4 Geo. 4, c. 74, expressly enacting that they shall not; therefore no such pre-contract creates any disability to marry another person (*Beachey v. Brown*, 29 L. J.

PRE-CONTRACTS OF MARRIAGE—continued.

Q. B. 105). Damages may, however, be given for breach of the pre-contract.

See title MARRIAGE, BREACH OF PROMISE OF.

PREDECESSOR. Under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), which came into operation on and from the 19th of May, 1853, and which applies to all persons becoming entitled to lands or to personal estates (other than legacies) in possession after the date of the commencement of the Act by death, a tax is imposed called Succession Duty, and the rate at which the tax is estimated varies with the relationship or absence of relationship of the successor to the person called his *predecessor*; and the term predecessor is declared by the Act (s. 2) to be "the settlor [disponer], testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

See title SUCCESSION DUTY.

PRE-EMPTION. (1.) The prerogative of purveyance, or pre-emption, was a right enjoyed by the Crown of buying up provisions and other necessities by the intervention of the king's purveyors, for the use of the royal household, at an appraised valuation, in preference to all others, and even without consent of the owners; and also of forcibly impressing the carriages and horses of the subject to do the king's business on the public roads, in the conveyance of timber, baggage, and the like. This prerogative of the Crown appears to have been made the occasion of much abuse in the early reigns, as one of the chief constitutional struggles of the period was the restriction and regulation of the right. (2.) A right of pre-emption is occasionally given in mortgage deeds to the mortgagee, so that in case of a sale of the equity of redemption by the mortgagor, the mortgagee shall have the refusal of the property; and in such a case the price may or may not be fixed beforehand (*Orby v. Trigg*, 9 Mod. 2).

See title MODUS ET CONVENTIO VINCIUNT LEGUM.

PREFER, TO. To bring before, to prosecute, to proceed with. Thus, preferring an indictment signifies prosecuting an indictment.

PREFERENCE, FRAUDULENT: See title FRAUDULENT PREFERENCE.

PREFERENCE SHARES. Are shares in companies, entitled to a preference over the ordinary shares of the company. Preference shares cannot be issued, unless there is a power to do so, contained either in the memorandum (which is unusual) or

PREFERENCE SHARES—continued.

in the articles of association of the company (*Harrison v. Mexican Ry. Co.*, L. R. 19 Eq. 368).

PREFERENTIAL DEBTS. Are debts payable before others, e.g., in an administration of the estates of deceased persons, and also in bankruptcy, debts owing to the Crown and a few other debts are paid in priority to the general debts.

PREGNANCY, PLEA OF. A plea which a woman capitally convicted may plead in stay of execution; for this, though it is no stay of judgment, yet operates as a respite of execution until she is delivered.

See title MATRONS, JURY OF.

PREJUDICE, WITHOUT: See title EVIDENCE, sub-title ADMISSIONS.

PREMISES. In a deed, the premises comprise all that portion which precedes the *habendum*, i.e., the date, the parties' names and descriptions, the recitals, the consideration and the receipt thereof, the grant, the description of the things granted, and the exceptions (4 Cr. Dig. 26). So, in pleading, the word is used, in its logical sense, as signifying foregoing statements or previously-mentioned facts. Thus, in the old declaration in *indebitatus assumpsit*, the plaintiff, after alleging that the defendant was indebted to him in a given sum of money, proceeded to state that, in consideration of the premises, the defendant promised to pay him the same. So, again, in the old declaration for the diversion of water from a water-course, the plaintiff, after stating his right to the enjoyment of the water, and his previous user of the same, and setting forth the fact and the nature of the diversion, then proceeded to point out the injurious consequences which had flowed from the previously-stated facts, in the following manner: "And the plaintiff, by reason of the premises, hath been deprived of the use, benefit, and advantage of the water of the said water-course." The common use of the word "*premises*," as in the phrase "eligible premises," is derived apparently from the frequency with which the word is used in conveyances and leases of lands and houses.

PREMIUMS. The yearly or other periodical sums of money payable upon policies of assurance for the keeping up thereof are so called; also, a premium is often paid for the admission of an individual into a partnership (*Bluck v. Capstick*, 12 Ch. Div. 863); and in leases of houses in towns, a premium is often taken, i.e., a lump sum is paid upon giving possession, in addition to the rent that is to be afterwards paid; but lessors with only a

PREMIUMS—continued.

qualified right of leasing cannot usually bargain for such premiums.

See title MINISTERIAL POWERS.

PREROGATIVE. By prerogative is meant some exclusive pre-eminent power or right. Thus, the king's prerogative is usually understood to be that special pre-eminence which the king has in right of his regal dignity. Thus, the power of making war or peace, of making treaties, leagues, and alliances with foreign states and princes; of appointing ports and havens, or such places only for persons and merchandise to pass into and out of the realm as he in his wisdom sees proper, are all instances of the king's prerogative. Some (but not all) of the principal prerogatives of the Crown are enumerated in the statute *De Prerogativa Regis* (17 Edw. 2, c. 11). The greater part of early constitutional history consists in the struggles of Parliament to restrain the royal prerogative (see title CONSTITUTION, GROWTH OF). And at the present day the law regarding the prerogative exhibits exactly the reverse peculiarity, viz., that the Crown may not of its own authority diminish its prerogative, although with the authority of Parliament it may do so (*Ex parte Eduljee Byramjee*, 5 Moo. P. C. C. 276). And generally the sovereign may not exercise his prerogative in contrariety to the Common Law; and although he may by his prerogative establish Courts to proceed according to the Common Law, he cannot create any new Court to administer any other law (*In re Natal (Bishop)*, 3 Moo. P. C. C. (N.S.) 115); because in English Law, equally as in Roman Law, the imperial reply holds good,—that although freed from the laws, yet kings live by the laws (*Et si legibus soluti sumus, attamen legibus vivimus*).

PREROGATIVE COURT: See title COURTS ECCLESIASTICAL.

PREROGATIVE LAW. That part of the Common Law of England which is more particularly applicable to the king. Com. Dig. tit. "Ley." (A).

PREROGATIVE WRITS. Are remedies of an extraordinary kind, granted by the Courts in certain cases, but never as a matter of right, they being a direct intervention of the Crown with the liberty or the property of the subject. The principal writs of this nature are,—(1.) the writ of *Procedendo*; (2.) the writ of *Mandamus*; (3.) the writ of *Prohibition*; (4.) the writ of *Quo Warranto*; (5.) the writ of *Habeas Corpus*; and (6.) the writ of *Certiorari*.

PRESCRIBE, TO. To assert a right or title to the enjoyment of a thing on the

PRESCRIBE, TO—continued.

ground of having hitherto had the uninterrupted and immemorial enjoyment of it.

See title PRESCRIPTION.

PRESCRIPTION. A title which a person acquires to incorporeal hereditaments by long and continued possession, just as by long adverse possession he may acquire a title, under the Statutes of Limitation, to corporeal hereditaments. Every species of prescription by which property is acquired or lost is founded on the presumption that he who has had a quiet and uninterrupted possession of anything for a long period of years is supposed to have a just right thereto, without which right he could not have been suffered to continue so long in the enjoyment of it. This mode of acquisition was well known in the Roman Law by the name of *usucapio*, because a person who acquired a title in this manner might be said *usu rem capere*. Before the Act of 2 & 3 Will. 4, c. 71, the enjoyment required in English Law to constitute a prescription must have existed time out of mind, or beyond the memory of man, that is, before the reign of Richard I.; but now, the period of enjoyment necessary to constitute a title by prescription is in many cases by the above Act considerably shortened.

See titles COMMONS; EASEMENTS; LIMITATION OF ACTIONS; PROFITS À PRENDRE.

PRESENTATION. The act of a patron of a living offering or presenting a clerk to the ordinary. This is done by a kind of letter from the patron to the bishop of the diocese in which the benefice is situated, requesting him to admit to the church the person presented (3 Cruise, 14).

See title NOMINATION TO A LIVING.

PRESENTATIVE ADVOWSON: See title ADVOWSON.

PRESENTMENT. In its relation to criminal matters, this word signifies the notice taken by the grand jury of any offence from their own knowledge without any indictment laid before them. In reference to admissions to copyholds, the word signifies an information made by the homage or jury of a Court Baron to the lord, by way of instruction, to give the lord notice of the surrender and of what has been transacted out of Court (5 Cruise, 542). But the necessity of the latter presentment has been abolished by 4 & 5 Vict. c. 35 (see title COPYHOLDS). As applied to bills and notes, the word signifies the presentment of the bill to the drawee for his acceptance, or to the acceptor of the bill or maker of the note for his payment thereof when due.

PRESS, LIBERTY OF. Upon the art of printing becoming general, the press was subjected to a rigorous censorship, first on the part of the Church, and latterly on the part of the State. Thus, in the reign of Elizabeth, printing was interdicted, save in London, Oxford, and Cambridge. In the reign of James I. the first newspaper was attempted to be printed, but that king and his successor endeavoured to silence the same by means of the Star Chamber jurisdiction. In 1641, when the Star Chamber was abolished, newspapers promised to become more abundant, especially as the mind of the nation was at that time in a very active and even excited state; but the Long Parliament by various ordinances endeavoured to restrain printing, at least on the part of the Royalist and Prelatical party. This conduct on the part of the Long Parliament was the occasion of Milton's treatise, entitled "*Areopagitica, A Speech for Liberty of Unlicensed Printing.*" Upon the Restoration, in 1660, the Licensing Act (13 & 14 Car. 2, c. 33) was passed, which placed printing under the control of the Government, and in particular confined the trade to London, York, Oxford, and Cambridge, limiting also the number of master printers to twenty; moreover, it imposed the severest and most degrading punishments on offenders against the Act. The Licensing Act expired in 1695, after various periods of renewal, and was not again re-enacted, it having been the opinion of Scroggs, C.J., and of the twelve other Common Law judges, that the Common Law was sufficient of itself, and without any statute to repress the publication of any matter without the king's licence, and the liberal opinions which sprung up after the Revolution of 1688, preferring to entrust the control of the press to the ordinary jurisdictions at Common Law.

From this date newspapers rapidly increased, and in the reign of Anne began to be published regularly, and some even daily; and in that reign they began for the first time to combine political discussion with matters of intelligence, and were subject only to the two following restraints:—

- (1.) The stamp duty on newspapers, which was imposed for the first time in 1712; and
- (2.) The law of libel.

These two restraints have been since gradually removed or relaxed: thus,—

(1.) The tax upon newspapers, which was 4d. in the reign of Anne, was reduced to 1d. in 1836, and was repealed altogether in 1855, and ultimately, in 1861, the duty upon paper also was repealed.

(2.) The law of libel was at first ex-

PRESS, LIBERTY OF—continued.

tremely severe, any reflection upon the Government, or upon ministers, being construed into a reflection upon the king himself, and therefore as a seditious libel. This state of the law of libel was rendered all the worse by reason of the then doctrine of the Common Law, that the jury could only find the particular fact of publication, and not a general verdict of libel or no libel, that matter being left to the judges, who (as being the servants of the Crown) were naturally suspected of being disposed towards the Crown. And although in the *Case of the Seven Bishops* (1687), the jury brought in a general verdict of no libel, yet that precedent was insufficient of itself to change the law, more especially as it was given in bad times. It was left to Mr. Erskine, in the *Case of the Dean of St. Asaph* (1778), to advocate the right of the jury in actions of libel to find a general verdict, and to Mr. Fox, in his Libel Act, 1792, to confer that right upon the jury. By a later Act (6 & 7 Vict. c. 96), it was for the first time rendered competent to a defendant, in a criminal information, to plead in defence or justification the truth of the matters published, and that the same were so published for the public good.

See title LIBEL.

PRESSING TO DEATH: See title PEINE, FORTE ET DURE.

PRESUMPTIONS IN CRIMINAL LAW.

Presumptions are admissible in criminal as well as in civil matters, and in fact (under the name of circumstantial evidence) are very much used in criminal matters. Such presumptions, when of fact, may be either violent, probable, or slight (see title PRESUMPTIONS, QUALITY OF.) The most usual presumptions of law, in criminal cases are,—the presumption of *malice* from the act of killing, or from any wrongful act done without just cause or excuse; the presumption that every man must intend the necessary consequence of his own act; the presumption in favour of the innocence of the accused; all of which presumptions are *juris tantum*, and may accordingly be rebutted by the proper evidence.

PRESUMPTIONS, QUALITY OF. Presumptions are either *violent*, or *probable*, or *light*, according to the amount of weight which attaches to them. Thus, if a landlord sues for rent due at Michaelmas, 1879, and the tenant cannot prove the payment, but produces an acquittance for rent due at a subsequent time, in full of all demands, this is a *violent* or strong presumption of his having paid the former rent, and is equivalent to full proof. Again, if

PRESUMPTIONS, QUALITY OF—*contd.*

in a suit for rent due in 1879, the tenant proves the payment of his rent due in 1880, this is a *probable* presumption that the rent of 1879 was paid also. Again, such presumptions as are drawn from inadequate grounds are termed *light* or *rash* presumptions, *e.g.*, the presumption of marriage from brief cohabitation. Presumptions are also commonly divided into (1.) Presumptions *juris et de jure*, and (2.) Presumptions *juris tantum*, the former class being considered irrebuttable, and the latter rebuttable, by contrary evidence.

See titles EVIDENCE; PRESUMPTIVE EVIDENCE.

PRESUMPTIONS, VARIETIES OF. The chief varieties of presumption are—(1.) Presumptions of *Law*, (2.) Presumptions of *Fact*, and (3.) Presumptions of mixed *Law* and *Fact*. (1.) Presumptions of law are inferences established by the common law or by statute, and which inferences the law peremptorily requires to be drawn; and in case the jury is directed contrary thereto or disregards same, a new trial is grantable *ex debito justitiæ* (*Haire v. Wilson*, 9 B. & C. 643; *Tindal v. Brown*, 1 T. R. 167). These presumptions rest partly on natural reason and partly on public policy: some presumptions of law are irrebuttable, and are thence called *juris et de jure*; others (and the majority) of these are rebuttable, and are thence called *juris tantum*. (2.) Presumptions of fact, called also *presumptiones hominis*, are *e.g.*, the presumption of conformity with the ordinary course of nature, the presumption of virile power within the recognised ages, and such like. And of these presumptions some are violent in their probative effect, some are probable, some are only slight. (3.) Presumptions of mixed law and fact consist chiefly of inferences which, from their frequent occurrence or from any other like cause, attract the observation of the law, and therefore are constantly recommended by the judges to be drawn and acted on by juries, *e.g.*, the presumption of lost conveyances in favour of long established rights. Where a jury disregards or is misdirected regarding either a presumption of fact or a presumption of mixed law and fact, a new trial may be granted in the discretion of the Court, but is not *ex debito justitiæ*.

PRESUMPTIVE EVIDENCE. Is a phrase commonly used to denote circumstantial evidence (see title CIRCUMSTANTIAL EVIDENCE); and as so used, it is opposed to direct evidence (see title DIRECT EVIDENCE). Circumstantial or presumptive evidence is not of the nature of secondary but of primary or original evidence (see titles DERIVATIVE EVIDENCE; PRIMARY

PRESUMPTIVE EVIDENCE—*contd.*

EVIDENCE). The probative force of presumptive evidence consists in the chain constructed out of moral and physical coincidences, especially when such coincidences are of mutually independent origin. In criminal law, the conduct of the accused *antecedent* to and *subsequent* to the commission of the crime, afford presumptive evidence of his guilt or innocence; also his motions, means, and opportunities should not be disregarded; also his previous threats, his previous attempts, his preparations, and such like, are material circumstances affecting the question of his guilt.

See title PRESUMPTIONS, VARIETIES OF.

PRÊT, in French Law is a loan, and may be either (a.) *Prêt à usage*, corresponding to the *commodatum* of Roman Law, or (b.) *Prêt à consommation*, corresponding to the *mutuum* of Roman Law.

See titles COMMODATUM; MUTUUM.

PRÊT À CONSOMMATION: See title PRÊT.

PRÊT À USAGE: See title PRÊT.

PREVIOUS CONVICTION. Under various statutes offenders convicted after a previous conviction are liable to severer punishment. Thus, by the stat. 7 & 8 Geo. 4, c. 28, persons convicted of felony after a previous conviction for felony may be sentenced to penal servitude for life or for seven years or more, or to imprisonment for any period not exceeding four years, and (if a male) to be whipped. Similar provisions are contained in the Larceny Act, 24 & 25 Vict. c. 96, ss. 7, 8, and are extended to a conviction after two summary convictions (s. 9); also, in the Coinage Offences Act, 24 & 25 Vict. c. 99, s. 12, for uttering base coin after a previous conviction. And under the Habitual Criminals Act, 1869 (32 & 33 Vict. c. 99), s. 8, persons twice convicted are rendered subject to police supervision. The usual evidence of a previous conviction is the certificate to that effect of the clerk of the court of the first conviction, and of the identity of the prisoner.

PREVIOUS QUESTION. In the procedure in Parliament, is a method of avoiding a vote. After a debate is closed, or when there is no debate, the Speaker ordinarily and as a matter of course puts the question which has been the subject of debate; but any member of the House may intercept this act of the Speaker's by moving the previous question. Members desiring to oppose the main question vote (curiously enough) *against* and not *for* the previous question; and if the previous question is carried, it is (in effect) lost,

PREVIOUS QUESTION—*continued.*

and the main question is carried without further discussion or amendment; but if the previous question is not carried, it is (in effect) carried, and the main question is lost. May's Parl. Pract. 6th ed. 263-4.

PRICKING FOR SHERIFFS. Is the method of electing the sheriffs of the different counties of England. Originally the sheriffs were chosen by the people in their folkmoete or county court; but these popular elections were put an end to by 9 Edw. 2, stat. 2, and it was enacted that the sheriffs should be assigned by the Chancellor, Treasurer, Barons of the Exchequer, and the justices; and since the time of Henry VI. it has been the custom for these distinguished and learned persons to meet yearly in the Exchequer Chamber on the morrow of All Souls (which day was altered to the morrow of St. Martin by 24 Geo. 2, c. 48, s. 12) and then and there to propose three persons to the king (or queen) for him or her to appoint one of them to be the sheriff, and this they do by marking each name with the prick of a pin, and for that reason this particular mode of election is called pricking for sheriffs.

See title SHERIFF.

PRIMAGE. A small payment made to the master of a vessel for his personal care and trouble, which he receives in addition to his wages or salary, to his own use, unless he has otherwise agreed with his employers. This payment is that intended in the phrase "with primage and average accustomed." It appears to be of very ancient date; and in the old books is sometimes called "bat money," and also "*la contribution des chausses, ou pot de vin du maître.*" Kay's Law of Shipmasters.

See title AVERAGE.

PRIMARY EVIDENCE. As opposed to *secondary* evidence is, e.g., the original document itself, and not a copy thereof. Primary evidence is not the same as *direct* evidence, nor is secondary evidence the same as *circumstantial* evidence; but apparently, evidence called primary is so called, because it is to be *first* used (when it exists and is procurable) before resort is had to secondary evidence, which latter evidence is only to be secondly used upon proof of the loss, destruction, or non-procurability of primary evidence.

See title EVIDENCE, sub-title PRIMARY EVIDENCE and SECONDARY EVIDENCE.

PRIMATE OF ALL ENGLAND. An ecclesiastical title belonging to the Archbishop of Canterbury, who is styled

PRIMATE OF ALL ENGLAND—*contd.*

"Primate of all England and Metropolitan." Anciently, indeed, he had primary jurisdiction, not only over all England, but in Ireland too; for Ireland had no other archbishop till the year 1152 and the Archbishop of Canterbury was then denominated "*Orbis Britannici Pontifex.*" But for a long period, up to a recent date, Ireland had four archbishops, one for each of the four provinces of Armagh, Dublin, Cashel, and Tuam, all of whom were distinguished by the title of primate; but by the recent stats. of 3 & 4 Will. 4, c. 37, and 4 & 5 Will. 4, c. 90, the number was diminished to two, the two others being reduced to the rank of bishops. And by a still more recent Act (32 & 33 Vict. c. 42), the entire English hierarchy in Ireland has been abolished.

See title METROPOLITAN.

PRIMER FINE. On the levying of a fine, when the writ of covenant was sued out, there was due to the king by ancient prerogative a sum of money called the *primer* fine, being a noble for every five marks of land sued for. It was so called because there was another fine payable afterwards, which was termed the *post* fine.

See title FINE.

PRIMER SEISIN. During the feudal tenures, when any of the king's tenants *in capite* died seised of lands or tenements, the Crown was entitled to receive of the heir, if he were of age, a sum of money amounting to one whole year's profits of the lands, which was termed *primer seisin*, i.e., first possession (1 Cruise, 31; 2 Inst. 134).

See title RELIEF.

PRIMOGENITURE. The right of the eldest son to inherit his ancestor's estates to the exclusion of the younger sons; or, as the canon of descent has it, "that where there are two or more males, in equal degree, the oldest only shall inherit" (Litt. sec. 5). The law of primogeniture became generally established in England in the reign of Henry III., in which reign also the lineal descent of the Crown to the infant issue of an elder brother in preference to a younger brother of full age was established. The county of Kent is still an exception, theoretically at least, to the law of primogeniture.

See title DESCENTS.

PRINCIPAL AND ACCESSORY. A criminal offender is either a *principal* or an *accessory*. A principal is either the actor, i.e., the actual perpetrator of the crime (and who is called a *principal in the first degree*), or else one who is present, aiding

PRINCIPAL AND ACCESSORY—contd.

and abetting the fact to be done (and who is called a *principal in the second degree*). An accessory is he who is not the chief actor in the offence, nor yet present at its performance, but who is someway concerned in it, either before or after the fact committed. *An accessory before the fact* is one who, being absent at the time of the commission of a felony, procures, counsels, or commands the principal felon to commit it; as if several plan a theft, which one is to execute; or if a person incites a servant to embezzle the goods of his master. *An accessory after the fact* is one who, knowing a felony to have been committed, receives, harbours, relieves, comforts, or assists the principal or accessory before the fact with a view to his escape (1 Hale, 613, 618).

See titles ACCESSORIES; AIDERS AND ABETTERS.

PRINCIPAL AND AGENT. The English Law adopts the maxim, that what a man does through another person he does for himself (*qui facit per alium, facit per se*), and as a rule (but subject to a few exceptions, chiefly statutory) what a man may do by himself he may also do by another acting for him; but the converse does not hold, that what he cannot do for himself, he cannot do for another; for infants and married women, although they cannot bind themselves, may be agents so as to bind the principal who employs them.

Agents are either general or special; but in either case the authority of the agent is confined by his instructions, whether particular or general, and the same rules of law apply to both.

These rules are principally the following:—

(1.) Where an agent contracts within the scope of his authority he binds his principal; and if without that scope, then he does not bind the latter;

(2.) Where an agent contracts *as principal* he is personally liable; and, in the case of foreign principals, it is the custom of certain trades to look only to the London agent, who is in fact therefore the principal (*Hutton v. Bullock*, L. R. 8 Q. B. 331; L. R. 9 Q. B. 572).

(3.) But in case (2), if the principal is *known* at the time of the contract to the other contracting party, who chooses there and then to *debit* the principal, the agent is not liable; and, on the other hand, if with the like knowledge he there and then *debts* the agent, the principal is not liable;

(4.) But if the principal is *unknown* at the time of the contract to the other contracting party, then, whether the agent represent himself or not as principal, the

PRINCIPAL AND AGENT—continued.

other contracting party may upon discovering the principal, *debit* at his election either the principal or the agent;

(5.) Where, however, the principal is at fault in permitting his agent to act as apparent principal, and thereby the other contracting party is induced to contract with him, the true principal, if he should afterwards intervene, will take subject to all rights or equities, *e.g.*, by way of set-off, which the third party had against the apparent principal (*George v. Clagett*, 7 T. R. 359);

(6.) Where a person having no authority as an agent represents himself as agent, and in that self-assumed capacity enters into a contract, the other contracting party cannot charge the pretended principal either upon the contract or at all; but he may charge the assuming agent, not indeed, upon the express contract, but upon an implied contract or warranty that he had authority to make the contract, and in that way he will make such agent liable for damages (*Collen v. Wright*, 8 E. & B. 647); and

(7.) An agent who contracts in writing should describe himself both in the body of the instrument and in his signature to it, as agent merely for his principal, naming the latter in both places, otherwise he may (in case of any ambiguity in the instrument) be held personally liable (*Humfrey v. Dale*, 7 El. & Bl. 266; El. Bl. & El. 1004; *Paice v. Walker*, L. R. 5 Exch. 173); and he will certainly be personally liable in such a case if he names a fictitious principal.

An officer appointed by government and contracting for stores is not personally liable upon contracts made by him in that capacity (*Macbeath v. Haldimand*, 1 T. R. 172).

Agency is determined by the death of either principal or agent; nor does the English Law admit of that equitable extension of the Roman Law, whereby a stranger contracting with the agent in ignorance of the principal's death was protected, and might recover (*Smout v. Ilbery*, 10 M. & W. 1; *Blades v. Free*, 9 B. & C. 157). But as regards a factor's loans, a secret revocation of the agency does not now affect the validity of the loan (40 & 41 Vict. c. 39, s. 2; and see title ATTORNEY, POWER OF).

It seems, that in *tort* there is no agency, in other words, both agent and principal are equally liable as tort-feasors (*Heugh v. Abergavenny (Earl)*, 23 W. R. 40).

PRINCIPAL AND SURETY: See title SURETY.

PRINTER. Unless he affix his name to what he prints, is incapacitated by the

PRINTER—continued.

statute 39 Geo. 3, c. 79, s. 27, from recovering the price of his work.

See titles LIBEL; PUBLICATION.

PRIORITY. In equity, and as between equitable claimants, priority of time (in the absence of other equities) gives priority of right or of title, according to the maxim *qui prior est tempore, potior est jure*. But in the case of successive assignments of equitable choses in action, priority of notice prevails over priority in the date of assignment. Also, as between registered judgments, the priority of registration prevails over priority in the date of entering up the judgment.

See titles JUDGMENT DEBTS; NOTICE; TACKING; VENDOR'S LIEN.

PRISONER. Prisoners are of various kinds,—either (1.) Prisoners for debt (see title IMPRISONMENT FOR DEBT); or (2.) Prisoners awaiting trial for offences either not bailable or where no bail has been given; or (3.) Prisoners undergoing sentence.

See titles GAOL DELIVERY; PRISONS.

PRISONS. The Prisons Act, 1877 (40 & 41 Vict. c. 21), throws the expense of the maintenance of county and borough gaols on the public funds, and constitutes a Board of Prison Commissioners in whom it vests the legal estate in all prisons, and at the same time transfers all prisons to the Secretary of State. This Act likewise provides for keeping apart the different kinds of prisoners, e.g., convicts from prisoners not yet convicted, and debtors apart from convicts or alleged criminals; and unnecessary prisons may be discontinued, and set free for other purposes. Private prisons appear to have been abolished by stat. 5 Hen. 4, c. 10.

See title GAOLS.

PRIVATE ACT OF PARLIAMENT. Is an Act affecting particular persons, as distinguished from a public Act, which concerns the whole nation. The statutes of the realm are generally divided into public and private,—the former being universal rules that regard the community at large, and of which the Courts of Law take judicial notice; the latter operating only upon particular persons and private concerns, and of which the judges take no judicial notice.

A private Act is either local or personal, a local Act having for its object the interests of some particular locality, and a personal Act relating to the interests of some private individual, e.g., an Act for the management of his private estates. All Acts are public Acts unless the contrary is declared (13 & 14 Vict. c. 21, s. 7). The

PRIVATE ACT OF PARLIAMENT—continued.

Queen's printer's copy is the evidence of a private Act. The plea of not guilty by statute cannot be pleaded in the case of private Acts (5 & 6 Vict. c. 97).

PRIVATE BILLS. All parliamentary bills which concern only particular or private interests are so termed, as distinguished from such as concern the whole community, and which are thence termed public bills. In passing public bills, Parliament acts strictly in its legislative capacity,—originating the measures which appear for the public good, conducting inquiries, when necessary, for its own information, and enacting laws according to its own wisdom and judgment; and all its proceedings are independent of individual parties, who may petition indeed, and are sometimes heard by counsel, but who have no direct participation in the conduct of the business, nor any immediate influence upon the judgment of Parliament. In passing private bills, Parliament still exercises its legislative functions, but its proceedings partake also of a judicial character,—the persons whose private interests are promoted appearing as suitors, while those who apprehend injury are admitted as adverse parties in the suit; and all the formalities of a Court of justice are maintained, various rules of procedure requiring to be observed, and their observance to be strictly proved; and if the parties do not sustain the bill or if they abandon it, the bill is lost, however sensible the House may be of its importance (May's Parl. Pract. 626).

PRIVATE CHAPELS: See titles CHAPELS; PROPRIETARY CHAPELS.

PRIVATE WAY: See titles EASEMENT; WAYS.

PRIVATEERING. Consists in private individuals, under the lawful commission of some sovereign, sailing against one or other of two belligerent countries. By the treaty of Paris, 1856, privateering was abolished as between all the countries who were parties to that treaty; but the United States of America was not a party.

See titles FREE SHIPS, FREE GOODS; VISIT AND SEARCH.

PRIVIES. Persons between whom some connection exists, as between donor and donee, lessor and lessee, ancestor and heir, &c. Persons related by blood, as ancestor and heir, are denominated *privies in blood*; those related by mere right of representation, as executors or administrators of a deceased person, are denominated *privies in representation, or right*; those connected with each other in respect of estate, as lessors and lessees, donors and

PRIVIES—continued.

donees, &c., are denominated *privies in estate*; and lastly, those connected by contract only are *privies in contract*. Between lessors and lessees, there is usually privity both of estate and of contract; and between the lessor and the assignee, there is usually privity of estate only (5 Cruise, 158; *Les Termes de la Ley*).

PRIVILEGE. Sometimes used in law for a place which has some special immunity; and sometimes for an exemption from the rigour of the Common Law. A *real* privilege is that which is granted to a place, a *personal* privilege that which is granted to a person. An instance of the former kind is the power granted to the universities to have Courts of their own; an instance of the latter kind is the exemption of certain persons from being obliged to serve in certain offices, or to perform certain duties.

PRIVILEGE OF PARLIAMENT. Every member is entitled to freedom of speech (*see* title **FREEDOM OF SPEECH**); and the Crown is not to take any official notice of unpleasant truths spoken in Parliament, to the prejudice of the member. A member is also privileged in his speech against all actions for libel or slander. Every member used also to enjoy freedom from arrest (*see* title **FREEDOM FROM ARREST**); but arrest whether on final or on mesne process has now been abolished, even in the case of ordinary subjects (*see* title **ARREST**), with certain small exceptions, and excepting always for criminal offences. The House of Commons also enjoyed the right of determining on elections (*see* title **ELECTIONS, COMMONS' RIGHTS IN**), but this right has been delegated to the election judges. And Parliament as a Court has all the rights of the highest Court to commit for contempt.

PRIVILEGE OF PARTIES. An accused person (or the husband or wife of such accused person) is not competent or compellable to give evidence for or against himself or herself; but no such privilege exists in the case of civil proceedings (16 & 17 Vict. c. 83, s. 4; and *see* 32 & 33 Vict. c. 68); or in the case of the bankruptcy of a husband, his wife being examinable for the purpose of discovering the property of the bankrupt fraudulently disposed of by him or her (Bankruptcy Act, 1869, ss. 96, 97); or in the case of prosecutions in the Exchequer for offences against the revenue laws (17 & 18 Vict. c. 122, s. 15; 28 & 29 Vict. c. 104, s. 33), which prosecutions are declared to be civil proceedings.

PRIVILEGE, PLEA OF: *See* titles **LIBEL**; **PRIVILEGED COMMUNICATION**; **SLANDER**.

PRIVILEGE OF WITNESSES. Usually, witnesses (and deponents in affidavits) may refuse upon the ground of privilege to answer questions tending to criminate them, or to disgrace them, or to subject them to civil proceedings for a penalty or a forfeiture.

See title **PRIVILEGE OF PARTIES**.

PRIVILEGED COMMUNICATION. (1.) In actions for libel or slander, one of the most common defences is that of privilege, or that the words spoken or written were a privileged communication. The chief grounds of privilege are the following:—

(a.) That the defendant was the master of the plaintiff, and spoke the words to him while that relation was continuing (*Somerville v. Hawkins*, 10 C. B. 583);

(b.) That the defendant spoke or wrote the words as part of a *character* which he was requested to give of the plaintiff (*Fountain v. Boodle*, 3 Q. B. 11);

(c.) That the words were a fair comment upon an author or speaker (*Wason v. Walter*, L. R. 4 Q. B. 73); and

(d.) That the defendant had a pecuniary interest (direct or indirect) in the business with reference to which the words were spoken (*Coxhead v. Rickhards*, 2 C. B. 569).

(2.) Upon an order to produce documents in an action or other legal proceedings, it is a frequent objection to the production of certain of these that they are privileged from production. Such privileged communications are, for example, communications between the husband and wife as such, and which are privileged from disclosure for social and moral reasons; but they are principally communications made by either party to his or her legal advisers, as counsel, solicitors, &c. The privilege does not extend to medical men, nor to Protestant clergymen; but it does extend, *semble*, to Roman Catholic priests. As regards the professional privilege of communication to legal advisers, the client may always waive it; and when he chooses to insist upon it, he must confine it to communications made to his solicitor, or to his clerk or agent, or to or by any person employed specially by the solicitor to procure the communication (*Reid v. Langlois*, 1 Mac. & G. 627; *Anderson v. Bank of British Columbia*, 2 Ch. Div. 644); the opposite side having no right to see his adversary's brief, neither has he any right to see the materials for that brief. This privilege does not extend to communications between an agent and his principal, as such, even although litigation is imminent (*Anderson's Case*, *supra*). And such communications, when privileged at all, do not lose the privilege merely because made long *ante*

PRIVILEGED COMMUNICATION—*continued.*

litem motam; and, *à fortiori*, they do not lose it, if made *post litem motam*, or *conspetu litis* (*Minet v. Morgan*, L. R. 8 Ch. App. 361).

See titles **ANTE LITEM MOTAM**; **LIBEL**; **SLANDER**, &c.

PRIVILEGED DEBTS. Those debts which an executor may pay in preference to others; such as the funeral expenses, servants' wages, expenses of medical attendance incurred during the illness of the deceased, &c. Also, in bankruptcy proceedings under the Bankruptcy Act, 1869, the following classes of debts are privileged, *i.e.*, entitled to priority of payment:—

- | | |
|--|---|
| (1.) Parochial, and other local rates; | } to the extent of one year's arrears only: |
| (2.) Assessed taxes; | |
| (3.) Land tax; | |
| (4.) Property or income tax; | |
| (5.) Wages or salaries of clerks or servants, not exceeding four months' arrears or £50; and | |
| (6.) Wages of labourers and workmen, not exceeding two months' arrears. | |

PRIVILEGED VILLENAGE: See title **VILLEIN TENURE**.

PRIVILEGIA. Are particular statutes, *i.e.*, statutes applicable to individuals or to a very limited class of persons. The Royal Marriage Act is an example (see title **MARRIAGE ACT, ROYAL**). These statutes usually involving a personal incapacity, it is a general rule *Privilegia ne irroganto*.

PRIVITY OF CONTRACT. That connection or relationship which exists between two or more contracting parties is so termed. It is essential to the maintenance of an action on any contract, that there should subsist a privity between the plaintiff and the defendant in respect of the matter sued on; and the absence of such privity is fatal to the action (*Baron v. Husband*, 4 B. & Ad. 611). But in some cases, where an action of contract will not lie for want of privity, an action of tort (in which privity is not an essential) will properly lie (*Gerhard v. Bates*, 2 El. & Bl. 476).

See title **PARTICULARITY IN TORTS**.

PRIVITY OF ESTATE. Privity of estate is said to exist between two estates in land when both estates are acquired by the same conveyance, or the one is derived immediately out of the other. Thus, the successive tenants under a deed of settlement are privies in estate; also, a lessor and his lessee have a privity of estate; also,

PRIVITY OF ESTATE—*continued.*

the lessee's assignee is in privity (*i.e.*, contiguity) of estate with the lessor; and on the other hand, the lessee's underlessee is not in privity (not being in contiguity) of estate with the lessor.

See titles **ESTOPPEL**; **PRIVIES**.

PRIVY COUNCIL. Is the council which advises the sovereign, and through which she (or he) exercises her executive authority. Its functions, so far as judicial, are exercised by a judicial committee; and so far as executive, are exercised by the Cabinet Council.

See titles **CABINET MINISTRY**; **JUDICIAL COMMITTEE**.

PRIVY SEAL. Is the seal with which all documents are sealed before being sent to the great seal. The keeper of the privy seal is a member of the cabinet.

See titles **GREAT SEAL**; **SIGN MANUAL**.

PRIVY VERDICT: See title **VERDICT**.

PRIZE. Is booty seized on land or captured at sea in times of war. The English Court of Admiralty has always had jurisdiction in the matter of naval captures; but until the stat. 3 & 4 Vict. c. 65, s. 22, it had no jurisdiction in the matter of land seizures, or booty (*Banda and Kirwee Booty Case*, Law Rep. 1 A. & E. 109), but acquired jurisdiction under that statute.

Prize tribunals are a species of international tribunals, their sentences being conclusive evidence upon every matter within their respective jurisdictions (*Bolton v. Gladstone*, 5 East, 155); but nothing that rests on mere inference from these sentences is conclusive in the same manner (*Fisher v. Ogle*, 1 Camp. 418). The conclusive effect of these sentences appears to arise from the fact that they are not given in any litigation *inter partes* (the foreign state having no *locus standi* in the Courts) nor yet *ex parte*, but are given *in rem*; and the sovereign state in which the Court is sitting is by means of its Court making an inquiry for itself, and adjudicating for itself only; and that state would be answerable to the injured party, if the adjudication should be improperly conducted, or should be contrary to the admitted rules and usages of international law; for the country of which the injured party is a subject could take up his case, and assist him towards obtaining redress.

See titles **IN REM**; **MARQUE AND REPRISALS**, **LETTERS OF**; **REPRISALS**.

PRIZE TRIBUNALS: See title **PRIZE**.

PRO CONFESSO. When a defendant in a suit in Chancery would not put in his answer to the plaintiff's bill, and the

PRO CONFESSO—*continued.*

proper means had been resorted to, to compel him to do so, and yet he did it not, and would not do it, the plaintiff might proceed to have the bill taken against him *pro confesso* (i.e. as confessed), and to obtain a decree in the suit on the assumption that the defendant had confessed the truth of the bill; for by his not answering it, and remaining silent, it was assumed, reasonably enough, that he confessed the truth of its contents.

See titles ADMISSIONS IN PLEADINGS; PLEADING, DEFAULT OF.

PRO INDIVISO. The joint occupation or possession of lands; thus lands held by co-parceners are held *pro indiviso*, that is, they are held undividedly, neither party being entitled to any specific portions of the land so held, but both or all having a joint interest in the undivided whole (Cowel).

PRO MAJORI CAUTELÂ. Literally means "from greater caution;" as where some provision is inserted in a legal instrument, which the law would itself imply as being just and equitable under the circumstances, such a provision is said to be inserted only *pro majori cautelâ*. And there are many other like uses of the phrase.

PRO RATÂ. This phrase means "proportionately." Thus, in case of a deficiency of assets to pay legacies in full, they are said (being general legacies) to abate *pro ratâ*, i.e., to diminish proportionately, as well in regard to the deficiency of assets as in regard to their respective amounts. So, under certain circumstances, the payment of freight is regulated according to the proportion of the voyage performed, i.e., *pro ratâ itineris peracti*.

PROBATE. The copy of a will or testament made out on parchment under the seal formerly of the ordinary, and now of the Court of Probate, and usually delivered to the executor or administrator of the deceased, together with a certificate of the will's having been proved, is commonly called the probate.

See title PROVING A WILL.

PROBATE DIVISION. That Division of the High Court of Justice which now represents the Court of Probate.

See title COURT OF PROBATE.

PROBATE DUTY. All wills, where the estate of the testator exceeds £100, require to have the probate of them stamped *ad valorem* on the total amount of the personal estate; but a return of a part of duty will be made after payment of debts, in the proportion that the estate is diminished by

PROBATE DUTY—*continued.*

such payment. Where mortgage debts are secured on leaseholds only, such debts may be deducted from the original valuation, and probate duty is then only payable on the balance.

See title ADMINISTRATION DUTY.

PROCEDENDO, WRIT OF. A writ by which a cause which has been removed from an inferior to a superior Court by *certiorari* or otherwise, is sent down again to the same Court to be proceeded with there, after it has appeared that the defendant had not good cause for removing it, (Cowel; *Les Termes de la Ley*). The removal of civil actions, and their removal back, would now be effected without recourse to any writ of *certiorari* or of *procedendo*; but these writs appear to remain in criminal prosecutions, and also in various proceedings other than actions.

See title REMOVAL OF ACTIONS.

PROCEDURE. This word is commonly opposed to the sum of legal principles which constitute the substance of the law, and denotes the body of rules whether of practice or of pleading or of evidence, whereby rights are effectuated through the successful application of the proper remedies. A great uniformity of procedure has been introduced by the Judicature Acts, 1873-5, and the orders and rules made thereunder in all civil actions; but the procedure in criminal cases and in civil matters (not being actions), is not affected by these Acts or orders or rules.

See titles CRIMINAL LAW; EVIDENCE; PLEADING; PRACTICE; &c.

PROCESS. The word process, in its most comprehensive signification, includes not only the writ of summons, but all other writs which may be issued during the progress of an action, and also those writs which are used to carry the judgments of the Court into effect, and which are termed writs of execution.

Original process was the method of compelling a defendant to appear, when actions were commenced by original writ issuing out of Chancery; and *mesne* process was the method of compelling a defendant to comply at some other or intermediate stage of the action.

See title PROCEDURE.

PROCHEIN AMY. As an infant cannot legally sue in his own name, the suit or action must be brought by his *prochein amy*, i.e., some friend who is willing to take upon himself the trouble and responsibility. Co. Litt. 135 b., note; Cro. Car. 131.

See titles INFANTS; NEXT FRIEND.

PROCLAMATION, ROYAL. A notice publicly made of anything; or a public

PROCLAMATION, ROYAL—continued.

declaration of the king's will made to his subjects. It was the opinion of Lord Coke, that proclamations, when grounded on the laws of the realm, were of great force; and of Blackstone, that proclamations were binding on the subject when they did not contradict the laws of the land, or tend to establish new ones; and they appear, in fact, to be a proper mode, if not of signifying, at any rate of enforcing, the law, and, as such, to be a necessary part of the executive, in proper cases. They have been used at all times by all classes of sovereigns, as well those who regarded the constitution as those who disregarded it. The stat. 31 Hen. 8, c. 8, gave to the king's proclamations in ecclesiastical matters the force of law; and, similarly, Orders in Council made in virtue of any like enabling statute have the force of law.

PROCLAMATION OF A FINE. The notice or proclamation which was made after the engrossment of a fine, and which consisted of its being openly read in Court sixteen times: viz. four times in the term in which it was made, and four times in each of the three succeeding terms; which, however, was afterwards reduced to one reading in each term.

See title FINE.

PROCLAMATIONS BY LORD OF MANOR. Upon the death of a copyholder, the lord makes three proclamations for the heir or devisee to come forward, in order to be admitted, and pay to the lord the fine to which he has become entitled; and failing the heir or devisee to come forward, the lord may thereafter seize the lands *quousque*.

See title SEIZURE QUOUSQUE.

PROCTOR. An officer of the Ecclesiastical Courts, while these existed, and now of the Court of Probate, whose duties correspond with those of an attorney or solicitor in the Common Law Courts; and in fact all attorneys and solicitors may, and commonly do, now act as proctors in the Court of Probate (40 & 41 Vict. c. 25, s. 17).

See title PROCURATOR.

PROCURATION. Indorsing a bill of exchange by procuration, is doing it as proxy for or by authority of another. Also, many contracts are entered into *per proc.*, as it is called; in which case the agent should describe himself as such both in the body of the document and in his signature to it, otherwise he may be incurring a personal liability upon it.

See title PRINCIPAL AND AGENT.

PROCURATOR. In its most general signification, means any one who has received a charge, duty, or trust for another, thus, the proxies of the Lords in Parliament are in the old books called *procuratores*; so also a vicar or lieutenant was so called, and even the bishops were sometimes called *procuratores ecclesiarum*; and "proctor" is merely an abbreviation of procurator. The word "procurator" was also used for him who gathered the profits of a benefice for another man, and the word "procuracy" for the writing or instrument which authorized the procurator to act (Cowel; *Les Termes de la Ley*). In Roman Law, the procurator was a simple attorney in an action or prosecution,—of a less formal kind than the *cognitor*.

See title COGNITOR.

PROCUREMENT. Means the causing or procuring a thing to be done, whether civil or criminal. Inferior judges are liable to a fine and to pay treble damages to the injured party for wilfully procuring the institution in their Courts of an action against him (13 Edw. 1, c. 36).

PROCURERS. Persons procuring the defilement of girls under twenty-one years are so called; and when they effect their object by false pretences are liable to be imprisoned for any term not exceeding two years, with or without hard labour (24 & 25 Vict. c. 100, s. 49).

PROCUREUR DU ROI. In French Law is a public prosecutor, with whom rests the initiation of all criminal proceedings. In the exercise of his office (which appears to include the apprehension of offenders), he is entitled to call to his assistance the public force (*posse comitatus*); and the officers of police are auxiliary to him.

PROCUREUR - GÉNÉRAL, ou IMPÉRIAL. In French Law is an officer of the Imperial Court, who either personally, or by his deputy, prosecutes every one who is accused of a crime according to the forms of French Law. His functions appear to be confined to preparing the case for trial at the assizes, assisting in that trial, demanding the sentence in case of a conviction, and being present at the delivery of the sentence. He has a general superintendence over the officers of police and of the *juges d'instruction*, and he requires from the *procureur du roi* a general report once in every three months.

PRODIGUS. In Roman Law, was a spendthrift, whose extravagance was such as to render him incapable of managing his own affairs, and to require the appointment of a guardian of his estate for his protec-

PRODIGUS—*continued*.

tion. He is the lunatic of English Law, in the Court of Lunacy.

See title LUNACY.

PRODUCTION OF DOCUMENTS: See titles DISCOVERY; PRIVILEGED COMMUNICATION.

PROPERT IN CURIA: See title Oyer OF DEEDS AND RECORDS.

PROFESSIONAL PRIVILEGE. The privileges which belong to the members of certain professions (*e.g.* clergymen, barristers, &c.) during such times as they are exercising the business of their professions are called by this name. Clients in respect of the communications they make to their solicitors or counsel are also privileged under certain circumstances.

See titles BARRISTER; CLERGYMEN; PRIVILEGED COMMUNICATION.

PROFIT AND LOSS: See title PARTNERSHIP.

PROFITS À PRENDRE. Are rights of taking some portion of the substance or produce of lands, in which respect they are distinguished from *easements*, which are privileges without profit (see title EASEMENTS). They are to all intents and purposes mere rights of *common*.

See title COMMON, RIGHT OF.

PROFITS OR DAMAGES. A patentee or the owner of a copyright suing for the infringement of his patent or copyright is not entitled both to an account of profits (for that account amounts to a condonation of the alleged infringement) and also to an inquiry as to damages, but he must elect which he will take (*De Vitre v. Betts*, L. R. 6 H. L. C. 819). And the rule appears to be the same in the case of the piracy of trade-marks, excepting that in that case special damage must be shewn, there being no property in a trade-mark as there is in a patent or in a copyright (*Davenport v. Rylands*, L. R. 1 Eq. 308).

PROFITS OR INTEREST. Where trustees use the trust funds in trade, the *cestuis que trustent* have the option in each year of taking either the profits made from such use in the trade during that year or interest at the rate of five per cent. per annum (*Docker v. Somes*, 2 M. & K. 655). In taking partnership accounts, regard will be had to the articles of co-partnership in determining what is interest, and what profits; and the proper mode of ascertaining profits is to ascertain the value of the partnership property, and then to deduct the original (or added) capital of the partners (with or without interest thereon), according as the articles or the case may

PROFITS OR INTEREST—*continued*.

require (*Disham v. Bradford*, L. R. 5 Ch. App. 519).

PROFITS, SHARING: See title BOVILL'S ACT.

PROHIBITION. A writ issuing properly out of the Court of King's Bench, but for the furtherance of justice it may also be had in some cases out of the Courts of Chancery, Common Pleas, or Exchequer. It is a prerogative writ, and is directed to the judge and parties to a suit in any inferior Court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other Court. No such prohibition will issue after judgment or sentence unless the want of jurisdiction below appears on the face of the proceedings (*Buggin v. Bennet*, 4 Burr. 20, 35).

In early times, the chief use of prohibition was to restrain the Ecclesiastical Courts from interfering in matters which were properly subject to the jurisdiction of the Courts of Common Law, whence also numerous statutes were passed in aid of the Common Law (see titles ARTICULI CLERI; CLARENDON, CONSTITUTIONS OF). And the clergy used to complain, notably in the reign of James I. during the primacy of Archbishop Bancroft, that the Common Law Courts extended their interference with the spiritual Courts by means of their prohibitions too far (see *Case of Prohibitions*, 12 Rep. 59). But in more modern times the uses of writs of prohibition have been chiefly the following:—

- (1.) To commissioners, justices, and inferior Courts generally, whether civil or criminal, for assuming unwarranted jurisdiction;
- (2.) To Courts of Appeal, not excepting even the Judicial Committee of the Privy Council (*Darby v. Cozens*, 1 T. R. 552; *Ex parte Smyth*, 3 A. & E. 719).

The Court of Chancery could properly grant a prohibition (as distinguished from an injunction) during vacation only, and not during term; but at the present day although the Queen's Bench Division is and remains the proper jurisdiction for granting prohibitions, any of the other divisions of the High Court indifferently may assume the jurisdiction and at any time, when an application to the Q. B. Div. is either inconvenient or impossible.

PROHIBITIONS, CASE OF: See title PROHIBITIONS.

PROJECTED COMPANIES: See title PROMOTERS.

PROLIXITY. An offence in pleading, and which consists in the absence of conciseness or terseness. This offence, when very marked, is usually visited with costs.

PROMISE. In law is either express or implied. *Express*, when founded upon the express contract or declaration of the party promising; *implied*, when the promise is inferred from his acts, conduct, or peculiar position. Thus, the law will always infer a promise by a debtor to pay a debt due to his creditor; and in an action against the debtor for recovery of the debt, such promise required to be alleged in the declaration, although not to be specifically proved; but now it need not even be alleged (Order XIX. 28).

PROMISE OF MARRIAGE: See title BREACH OF PROMISE OF MARRIAGE.

PROMISSORY NOTE. A written instrument by which one person engages or promises to pay a certain sum of money to another. It in many respects resembles a bill of exchange; thus, the maker of the note is the ultimate debtor (combining in himself the two characters of drawer and acceptor of a bill of exchange), the promisee is the payee, and he is also the first indorser; and indorsements may be either special or blank, as in the case of a bill; and just as the acceptor must run after his bill when it is due, so the maker must run after his promissory note; but three days of grace are allowed in the case of notes, just as in the case of bills, unless the note (or the bill) is payable on demand or (since 34 & 35 Vict. c. 74) on presentation or at sight.

See title BILL OF EXCHANGE.

PROMOTERS. (1.) Are the individuals who project a company, whether or not they succeed in also launching it successfully. They are not partners, so as to be liable each of them for the acts of the other and others (*Dickinson v. Valpy*, 10 B. & C. 128); but they stand in a fiduciary relation to the company which is afterwards established (*New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. Div. 73; 3 App. Ca. 1218); and it is in general a term in the document constituting the company that the liabilities of the promoters shall be taken over by the company (see titles PROSPECTUS, FRAUD IN; ULTRA VIRES). (2.) Are the individuals who "promote" the office of judge in ecclesiastical suits of a quasi-criminal character, these proceedings being taken nominally in the name and under the sanction of the bishop, but effectively by the individual prosecuting (*Bishop of Winchester v. Wix*, L. R. 3 A. & E. 19).

PROOF. The evidence which a witness is brought forward to give in an action,

PROOF—continued.

when in the form of a brief to counsel to examine him from, is commonly called his proof.

See titles EVIDENCE; WITNESSES.

PROOF OF DEBTS IN BANKRUPTCY.

The creditors of a debtor who has been made a bankrupt come in and prove their debts in the Court of Bankruptcy, in order to obtain payment on account thereof *pari passu* and *pro rata* among each other, to the extent of the assets from time to time realised. All debts are proveable, other and except unliquidated damages for a tort, debts or liabilities contracted by the bankrupt subsequently to the date of the contractee having notice of any act of bankruptcy available for the adjudication of bankruptcy, contingent liabilities that are incapable of being fairly estimated, and the like (Bankruptcy Act, 1869, s. 31). The proving creditor swears an affidavit of his debt in a prescribed form, and leaving same with the registrar of the Court or (after the appointment of the trustee) with the trustee, and the trustee admits or expunges the proof according to the evidence, subject to an appeal to the Court.

PROOF PER TESTES: See title TESTES, PROOF OF WILL PER.

PROPERTY. A word of almost infinite extent, including every species of thing a man may have an interest in. Thus the terms lands, goods, chattels, effects, and, indeed, almost every term which represents an object in which a person may acquire an interest or a right, are included in the word "property" (*Doe d. Morgan v. Morgan*, 6 B. & C. 512); and the word "property" occurring in a will is not real property or personal property, but is either or both indifferently (*Ward v. Holderness*, 20 Beav. 147).

See titles EASEMENT; JUS IN RE ALIENÂ; JUS IN RE PROPRIÂ.

PROPERTY TAX. Is the income tax regarded as arising, or so far as it arises, from—lands, tenements, and hereditaments. In the Property and Income Tax Act, 5 & 6 Vict. c. 35, the distinction between the landlord's property tax and the tenant's property tax is taken, the former tax being levied in respect of the annual value of the property (at the rate of sevenpence in the pound), and the latter tax being levied in respect of the annual value of the occupation (at the rate of 3½d. for England and 2½d. for Scotland in the pound). The tenant is (by the Act) authorized to deduct this tax paid by him out of his next rent, and he cannot bargain away this right of deduction (46 Geo. 3, c. 65, ss. 115, 195, and above Act of 1842).

PROPERTY TAX—continued.

there being usually an express covenant in his lease to pay and bear all taxes other than landlord's property tax, (i.e. other than the proportion of property tax which should fall upon the landlord in respect of his property, after allowing for the proportion of property tax payable of right by the tenant in respect of his occupation). Property tax (unlike land-tax) is a charge on the person, and not on the property; but the occupier is the first person regarded in the collection of the tax.

See title **INCOME TAX**.

PROPOUNDER OF A WILL. He by whom it is brought forward, and who seeks to obtain for it the probate formerly of the ordinary or of the Prerogative Court, and now of the Court of Probate. This is generally the executor; but if any testamentary paper be left in the possession of, or materially benefits, any other person, it may be propounded by such person (*Wood and Others v. Goodlake, Helps and Others*, 2 Curt. 84, 95).

See title **EXECUTOR ACCORDING TO THE TENOR**.

PROPRIETARY CHAPELS. Are such as have been built within time of living memory; and these, unless when they were enabled by statute, could exercise no parochial rights, and were described by Sir John Nicholl to be "anomalies unknown to the constitution and to the ecclesiastical establishment of the Church of England" (2 Hag. 46). These chapels are now subject to the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85).

See title **CHAPELS**.

PROPRIETATE PROBANDA, WRIT OF. A writ which used to be directed to the sheriff, requiring him to inquire whether goods distrained were the property of the plaintiff, or of the person claiming them. This writ issued when to a writ of replevin the sheriff returned as his reason for not executing it, that some third person claimed a property in the goods distrained (2 Arch. Pract. 827). The object of this writ is now obtained by means of a summons to interplead.

See title **INTERPLEADER**.

PROPRIÉTÉ. In French Law, is the right of enjoying and of disposing of things in the most absolute manner, subject only to the laws.

See title **PROPERTY**.

PROROGATION OF PARLIAMENT. Is the termination of a particular session of an existing Parliament, and not the dissolution of Parliament.

See title **DISSOLUTION OF PARLIAMENT**.

PROSECUTION: See title **ACTION OR PROSECUTION, WHICH?**

PROSECUTOR, PUBLIC: See title **PUBLIC PROSECUTOR**.

PROSPECTUS, FRAUD IN: See titles **FRAUD; FRAUD IN COMPANY LAW**.

PROTECTED TRANSACTIONS. In bankruptcy, the order of adjudication when once made relates back to the act of bankruptcy upon which the petition was founded, and even to any earlier act of bankruptcy (within a year from the order) that is still available as such; and in this manner many transactions with the bankrupt that have taken place in good faith and for value before the adjudication order are comprised within the bankruptcy, and (but for being by the Bankruptcy Act, 1869, declared protected transactions), would be wholly null and void. There are six such protected transactions, viz.:—(1.) Payments in good faith and for value to the bankrupt; (2.) Payment or delivery of the bankrupt's own money or goods to him by the depositary thereof in good faith; (3.) Contracts made with the bankrupt in good faith and for value; (4.) Transfers, &c., by the bankrupt of his property to a third person in good faith and for value, and (5.) and (6.) Executions against *land* executed by seizure and against *goods* by seizure and sale by any creditor in good faith.

PROTECTION ORDER. Under the stat. 20 & 21 Vict. c. 85, s. 21, a wife deserted by her husband may apply (within the metropolitan district) to a police magistrate, and (in the country), to justices in petty sessions for a protection order, i.e. for an order protecting any money or property which she may acquire by her own lawful industry, or which may be otherwise acquired by her after her desertion, against her husband and her husband's creditors. The order when made is to be entered with the County Court registrar of the district in which the female resides. The effect of the order is like that of a decree of judicial separation,—so far as regards property and contracts (Martin and Greenwood, 475–6).

PROTECTION, WRIT OF. A prerogative writ which the king might grant to privilege any person in his service from arrest during a year and a day; this prerogative, however, was seldom exercised; it was formerly the subject of much abuse, whence the frequent complaints regarding it in the early constitutional period.

PROTECTOR. By s. 32 of the stat. 3 & 4 Will. 4, c. 74, power is given to any settlor to appoint any person or persons, not exceeding three, to be the protector of the settlement, and also to perpetuate that

PROTECTOR—*continued.*

protectorship; and by s. 33 of the same Act, if any protector is a lunatic, idiot, or of unsound mind, the person for the time being entrusted by the royal sign manual with the care and custody of the persons and estates of such persons (being usually the Lord Chancellor) is constituted protector in the place of such lunatic, idiot, or person of unsound mind; or if the protector is a convicted felon, or an infant, or it is uncertain whether he is living or dead, and generally in the absence of a protector for other causes, there being a subsisting prior estate, the Court of Chancery is constituted protector in his stead. However, by s. 22 of the Act, it is enacted that if at the time of a subsisting tenancy in tail under a settlement, there is also subsisting under the same settlement in the same lands, any estate for years determinable on a life or lives, or any greater estate (not being an estate for years simply) prior to the estate tail, the owner of such prior estate (or if there be more than one such, then the owner of the first of them, being otherwise qualified) shall be the protector of the settlement, notwithstanding such owner may have wholly alienated his estate, or have incumbered the same; and by s. 23, each of two or more persons, co-owners of such prior estate, is sole protector in the proportion of his share; and by s. 24, a married woman being owner of such prior estate, if settled to her separate use, is sole protector, and if not so settled, is protector together with her husband. But by ss. 27 and 31, the following persons, as such, are not to be capable of being protectors, viz., dowresses, bare trustees, heirs, executors, administrators, or assigns: but a tenant by the curtesy may be protector (s. 22), and also a bare trustee under a settlement dated on or before the 31st of December, 1833.

The protector is, in the exercise of his own unlimited discretion, to accord or to withhold his consent to any disposition of an actual tenant in tail; but once he has accorded same, he cannot afterwards recall it, s. 44. The protector, by s. 42, is to give his consent either in the deed of disposition, or by any deed prior to or contemporaneous with the deed of disposition, the distinct deed (if any such is used) requiring to be inrolled in the Court of Chancery either with or before the inrolment of the deed of disposition. The Lord Chancellor or Court of Chancery may signify his or its consent by *order*.

See titles CONVEYANCES; DISENTAILING ASSURANCE.

PROTEST. In its most general sense signifies an open declaration or affirmation.

PROTEST—*continued.*

Thus, when in the House of Lords any vote passes contrary to the sentiments of any of its members, such members may, by leave of the House, enter their dissent on the journals of the House, with the reasons of such dissent, and this is styled their protest. So also the term "protest," as applied to foreign bills of exchange, signifies a solemn declaration by the notary that the bill has been presented for acceptance or payment and dishonoured. So also amongst mariners, a declaration made on oath before a magistrate or notary public in any distant port of the damage likely to ensue from a ship's delay is termed a protest.

See title NOTARY.

PROTESTATION. A particular formula used in pleading was so termed. Thus, in a demurrer to a bill in the Court of Chancery, the form began with a protestation in this manner: "This defendant by *protestation* not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur, &c." (Hunter's Suit in Equity, App. p. 275). Such a protestation is now unnecessary.

PROVING A WILL. When the will has the usual attestation clause, it is proved by the simple oath of the executor, that he believes the will to be the true last will; but when the will has not that attestation clause, then in addition to the executor's oath to the effect aforesaid, there is required also from one of the subscribing witnesses an affidavit of due execution by the testator. Probate in either of these forms is called probate in common form. Probate in solemn form is where both the attesting witnesses are sworn and examined, and other corroborative evidence is taken, in the presence of the widow and next of kin, including the heir. Where the will has once been proved in solemn form, the probate is not only sufficient but conclusive proof of the will (20 & 21 Vict. c. 77, s. 26); where the probate has been in common form, and in some subsequent action affecting real estate it is necessary to establish the devise, the plaintiff gives to the defendant ten days at least before the trial notice that he intends using at the trial the probate, and thereupon such probate becomes sufficient evidence, unless the defendant within four days after receiving the notice gives a counter-notice to the effect that he disputes the devise (21 & 22 Vict. c. 77, s. 64); and in that latter case, it would be necessary to prove the will as a substantive independent fact, in accordance with the ordinary rules of evidence.

PROVISIONAL ASSIGNEE. Was an assignee to whom the property of a bankrupt was assigned until the regular or permanent assignees were appointed by the creditors. But the 1 & 2 Will. 4, c. 56, s. 22, and 5 & 6 Vict. c. 122, s. 48, having enacted that until assignees should be chosen by the creditors of a bankrupt, the official assignee to be appointed to act with the creditors' assignees should be enabled to act, and should be deemed to be to all intents and purposes a sole assignee of the bankrupt's estate and effects, provisional assignees ceased to be any longer necessary, the official assignees acting, in fact, as such provisional assignees in all cases. The like simplification of the bankruptcy law is preserved under the Act of 1869, under which the registrar of the Court is the official trustee until the Court or the creditors have appointed a particular trustee of the bankrupt.

See titles **BANKRUPTCY**; **LIQUIDATION**.

PROVISIONS. The nominations to benefices by the pope were so called, and those who were so nominated were termed provisors. Various statutes were passed in the reign of Edward III. forbidding all ecclesiastical persons from purchasing these provisions, in particular, the stat. 25 Edw. 3, st. 6, and 27 Edw. 3, st. 1, which are pre-eminently called the Statutes of Provisors.

See title **PRÆMUNIRE**.

PROVISIONS OF OXFORD. Certain provisions made in the Parliament of Oxford, 1258, for the purpose of securing the execution of the provisions of Magna Charta, against the invasions thereof by Henry III.; the government of the country was in effect committed by these provisions to a standing committee of twenty-four, whose chief merit consisted in their representative character and their real desire to effect an improvement in the king's government.

PROVISO. A condition or provision inserted in deeds, on the performance or non-performance of which the effect of some clause in the deed frequently depends; it usually begins with the word "provided." Thus, in leases there is usually a proviso that if the rent be unpaid for the space of twenty-one days after the day appointed for the payment of it, then it shall be lawful for the lessor to enter into possession of the premises (4 Cruise, 876). So in mortgage deeds, that part which provides that on payment of the mortgage-money and interest and costs by the mortgagor, the mortgagee shall re-convey the estate to the mortgagor, is termed the proviso for redemption, because it is by virtue

PROVISO—continued.

of that proviso that the mortgagor is empowered to redeem his estate.

See title **PROVISO**, **TRIAL BY**.

PROVISO, TRIAL BY. In all cases in which the plaintiff, after issue joined, did not proceed to trial, when by the course and practice of the Court he might have done so, the defendant might, if he wished, give the plaintiff notice of trial, and proceed to trial, as in ordinary cases; this was termed a trial by proviso. It was so called because, in the *distringas* to the sheriff there was a proviso that *provided* two writs should come to his hands he should execute one of them only (2 Arch. Prac. 1492-3). But as this mode of proceeding was tedious and expensive, the defendant in ordinary cases more usually took proceedings under the C. L. P. Act, 1852, s. 101, to compel the plaintiff to proceed to trial.

PROVISORS, STATUTES OF: See titles **BENEFICES**; **PROVISIONS**.

PROVOCATION. Provocation can never render homicide either justifiable or excusable; at the most, it may reduce murder to manslaughter (1 Hale, 466). But if there be evidence of express malice, or if the provocation was at an end, the homicide would be murder, and not manslaughter. The matter alleged as provocation must consist of some sort of battery, with or without words, and not of words only (Archbold's Crim. Pract. 631-4).

PROXY. Votes are usually given either in person or by proxy; but as regards voting by proxy, that is sometimes wholly excluded (*e.g.*, in parliamentary elections), and at other times placed under strict regulations. Every writing constituting a proxy must be in the prescribed form.

PUBLIC ACT OF PARLIAMENT is an Act which concerns the whole community, and of which the Courts of Law are bound judicially to take notice. See for distinction between a Public and Private Act, title **PRIVATE ACT OF PARLIAMENT**. See also title **PRIVATE BILLS**.

PUBLIC COMPANY: See title **JOINT STOCK COMPANIES**.

PUBLIC HEALTH: See titles **HEALTH**, **PUBLIC**; **SANITARY LAWS**.

PUBLIC MINISTER. In international law, this term comprises all the higher grades of the representatives of foreign countries; but it does not extend to include a consul, or even a consul-general, when acting in the place of an absent minister.

PUBLIC MORALS: See title **VAGABONDS**.

PUBLIC POLICY: See title **POLICY**, **PUBLIC**.

PUBLIC PROSECUTOR: See title DIRECTOR OF PUBLIC PROSECUTIONS.

PUBLIC RIVERS: See titles NAVIGATION, PUBLIC RIGHT OF; RIVERS.

PUBLIC SCHOOLS: See title SCHOOLS.

PUBLIC SHIPS: See title EXTRA-TERRITORIALITY.

PUBLIC WAYS: See titles HIGHWAYS; TURNPIKE ROADS; WAYS.

PUBLIC WORKS LOANS. Under the Public Works Loans Acts, 1875 and 1879 (38 & 39 Vict. c. 89; 42 & 43 Vict. c. 77), the government may lend public moneys for various purposes of a municipal character calculated to ensure the health or comfort of the people or the national welfare, e.g., the construction of baths and wash-houses; docks, harbours, &c.; the acquisition of cemeteries; the improvement of towns; the construction of police stations, of labourers' dwellings, museums, &c., &c. The loan is repayable usually in twenty years, and carries interest at or about 5 per cent.

PUBLIC WORSHIP. The statutes relating to public worship extend to regulate the general conduct of such worship (its places, times, and celebrants), its services, rites, sacraments, and ceremonial, the vestments of the clergy and the ornamentation of the church or chancel, &c. The two principal modern statutes are the Church Discipline Act, 1840 (3 & 4 Vict. c. 86), and Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85).—Brice's Public Worship.

PUBLIC WORSHIP REGULATION ACT. This is the stat. 37 & 38 Vict. c. 85, which provides for the appointment of a judge of the Provincial Court of Canterbury and York, such judge to assume the duties also of the official principal of the Archdeaconry Court of Canterbury, and generally to try all alleged offences against the form of public worship as by law established. The Act does not interfere in any way with the Church Discipline Act, 1840 (3 & 4 Vict. c. 86).

See title PUBLIC WORSHIP.

PUBLICA JUDICIA: See title POPULAR ACTIONS.

PUBLICANS: See title LICENSING ACTS.

PUBLICATION. (1.) This word, as applied to the depositions of witnesses in a suit in Chancery, signified the right which was exercised by the clerks in Court, or the examiner, of openly shewing the depositions as taken at the examination of such witnesses. There was a limited time only, namely, eight weeks after issue joined, within which this public shewing of the

PUBLICATION—continued.

depositions was permitted to be made; after which time publication was said to have "passed." But the Court would enlarge the time for publication, and latterly even upon summons at chambers. The closing of the time for taking evidence by affidavit under the modern practice is the same thing as the passing of publication under the former.

(2.) As applied to actions of libel, publication denotes the writing, sending, or transmitting for insertion in a public print, or the public printing of the matter alleged as libellous (*Skipworth's Case, Reg. v. Castro*, L. R. 9 Q. B. 219).

(3.) As applied to wills, the phrase publication of will denoted the act of the testator when he informed the attesting witnesses of the nature of the document they were about to attest. It is no longer necessary (1 Vict. c. 26, s. 13).

PUBLISH. The publishing of a will by a testator signified the declaration which he made (usually at the time of signing it) in the presence of a proper number of witnesses, that it was his last will and testament. But under the new Wills Act, 1 Vict. c. 26, no such publication is now necessary to the validity of a will, s. 13.

PUBLISHER: See titles LIBEL; PRINTER.

PUIS DARREIN CONTINUANCE. By the ancient practice, when adjournments of the proceedings took place for certain purposes from one day or one term to another, there was always an entry made on the record expressing the ground of the adjournment and appointing the parties to re-appear at another specified day, which entries were called *continuances*. In the intervals between such continuances and the day appointed the parties were of course out of Court, and consequently not in a situation to plead. But it sometimes happened, that after a plea had been pleaded, and while the parties were out of Court in consequence of such a continuance, some new matter of defence arose which did not exist before the last continuance, and which the defendant consequently had had no opportunity of pleading before that time. This new defence he was therefore entitled, at the day given for his re-appearance, to plead, as a matter that had happened after or "since such last continuance" (*puis darrein continuance*); and it was, therefore, termed a plea *puis darrein continuance*. And under the C. L. P. Act, 1852, s. 69, in cases in which a plea *puis darrein continuance* was theretofore pleadable in *banc* or at *nisi prius*, the same defence might be pleaded, with an allegation that the matter arose after the last pleading; but no such

PUIS DARREIN CONTINUANCE—*continued.*

plea was allowed unless accompanied with an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the Court or a judge otherwise ordered (2 Arch. Pr. 920). And that is now substantially the law.

See titles CONTINUANCE; FURTHER DEFENCE.

PUISNE. All the common law judges, excepting the chiefs, are termed puisne judges; that is, they are subordinate to their respective chiefs, and a puisne mortgage or incumbrance is one subsequent to a prior one.

See title MESNE.

PUISNE, MULIER: *See title EIGNÉ.*

PUISSANCE PATERNELLE. In French Law the male parent has the following rights over the *person* of his child:—(1.) If child is under sixteen years of age he may procure him to be imprisoned for one month or under; (2.) If child is over sixteen and under twenty-one he may procure an imprisonment for six months or under, with power in each case to procure a second period of imprisonment. The female parent, being a widow, may, with the approval of the two nearest relations on the father's side, do the like. The parent enjoys also the following rights over the *property* of his child, viz., a right to take the income until the child attains the age of eighteen years, subject to maintaining the child and educating him in a suitable manner.

See title PATRIA POTESTAS.

PUNISHMENTS. The principal varieties of punishments in English Law are death, penal servitude (for life or years), solitary confinement, imprisonment with or without hard labour, whipping, police supervision, &c.

PUR AUTRE VIE: *See title ESTATE PUR AUTRE VIE.*

PUR CAUSE DE VICINAGE: *See title VICINAGE.*

PURCHASE. The word "purchase" is used in law in contradistinction to descent: and as so used is any mode of acquiring real property other than by the common course of inheritance. Thus, if a person acquires real property by gift, grant, or by devise, or by any other mode (excepting descent), he is in legal language said to acquire such property by purchase. The difference between the acquisition of an estate by descent and by purchase consists principally in two points: (1.) That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's

PURCHASE—*continued.*

blood in general. (2.) That an estate taken by purchase does not always make the person who acquires it answerable for the acts of his ancestors, whereas an estate taken by descent invariably does so (2 Cruise, 451, 452).

PURCHASE-MONEY: *See title VENDOR'S LIEN.*

PURCHASER. In the law of descents the purchaser is the stock of descent, and is by the Act 3 & 4 Will. 4, c. 106, declared to be the last person entitled who did not inherit, and the last person entitled is *primâ facie* the purchaser.

See title DESCENTS.

PURCHASER FOR VALUE. If without notice of any prior charge upon or equitable title to the property bought, is not affected thereby, provided he get in the legal estate; and if he be merely equitable, then he is retained in his due posterity to such charge or other equitable title.

See title NOTICE.

PURE VILLENAGE: *See title VILLEN TENURE.*

PURGATION: *See title COMPURGATORS.*

PURGING A TORT. Is like the ratification of a wrongful act by a person who has power of himself to lawfully do the act. But unlike ratification, the purging of the tort may take place even after commencement of the action (*Hull v. Pickersgill*, 1 B. & B. 282).

PURPRESTURE, or PURPRESTER: *See title POURPRESTURE.*

PURVEYANCE. An ancient prerogative of the Crown, until resigned by Car. II. Under Magna Charta the king was not to take any one's goods on credit, but was to pay a fair cash price; and he was not to take any one's carriage or timber unless by consent of the owner. The prerogative, or something analogous to it, would of course revive in time of war, or upon the proclamation of martial law.

See title PREROGATIVE.

PURVIEW. The purview of an Act of Parliament is that part of it which begins with the words, "Be it enacted," &c. (Cowel).

PUTATIVE FATHER. The alleged or reputed father of an illegitimate child is so called.

See titles AFFILIATION ORDER; BASTARD.

PUTTING IN SUIT. As applied to a bond, or any other legal instrument, sig-

PUTTING IN SUIT—*continued.*

nifles bringing an action upon it, or making it the subject of an action.

PYX JURY: See title PIX or PYX JURY.

Q.

QUÆ INTER ALIOS ACTA SUNT, &c.: See title RES INTER ALIOS ACTA.

QUÆLIBET CONCESSIO FORTISSIME CONTRA DONATOREM INTERPRETANDA EST. Means literally, that every grant is to be construed most strongly against the grantor. This rule is one for the construction of written documents, but it is subject to all the other more pertinent rules of interpretation, which usually suffice without the necessity of resorting to this maxim, which at best is an unsafe and desperate resort.

QUESTIONES PERPETUÆ. In Roman Law, were commissions (or Courts) of inquisition into crimes alleged to have been committed. They were called *perpetuæ*, to distinguish them from *occasional* inquisitions, and because they were permanent Courts for the trial of offenders.

QUAKERS: See titles CHURCH AND STATE; DECLARATIONS, STATUTORY; DISSENTERS; NON-CONFORMISTS.

QUALIFICATION. (1.) The circumstance or group of circumstances whereby an individual is rendered eligible for a post is called his qualification, *e.g.*, in a case of the directors of public and joint stock companies, with whom the possession of a prescribed number of shares is usually made the qualification. (2.) Any incident annexed to a right, *e.g.*, an inherent reciprocal obligation, is also called a qualification of the right.

See title FREE SIMPLE ESTATES, sub-title FREE SIMPLE QUALIFIED.

QUALIFIED FEE: See title BASE FEE.

QUAMDIU SE BENE GESSERIT. A clause frequently inserted in the grant of offices, &c., by letters patent, and signifying that the party shall hold the same "as long as he behaves himself well" (*quamdiu se bene gesserit*) (Co. 4 Inst. 117; Cowel). Under the Act of Settlement (12 & 13 Will. 3, c. 2), the judges are made to hold office upon the like terms, namely, *quamdiu se bene gesserint*.

QUANDO ACCIDERINT, JUDGMENT. Judgment of assets *quando acciderint* is a judgment which is sometimes signed against an executor, and which empowers the party so signing it to have the benefit of any assets which may afterwards come

QUANDO ACCIDERINT, JUDGMENT—*continued.*

to the hands of the executor, "whenever they may happen" to so come (2 Arch. Pract. 1229). The plaintiff, having obtained a judgment of this sort, may afterwards, upon the assets coming to the defendant's hands, proceed against him by *sci. fa.* to obtain payment of his debt.

See title PLENE ADMINISTRAVIT, PLEA OF.

QUANDO ALIQUID CONCEDITUR, &c.

Where anything is granted, that also is deemed to be impliedly granted with it without which the principal subject matter of the grant (*i.e.*, the express grant) could not be enjoyed (*id quoque concedi videtur, sine quo res ipsa percipi non debeat*). When mines are granted or reserved apart from the surface, a right of entry (in the absence of other access to them) would be impliedly granted or reserved.

QUANDO DUO JURA, &c. When two rights concur in one and the same person (*in unâ et eâdem personâ concurrunt*), they are to be regarded exactly as they would be, if centred in different persons (*æquum est ac si essent in diversis*). This is only another form of the maxim *unus homo sustinet plures personas*.

QUANTUM MERUIT. These words are thus explained by Blackstone; "If I employ a person to transact any business for me, the law implies that I undertook to pay him as much as his labour deserved; and if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case upon this implied promise; wherein he is at liberty to suggest that I promised to pay him so much as he reasonably deserved;" and this action on the case is thence termed an action on a *quantum meruit*, that is, an action for breach of my promise to pay him as much as he deserves. Usually, the action on a *quantum meruit* is brought where the work undertaken to be done is not completed, but is left incomplete through no fault of the doer; and the plaintiff claims to be paid for the portion done. But this action may be excluded by special agreement (*Cutter v. Powell*, 2 Sm. L. C. 1). There is also an action on a *quantum valebat* (*i.e.*, as much as it was worth), being where one takes up goods or wares of a tradesman without expressly agreeing the price; because in such a case the law concludes that both parties intentionally agreed that the real value of the goods should be the price, and therefore an action may be brought for the breach of the implied promise to pay as much for the goods as they are worth.

QUANTUM VALEBAT: *See* title **QUANTUM MERUIT.**

QUARE CLAUSUM FREGIT, TRESPASS. That species of the action of trespass which lies for an unlawful entry upon another's land is termed an action of trespass *quare clausum fregit*; "breaking a close" being the technical expression for an unlawful entry upon land. The language of the declaration in this form of action used to be "that the defendant with force of arms broke and entered the close" of the plaintiff; but irrelevant additions are forbidden by the present rules of pleading, and the "force of arms" addition is wholly irrelevant to the action, the object of which is usually to try a mere right of property in or title to the land or *locus in quo*.

The foundation of this action is *possession* in the plaintiff, which must be actual, not merely constructive, possession, while in the action of trespass to personal property, *i.e.*, the action of trespass *de bonis asportatis*, the foundation of the action is either actual or *constructive* possession.

QUARE EJECIT INFRA TERMINUM. A writ which lay for a lessee when he was wrongfully cast out or ejected from his farm before the expiration of his term, against the lessor or his feoffee who so ejected him, to recover the residue of his term, and also damages for being so ejected (Cowel; *Les Termes de la Ley*).

QUARE IMPEDIT. The action of *Quare impedit* was the remedy by which a party whose right to a benefice was obstructed recovered the presentation, and was the form of action constantly adopted to try a disputed title to an advowson,—*i.e.*, "why the defendant hinders" the plaintiff in his presentation. But by the C. L. P. Act, 1860, s. 26, no *Quare impedit* was to be brought after the commencement of that Act, but the action was to be commenced by the ordinary writ of summons, with an indorsement thereon that the plaintiff intended to declare in *Quare impedit* (1 Arch. Prac. 2). And that is now the law, excepting that no indorsement of any intention to declare in *Quare impedit* is now necessary, but only the ordinary indorsement of the plaintiff's claim.

QUARREL. This word is said to extend not only to real and personal actions, but also to the causes of actions and suits; so that by the release of all quarrels, not only actions pending but also causes of actions and suit are released; and quarrels, controversies, and debates are in law considered to have one and the same signification (Co. Litt. 8, 153; *Les Termes de la Ley*).

QUARTA. One equal fourth part. In

QUARTA—continued.

Roman Law there were the following fourth parts of distinction, *viz.* :—

(1.) *Quarta Antima*,—being the fourth part of the arrogating father's own property, which he was compellable to give up to his arrogated son, upon any subsequent causeless emancipation of the son, in addition to restoring all the original property of the son :

(2.) *Quarta Legitima*,—being the fourth part of the estate of a deceased *parens*, to which his children (*liberi*) were entitled, and which they obtained by (in default of other means) the *querela de inofficioso*, *i.e.*, plaint concerning the undutious will :

(3.) *Quarta Falcidia*,— } which the being the fourth part of the } *hæres* was legacies } entitled to

(4.) *Quarta Pegasiana*,— } retain to being the fourth part of the } himself (if inheritance } he chose), before paying over the legacies or handing over the inheritance, as the case might be.

QUARTER SESSIONS, called also General Quarter Sessions, are the sessions of the Justices in Counties and of the Recorder in Boroughs, held at four stated periods in the year. The business of quarter sessions is partly of a criminal (extending to offences of a minor character) and partly of a public civil character (*e.g.*, extending to questions concerning roads, bridges; highway and other rates, &c.). The public civil business of the quarter sessions is frequently of an appellate character, and usually a further appeal lies to the Queen's Bench Division of the High Court. The criminal jurisdiction is defined by the stat. 5 & 6 Vict. c. 38; but it has since been extended (sometimes with and sometimes without the consent of the prisoner) to many other offences.

See title **SESSIONS**.

QUASH. To make void, &c. Thus, to quash a conviction, or an order of sessions, &c., is to annul or cancel same.

QUASI-CONTRACT. An implied contract.—There were six of these *quasi-contracts* in Roman Law, namely,—

(1.) *Negotiorum gestorum*,—action and cross-action between a self-constituted agent to the principal in whose absence he had managed his affairs,—for an account and for repayment of necessary expenses ;

(2.) *Tutor cum pupillo*,—action and cross-action between guardian and ward upon the latter's attaining his majority,—for an account and settlement ;

(3.) *Communi dividundo*,— } being re-

(4.) *Familie Eriscunda*,— } spectively actions between co-owners of an individual thing or of a *universitas rerum*, for an equitable adjustment of the expenses and profits

QUASI CONTRACT—continued.

incurred upon or growing from the subject-matter of the co-ownership, and for a partition thereof;

(5.) *Hæres Legatorum Nomine*,—being the action to which the executor was liable, in order to enforce payment by him to the legatees of their legacies; and

(6.) *Indebiti soluti*,—being the action for the recovery of money paid by mistake, under the belief that it was due, when in fact it was not.

Maine, in his *Ancient Law*, objects that the implied contracts of English Law are different from the *quasi*-contracts of Roman Law, but his opinion is not correct; for the particular instances of *quasi*-contracts in Roman Law as given above are all of them good as implied contracts in English Law. It is true, however, that there are in Roman Law certain contracts, not being *quasi*-contracts, which are implied contracts (*tacite convenire*) e.g., in Dig. ii. 14, 4, where a landlord's right to take the furniture of his tenant in distress for rent is instanced as an implied contract; and similarly, there are the like implied contracts in English Law.

See title IMPLIED CONTRACTS.

QUASI-DELICT. In Roman Law was a tort indirectly and not directly occasioned by the party liable, and which could not be classified either as *furtum*, *rapina*, *damnum injuria*, or *injuria*. They were four in number, viz.:—

(1.) *Qui judex litem suam fecit*,—being the offence of partiality or excess in the *judex* (jurymen), e.g., in assessing the damages at a figure in excess of the extreme limit permitted by the formula;

(2.) *Dejectum effusumve aliquid*,—being the tort committed by one's servant in emptying or throwing something out of an attic or upper story upon a person passing beneath;

(3.) *Damnum infectum*,—being the offence of hanging dangerous articles over the heads of persons passing along the king's highway; and

(4.) Torts committed by one's agents (e.g., stable-boys, shop-managers, &c.) in the course of their employment.

QUASI-ENTAIL: See title ESTATE-TAIL QUASI.

QUASI-FEE SIMPLE: See title FEE SIMPLE ESTATE QUASI.

QUE ESTATE. A term used in pleading, the nature of which may be thus explained. Formerly it was necessary, when there was occasion to plead a prescriptive right to any easement, or profit, or benefit arising out of land (as, for example, a prescriptive right of way or a right of com-

QUE ESTATE—continued.

mon), to allege in A.B. a seisin in fee of the land in respect of which the right was claimed, and then to allege that the said A. B. AND all those (including the plaintiff) who had his estate in the land, had from time immemorial exercised the right in question, and this was termed prescribing in a QUE estate, from the word AND (*que*).

QUEEN ANNE'S BOUNTY. This is a perpetual fund for the augmentation of poor livings in the Church of England, arising out of the revenue of the first fruits which Queen Anne (by charter subsequently confirmed by stat. 2 & 3 Anne, c. 11) vested in trustees for ever for that purpose. Those "first fruits" having been originally a tax levied by the popes upon the richer English clergy, formed subsequently to the Reformation a branch of the revenue of the Crown; and, subject to various alterations in amount, they so remained until the reign of Queen Anne, who did not remit them unconditionally, but applied them as being superfluities of the larger benefices to make up the deficiencies of the smaller. This fund still exists, and is regulated by a variety of statutes, of which the principal are,—2 & 3 Anne, c. 20, 55 Geo. 3, c. 147, 16 & 17 Vict. c. 70, and 28 & 29 Vict. c. 69.

See title ECCLESIASTICAL COMMISSIONERS.

QUEEN CONSORT. Is the wife of the reigning king, as opposed to a queen dowager, who is the widow of a deceased king.

QUEEN DOWAGER: See title QUEEN CONSORT.

QUEEN REGNANT. By the stat. 1 Mary, s. 3, c. 1, the powers and dignities vested in a queen are declared to be the same as those vested in a king; and all statutes in which a king is named were declared to apply equally to a queen.

QUEEN'S ADVOCATE. An advocate of the Civil Law Bar appointed by the Crown to maintain its interests and to advise it in all matters in which the learning of the Civil Law is involved. Those matters include important questions of international law, upon which (as in framing treaties with foreign nations) the counsel of the Queen's Advocate is frequently taken by the government. He now ranks next in dignity to the Attorney-General and Solicitor-General, and formerly, indeed, the Queen's Advocate took precedence even of them. The Queen's Advocate used to practise in the Ecclesiastical Courts at Doctors' Commons, and at the present day

QUEEN'S ADVOCATE—*continued.*

confines his practice, as a rule, to the Courts of Probate, Divorce, and Admiralty.

See titles ADVOCATE-GENERAL; MAR-TIAL LAW.

QUEEN'S BENCH, COURT OF: See title KING'S BENCH.

QUEEN'S BENCH PRISON. Sometimes called the Prison of the Marshalsea of the Court of Queen's Bench, was a prison for debtors and for persons confined under the sentence, or charged with the contempt of Her Majesty's Court of Queen's Bench. This prison, the Fleet, and the Marshalsea Prisons, were, by the 5 Vict. c. 22, consolidated under the title of the Queen's Prison, which latter was by the above-mentioned Act appointed to receive all the prisoners formerly distributed among the three (6 Jur. 254).

See title PRISONS.

QUEEN'S PROCTOR: See titles PROCTOR; INTERVENER.

QUEEN'S REMEMBRANCER: See title REMEMBRANCERS OF THE EXCHEQUER.

QUEEN'S TAXES: See title ASSESSED TAXES.

QUERELA. An action preferred in any Court of justice in which the plaintiff was *querens*, or complainant, and his complaint was *querela*, whence the use of the word "quarrel" in law. *Quietus esse à querelâ* sometimes meant to be exempted from the customary fees paid to the king or lord of a Court for liberty to prefer such an action; but more commonly it meant to be freed from the fines or amercements which would otherwise have been imposed upon the exempted person for trespasses and such like offences. (Cowel.)

QUI FACIT PER ALIUM, FACIT PER SE: See title PRINCIPAL AND AGENT.

QUI HÆRET IN LITERÂ, HÆRET IN CORTICE. This is a maxim of construction, and literally interpreted means, that he who sticks at the letter sticks in the bark, *scil.* and does not penetrate to the real content or heart of the document, *i.e.*, to its real signification.

QUI PRIOR EST TEMPORE POTIOR EST JURE. This is a maxim of equity, and is to this effect, *viz.*, that priority in time gives priority of title, when the legal estate is outstanding, or all the equities between the parties (other than the equity of time) are equal.

See title PRIORITY.

QUI SENTIT COMMODUM SENTIRE DEBET ET ONUS. He who enjoys the benefit ought to bear the burden also. This maxim is one of very wide (often of

QUI SENTIT COMMODUM SENTIRE DEBET ET ONUS—*continued.*

too wide) application in law. The lessee who enjoys the occupation of lands or houses, and his assignees, were respectively liable to the burdens and covenants running with the land, *i.e.*, inherent in the subject-matter enjoyed. But a burden not so inherent should not (as a mere matter of course or inference of law) attach to the enjoyment.

See titles RUNNING WITH THE LAND; RUNNING WITH THE REVERSION.

QUI TACET, CONSENTIRE VIDETUR. "Silence is consent." This maxim is of a very dangerous and limited application, because the silence may be otherwise explained. But silence, under circumstances in which it was a duty to speak, may be fitly construed into consent; and that seems to be the proper limit of the maxim.

QUI TAM. Prosecuting a popular action for the purpose of recovering the penalty is called suing *qui tam*, because the prosecutor or informer sues *as well* for the Crown as he does for himself.

See title QUI TAM ACTIONS.

QUI TAM ACTIONS. Those kinds of popular actions in which one part of the penalty recovered is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor, and the Crown, *semble*, is not able to remit the penalty in such cases, so far as it accrues to the informer, unless expressly authorized by statute so to do (38 & 39 Vict. c. 80). It is called a *qui tam* action, because it is brought by a person "*qui tam pro domino rege, &c., quam pro se ipso in hac parte sequitur*" (*i.e.*, who sues *as well* for our lord the king as for himself). The case of *Thomas v. Sorrell* (Vaughan), which is otherwise famous as having first stated the true nature and limits of the king's dispensing power, was a *qui tam* action.

See title DISPENSING POWER.

QUI TARDIUS SOLVIT MINUS SOLVIT. He who pays after the day, pays less than if he paid at the day. This maxim lies at the root of interest on money lent.

See title MORA.

QUIA EMPTORES. The stat. 18 Edw. 1, c. 1, is so called from the words with which it begins, *viz.*, *Quia emptores*, meaning *whereas purchasers, &c.* This statute took from the tenants of common lords the feudal liberty they claimed of disposing of part of their lands to hold of themselves, and instead of it gave them a general liberty to sell all or any part, to hold of the next superior lord, which they could not have done before without consent (Wright's Ten. 161; 4 Cruise, 6). The

QUIA EMPTORES—*continued.*

effect of the statute was twofold—(1.) To facilitate the alienation of fee simple estates; and (2.) To put an end to the creation of any new manors, *i.e.*, tenancies in fee simple held of a subject.

See title ALIENATION.

QUIA TIMET, BILL: See title BILL QUIA TIMET.

QUID PRO QUO. Used in law for the giving one valuable thing for another. It is nothing more than the consideration which passes between the parties to a contract, and which renders it valid and binding. (Cowel.)

QUIDQUID PLANTATUR SOLO, SOLO CREDIT. Whatever is annexed to, becomes incorporated in, the soil. This maxim lies at the root of the law of fixtures.

See title FIXTURES.

QUIET ENJOYMENT, COVENANT FOR. In leases, the lessor usually covenants for quiet enjoyment by his lessee of the premises demised, so long as the lessee observes and performs the covenants and conditions of the lease. A vendor usually gives the like covenant, but without prejudice to his lien.

QUIETUS. A certificate which was commonly granted by the clerk of the pipe and auditors of the Exchequer as an acquittance or discharge to accountants (Cowel).

See title CROWN DEBTS.

QUIETUS ESSE A QUERELÂ: See title QUERELA.

QUIT CLAIM. The release or acquitting of one man by another, in respect of any action that he has or might have against him; also, acquitting or giving up one's claim or title (Bracton, b. 5, tract. 5, c. 9, num. 6; *Les Termes de la Ley*).

QUIT RENT. Certain established rents of the freeholders of manors are denominated quit rents, *quieti redditus*, because thereby the tenant goes quit and free of all other services (3 Cruise, 314). Further, in respect even of ordinary freehold lands, a quit rent is payable to the Crown as lord, but it is too insignificant in amount to be demanded.

See title RENTS.

QUO MINUS, WRIT OF. A writ upon which all proceedings in the Court of Exchequer were formerly grounded, in which the plaintiff suggested that he was the king's farmer or debtor, and that the defendant had done him the injury or damage complained of, *quo minus sufficiens existit, by which he was the less able to pay the king his debt or rent.* It was also a writ

QUO MINUS, WRIT OF—*continued.*

which formerly lay for one who had a grant of house-bote and hay-bote in another man's woods against the grantor for making such waste as interfered with the grantee's enjoyment of his grant (Cowel).

See title FICTIONS.

QUO WARRANTO, CASE OF. The case which is pre-eminently so called was a case brought in 1681 by the Attorney-General, on behalf of the king against the corporation of the City of London, alleging breaches of trust in the officers of the corporation and seditious opposition to the Crown, and requiring the City to shew the tenure of its liberties, with a view to the justification of its proceedings. The offences alleged were,—

- (1.) That the City had imposed taxes without authority; and
- (2.) That the City had concocted seditious petitions to the king.

Judgment was given for the Crown, and against the City: and the corporation not submitting within the time limited for their so doing, their liberties were taken from them, and their charter was forfeited. These liberties, together with their charter, were not restored until 1688, when James II., under the immediate fear of his own expulsion, restored them.

QUO WARRANTO, WRIT OF. A writ which lies for the king against any one who claims or usurps any office, franchise, or liberty, to inquire *by what authority* he supports his claim, in order to determine the right. It lies also in case of non-user or long neglect of a franchise, or misuser or abuse of it, being a writ commanding the defendant to shew by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse (Finch's L. 322). An information in the nature of a *quo warranto* may also be laid under the stat. 9 Anne, c. 20, regarding corporations of cities and boroughs, but it is in the discretion of the Court to grant it or not (*Rex v. Trevener*, 2 B. & A. 479). The information will generally be granted where the right in dispute depends upon a doubtful point of law, in order to its being finally determined (*Rex v. Carter*, Lofft. 516). And generally a *quo warranto* will lie for usurping any office, whether created by charter of the Crown alone, or by the Crown with the consent of Parliament, provided the office is of a public nature, and a substantive office, not merely a function discharged at the will or pleasure of others (see *Darley v. Reg.* (in error), 12 Cl. & F. 520, which was a case regarding the office of treasurer of the public money of the county of the city of Dublin).

QUOAD. A prohibition *quoad* is a prohibition *as to* certain things amongst others. Thus, where a party was complained against in the Ecclesiastical Court for matters cognisable in the temporal Courts, a prohibition *quoad* these matters issued, *i.e.*, *as to such matters* the party was prohibited prosecuting his suit in the Ecclesiastical Court. The word is also frequently applied to other matters than to prohibitions (2 Roll. Abr. 815, b. 10; Vin. Abr. tit. "Prohib." E. a. 7).

QUOD AB INITIO NON VALET, TRACTU TEMPORIS NON CONVALEBIT. A thing which is not valid in law at its first execution, does not become valid merely by length of time. For example, a will made by a woman during coverture and, by reason of that disability, rendered invalid by the Wills Act (1 Vict. c. 26), at the time of executing the will, does not become a valid will merely because the woman lives to become and dies a widow.

QUOD EI DEFORCEAT, WRIT OF. A writ that lay for tenants in tail, tenants in dower, and tenants for life, who had lost their lands by default, against him who recovered them, or against his heir (Reg. Orig. 171).

See title DEFORCEMENT.

QUOD FIERI NON DEBET, FACTUM VALET. A thing which ought not to have been done, is [occasionally] permitted to be valid when done, *e.g.*, an infant ward of Court ought not to marry or to be married without the sanction of the Court; but if he or she being of the marriageable age should marry without such consent, then the marriage holds good.

QUOD NULLIUS EST, REGIS EST. That is to say, what is nobody's, is the Crown's: *e.g.*, *bona vacantia* belong to the Crown.

QUOD PERMITTAT, WRIT OF. A writ that lay for the heir of him who was disseised of his common of pasture against the heir of the deceased disseisor (Cowel).

See title DISTURBANCE.

QUOD PERMITTAT PROSTERNERE. A writ which lay against any person who erected a building, though on his own ground, so near to the house of another that it overhung it, and became a nuisance to it (Tomlins).

QUOD SEMEL PLACUIT IN ELECTIONIBUS, AMPLIUS DISPLICERE NON POTEST. When a person is called upon to elect between two things (whether properties or rights of action), and he elects or makes his choice between them with full knowledge of all the circumstances of the case,

QUOD SEMEL PLACUIT IN ELECTIONIBUS, AMPLIUS DISPLICERE NON POTEST—continued.

it is no longer open to him to alter his choice.

See title ELECTION.

QUORUM. Among the justices of the peace appointed by the king's commission, there were originally some who were more eminent for their skill and discretion than others, one, or some of whom, on special occasions the commission expressly required should be present, and without whose presence the others could not act; and who were thence termed justices of the quorum, from the language of the commission, which ran thus: "*quorum aliquem vestrum* A. B., C. D., &c., *unum esse volumus*" (*i.e.*, "*of whom*" we wish some one of you, A. B., C. D., &c., to be present). The word is used in a similar sense in the following passage: "By charter 2 Edw. 4, the mayor, recorder, and aldermen that have been mayors, shall be conservators of the peace within the city; and they, or four of them, *quorum* the mayor to be one, shall be justices of *oyer* and *terminer* there." Com. Dig. tit. London (C.), Mayor.

See title JUSTICES OF THE QUORUM.

QUOUSQUE. Thus, a *seizure quousque* by the lord of a manor on default of the heir coming in to be admitted, means a seizure "UNTIL" the heir so comes in, the lord being entitled to do this after three proclamations made at three consecutive Courts (Watkins on Copyholds, 230, tit. "Admission;" Carth. 41: 1 Lev. 63; 8 T. R. 162.) A *prohibition quousque* is a prohibition by which something is forbidden or prohibited "UNTIL" a certain time. Thus, if in trying temporal incidents in the Ecclesiastical Courts, these Courts rejected a mode of proof sufficient at Common Law they might have been prohibited "UNTIL" they submitted to the legal mode of trial (Yelv. 92).

See titles PROHIBITION; SEIZURE QUOUSQUE.

R.

RACECOURSES. As regards the metropolis, from and after the 25th of March, 1880, a horse-race may not be held or take place on any pretext whatever within a radius of ten miles from Charing Cross, unless such place is licensed for the purpose under the provisions of the Racecourses Licensing Act, 1879 (42 & 43 Vict. c. 18). The licence is granted at the Michaelmas Quarter Sessions. The owners and occupiers of unlicensed racecourses,

RACECOURSES—continued.

and all persons taking part in any horse-race thereon, are subjected to penalties by the Act; and an unlicensed horse-race is made a nuisance at Common Law.

RACHAT. In French Law is the right of re-purchase which the vendor in English Law may reserve to himself. It is also called *rémercé*.

RACK-RENT. A rent of the full annual value of the tenement, or near it.

See titles **EMBLEMENTS**; **MINISTERIAL POWERS**.

RAILWAY COMMISSIONERS. Are a body of three gentlemen (one of them a lawyer), appointed under the Regulations of Railways Act, 1873 (36 & 37 Vict. c. 48), and continued under the Regulation of Railways Act, 1873 & 1874, Continuance Act, 1879 (42 & 43 Vict. c. 56). They have jurisdiction in all matters comprised in the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and in the 16th section of the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), being generally cases of alleged unfair carrying, undue preference, and such like; and the commissioners are invested with all authorities incidental to the effective discharge of their office.

RAILWAY COMPANIES. Are companies of a public nature, that is, in which the general public have a direct and proximate interest, and therefore (unlike the ordinary class of private or joint stock companies) they require for their construction a special Act of Parliament. But the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), which contains provisions usually (theretofore) inserted in the special Acts authorizing the making of railways, may be incorporated in the special Act.

See title **LANDS CLAUSES CONSOLIDATION ACT, 1845**.

RAILWAY, MINERALS UNDER. In a conveyance of land to a railway, for the purposes of the railway, the mines and minerals under or adjoining the land are not comprised in the purchase-deed, unless expressly therein comprised (Railways Clauses Consolidation Act, 1845, s. 77); but the company may afterwards purchase such mines and minerals, if they deem their working would or might prove injurious to the stability of the railway, and the owner gives them notice of his intention to work them. The limit of proximity to the railway is (in general) forty yards (s. 78).

RAILWAY PASSENGERS: See title **PASSENGERS, CARRIAGE OF**.

RAILWAY SCRIP: See title **SCRIP**.

RAILWAYS, REGULATION OF: See title **RAILWAY COMMISSIONERS**.

RAISING A USE. Creating, establishing, or calling into existence, a use. Thus, if a man conveyed land to another in fee, without any consideration, Equity would presume that he meant it to be to the use of himself, and would therefore raise an implied use for his benefit.

See title **USE**.

RANSOM. In law this word is frequently used to signify a sum of money paid for the pardoning of some great offence: and the distinction made between a ransom and an *amerciament* was, that a ransom was the redemption of a corporal punishment, whereas an *amerciament* was the penalty for an offence committed (Litt. 127; Cowel).

See title **AMERCIAMENT**.

RANSOM BILL. Upon any capture of enemy's property on the high seas in time of war, the captor may accept a ransom for the same, the effect of which is that the property is thenceforth safe (until its destination) from any second capture by the same belligerent or his allies. In English Law, ransoms are within the jurisdiction of the Court of Admiralty as a Prize Court, and are regulated by various statutes, the Queen in her Privy Council allowing them or not to hold good according to the circumstances of the capture.

RAPE. A criminal offence, consisting in the penetration of a female's parts against her will or without her consent, and with or without emission, or consummation. It is punishable with penal servitude for life, or for any period not under five years, or with imprisonment not exceeding two years, and with or without hard labour (Arch. Crim. Pleading).

See title **PENETRATION**.

RAPINE: See title **VI BONORUM RAPTORUM**.

RAPPORTS. This is in French Law the duty incumbent upon a legatee to bring into hotchpot such part of the legacy as he has already received by gift *inter vivos*.

See title **COLLATIO**; **HOTCHPOT**; **REDUCTION**.

RATES: See title **RATING**.

RATIFICATION. This is authorizing subsequently what has been already done previously without authority or request. In contract law, it is equivalent to a prior request to make the contract; and in the law of torts, it renders the principal liable,

RATIFICATION—*continued.*

unless it should have (as it often has) the effect of purging the tort (*Hull v. Pickersgill*, 1 B. & B. 282). To any ratification, it is necessary that the act when originally done should be for the person who subsequently ratifies it; and usually, such ratification must be given at a time when the principal himself might have done the act, and not afterwards.

See titles **CONTRACTS**; **PRINCIPAL AND AGENT**; **PURGING A TORT**.

RATING. Is the levying of money by (and by the authority vested in) *local* bodies, whether justices of the peace, or other persons holding local office, *e.g.*, the town-councillors of boroughs; and on the other hand, taxation is by authority of Parliament alone, and is imperial not local. The word rating appears to denote the equal incidence of the money levied upon all propertied persons, proportionately to (*i.e.*, *pro rata*) the value of the property rated. The poor rate was one of the earliest of such rates; and its origin and extent and the mode of its assessment and collection are explained under the titles **POOR** and **POOR RATE**. For all other [local] rates, the test of the liability of property thereto has been in general made that of the liability of the same property to the poor rate; *e.g.*, by the Rating Act, 1874 (37 & 38 Vict. c. 54), s. 10, the mines which (with other hereditaments) are by the Act made rateable to the poor rate are made rateable to all local rates in like manner as if the Poor Rate Act had always extended to them; and by s. 15 of the same Act, the term "local rate" is declared to mean any county rate, borough rate, highway rate, and other local rates leviable on property rateable to the relief of the poor. And under the provisions of particular statutes, a water rate, a general district rate, &c., &c., may be levied by the proper local authority in that behalf specified in the Acts.

RATIO DECIDENDI } See title **INTER-**
RATIO LEGIS } **PRETATION.**

RATIONABILI PARTE BONORUM. A writ that once lay for the wife against the executors of her husband, to have the third part of his goods after his just debts and funeral expenses had been paid (F. N. B. 122; *Les Termes de la Ley*).

See titles **REASONABLE PART**; **THIRDS**.

RATIONABILIBUS DIVISIS, WRIT OF. A writ that lay for the lord of a seignior, when he found that any portion of his seignior or his waste had been encroached upon by the lord of an adjacent seignior, against him who had so encroached, in

RATIONABILIBUS DIVISIS, WRIT OF—*continued.*

order to settle their boundaries (Cowel; F. N. B. 128).

See title **PERAMBULATIONE FACIENDÂ, WRIT OF.**

RATIONE TENURÆ. Where an individual landowner is liable to repair a highway (the liability to repair that class of way usually resting with the county), the landowner is said to be liable either *ratione tenuræ* or by prescription. By *ratione tenuræ* it is intended in such a case to express, that the landowner's liability to repair the highway is a burden upon his ownership of the land, running with the land, and incident to the tenure thereof. In the general case, even in the case of a private way, the servient owner is not bound to repair the way, but by express agreement or by prescription (or, *semble*, from some necessity or even *ratione tenuræ*) he may be liable to repair it (Comyns' Digest, Chimin, A. 4; *Reg. v. Ramsden*, E. B. & E. 949).

RAVISHMENT DE GARD. A writ that lay for the guardian by knight service or in socage against him who took away from him the body of his ward (12 Car. 2, c. 24; Cowel).

See title **WARDSHIP**.

RE. *Re Vivian* signifies In the matter of Vivian, or in Vivian's Case. In this use of the word, *res* is opposed to *causa* (cause).

READERS. In the Middle Temple, those persons were so called who were appointed to deliver lectures or "readings" at certain periods during term. The clerks in holy orders who read prayers and assist in the performance of divine service in the chapels of the several inns of court, are also so termed. (5 Reeves's Eng. Law, 247, 1st. edit.).

READING IN. A new incumbent of a benefice is to read, within two months of actual possession, the morning and evening prayers, and also the thirty-nine articles, and declare his unfeigned assent and consent thereto, publicly in the church, before the congregation; and to read in his church, within three months after institution or collation, the declaration appointed by the Act of Uniformity, and also the certificate of his having subscribed it before the bishop. The observance of the above forms by a new incumbent constitutes what is termed "reading in" (Rog. Ecc. Law; Burns' Ecc. Law).

REAL ACTIONS. Called also actions *in rem* (as opposed to actions *in personam*) are, *e.g.*, certain actions in the Court of

REAL ACTIONS—continued.

Admiralty, which being instituted against the vessel itself or other the subject matter of the suit, definitively adjudicate as against all the world (*i.e.*, as against all persons interested, whether appearing or not), upon the condition of the vessel or other subject-matter. Prior to 3 & 4 Will. 4, c. 27, there were many real actions (being otherwise called *droitural actions*) in which the very right (*droit*) or title was involved, and not the possession merely; but the policy of the law having by that statute fixed the period for the recovery of land at (in general) twenty years, the whole *droitural actions* (some of which might have been brought within sixty years) were necessarily abolished and superseded by the one possessory action of ejectment.

See titles **DROIT; MIXED ACTIONS; PERSONAL.**

REAL EVIDENCE. Called also *evidentia rei vel facti*, means all evidence of which things (or persons regarded as things) is the source. It is sometimes *direct*, *e.g.*, when the offence is committed *in fori conspectu*; but it is most usually circumstantial or indirect. A coroner's inquest must be held *super visum corporis*; and in all charges of murder, the *corpus delicti* is proved by production of the dead body,—two illustrations of direct real evidence of the fact of a crime having been committed. But who the criminal was, is dependent upon (in general) circumstantial evidence, the inferences from which are usually not necessary but probable only, and the degree of probability may vary in ever so many degrees, one physical coincidence being sometimes sufficient in itself, *e.g.*, the broken knife left sticking in the window frame, the corresponding fragment of which was found in the pocket of the prisoner accused of burglary, and no sensible interval intervened between the act and his apprehension. But more often circumstantial real evidence is open to innumerable infirmative hypotheses, that may either weaken it or explain it altogether away. (Best on Evidence, 5th ed., 277–295).

REAL AND PERSONAL. Real and personal property is the most fertile division of things, the subjects of property, in English Law. The division is substantially coincident with that into *lands, tenements, and hereditaments*, on the one hand, and *goods and chattels* on the other. In the case of each division, the principle underlying the division is feudal; it is directly so in the case of the division into lands and chattels, and indirectly so in the case of the division into real and personal

REAL AND PERSONAL—continued.

property. As law and society progressed, it became more and more apparent that the essential difference between lands and goods was to be found in the remedies for the deprivation of either; that as to the one, the *real* land, *i.e.*, the land itself could be recovered and that as to the other, proceedings could be had against the *person* only. The two great classes of property accordingly began to acquire two other names that were characteristic of this difference; and with reference to the remedies for the recovery of each they were called respectively *real* and *personal* property. The striking circumstance that a leasehold interest in land is to the present day personal property only illustrates both the origin and the principle of this division. It illustrates the *origin* of the division, because originally all leases were farming leases, and the farmer was only the bailiff or agent of his landlord, who warranted him in the quiet possession of the land; it also illustrates the *principle* of the division, because the farmer in the case of an ejectment had no action for the recovery of the land itself, but at the most an action against his landlord personally, whereby he compelled the latter either to take proceedings for the restitution of the land to his lessee, or else to compensate him in damages for the disturbance of his quiet enjoyment.

REAL AND PERSONAL COVENANTS:
See title **COVENANTS.**

REAL REPRESENTATIVE. He who represents or stands in the place of another with respect to his real property, is so termed, in contradistinction to him who stands in the place of another with regard to his personal property, and who is termed the personal representative. Thus, the heir is the real representative of his deceased ancestor, and the executor or administrator is the personal representative.

See title **REPRESENTATION.**

REALTY. That which either is or relates to real property (*i.e.*, to lands, tenements, and hereditaments), in contradistinction to that which either is or relates to personal property (*i.e.*, to moveable things in general), which latter is termed personalty.

REASONABLE PART. The shares to which the wife and children of a deceased person were entitled, were called their reasonable parts; and the writ *de rationabili parte bonorum* was given to recover them (F. N. B. 122). These rights of the wife (or widow) and children originally held good whether the deceased had died

REASONABLE PART—*continued.*

testate or intestate, but they now hold good only when he has died intestate.

See title **THIRDS**.

REASONABLE AND PROBABLE CAUSE.

In an action for malicious prosecution, the plaintiff, besides proving that the prosecution ended in his favour, must also prove the absence of all reasonable and probable cause for accusing him; and this latter question is for the judge (and not the jury) to decide (*Watson v. Whitmore*, 14 L. J. Exch. 41).

RE-ASSURANCE. Is when an underwriter procures the sum which he has insured to be insured over again to himself by some other underwriter. In English Law, re-assurance is limited by statute to the case of the original underwriter becoming insolvent or bankrupt or dying (*Maude and Pollock*, 3rd ed. 346).

RE-ATTACHMENT. A second attachment, or the attachment of a person who has been previously attached, and who, from the happening of some casual circumstance, has been discharged *per incuriam*.

See title **ATTACHMENT**.

REBEL or BELLIGERENT. As against the parent state, rebels are rebels and not belligerents; and the dimensions of the rebellion, its power and organization, do not alter the strictly legal *status* of the rebel. As a question of law, a rebel is a criminal, whether his acts are done at sea or on land. The question of his acting *bonâ fide* under colour of an asserted belligerent power, cannot arise between the state and one of its own subjects. If the acts are depredations on commerce protected by the state, they may be adjudged piracy by the Courts of the state. It is a political and not a legal question, whether the right so to treat them shall be exercised; and accordingly when a rebellion has attained such dimensions and organization as to be a state *de facto*, and its acts reach the dimensions of a war *de facto*, and the parent state is obliged to exercise powers of war to suppress it, and especially if neutral interests are involved in the struggle, it is now the custom for the state to yield to the rebels such belligerent privileges as policy and humanity require; and to treat captives as prisoners of war, make exchanges, respect flags of truce, &c. (*Wheaton's International Law*).

REBUTTABLE PRESUMPTIONS: See title **PRESUMPTIONS, QUALITY OF; PRESUMPTIONS, VARIETIES OF.**

REBUTTER. In an action, the alternate allegations of fact (*i.e.*, the pleadings) were

REBUTTER—*continued.*

denominated as follows,—declaration, plea, replication, rejoinder, surrejoinder, rebutter, and surrebutter. The declaration was the statement of the plaintiff's cause of complaint; the plea was the defendant's answer to the declaration; the replication was the plaintiff's answer or reply to the plea; the rejoinder was the defendant's answer to the replication; the surrejoinder was the plaintiff's answer to the rejoinder; the rebutter was the defendant's answer to the surrejoinder; and the surrebutter was the plaintiff's answer to the rebutter. Under the present practice, these names continue to accurately describe the successive pleadings, but the names are now little in use, and no fourth pleading except a simple joinder of issue can now be put in without leave of the Court.

See title **PLEADING**.

REBUTTING EVIDENCE. Is evidence adduced (by leave only) to destroy (if possible) the effect of evidence of a very material kind unexpectedly produced by the other side, *e.g.*, unexpected proof of an *alibi* reasonably suspected.

RECAPTION. Recaption, or reprisal, is a species of remedy by the mere act of the party injured; and is resorted to when any one has deprived another of his property in goods or personal chattels, or wrongfully detains his wife, child, or servant, in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them wherever he happens to find them, so that it be not in a riotous manner, or attended with a breach of the peace; and this retaking is termed a "recaption." There was also a writ of recaption to recover damages against a person who (pending a replevin) distrained a man again for the same rent or service.

See title **REPRISALS**.

RECAPTION, WRIT OF: See title **RECAPTION**.

RECAPTURE. When this country is at war with another country, and property at sea of a subject of this country is captured by the enemy, it may be re-captured by this country; and upon such re-capture the original ownership is re-vested by statute, subject to the payment of salvage, that is, one-eighth or one-sixth part of the value of the re-captured goods, according as the re-captor is a public vessel or a privateer (45 Geo. 3, c. 72). *Semble*, this rule does not apply where the captors have carried their prize *infra præsidia*, as that seems to divest altogether the original ownership.

RECEIPTS. When receipts are given for money paid as the price of goods the receipts may operate as bills of sale, and require registration; but usually they do not so operate. A purported receipt of money under hand only is no estoppel; but if under seal, it is (or used to be) so at law, but the truth might be shewn in equity.

RECEIVER. There are many kinds of receivers. (1.) The receiver of fines, an officer who received the money of all such as compounded with the king upon original writs in Chancery: (2.) The Receiver-General of the Duchy of Lancaster, an officer belonging to the Duchy Court, who gathered in all the revenues and fines of the lands belonging to that duchy, and all forfeitures of and assessments upon the same: (3.) A receiver of estates, appointed by the Court of Chancery to receive the rents, issues, and profits of lands, and the produce and profits of personal property the subject-matter of the action, and to manage and take care of such lands and personal property during the pendency of the action: (4.) A receiver of wreck, appointed by the Court of Admiralty, and who discharged similar functions to those of the receivers in Chancery. And any Division of the High Court of Justice may in a proper case appoint a receiver, and the Probate Division very frequently appoints one, pending any litigation that affects property either real or personal.

See title **RECEIVER IN AN ACTION.**

RECEIVER IN AN ACTION. For the interim preservation of property, and sometimes (*e.g.*, in administration actions in the Chancery Division) for securing its equal distribution among the parties (*e.g.*, creditors) entitled to the benefit of the action, a receiver is appointed in an action, usually upon motion, with a reference to chambers. Persons not parties to the action (either personally or by representation) are not entitled to any protection by or through a receiver (*Brocklebank v. East London Ry. Co.* W. N. 1879, p. 146). The possession of the receiver is neutral as between or among the parties to the action (Kerr on Receivers).

RECEIVER OF DUCHY: See title **RECEIVER.**

RECEIVER OF FINES: See title **RECEIVER.**

RECEIVER OF STOLEN GOODS: See title **RECEIVING STOLEN GOODS.**

RECEIVER OF WRECK: See title **RECEIVER.**

RECEIVERS AND TRIERS OF PETITIONS. The mode of receiving and try-

RECEIVERS AND TRIERS OF PETITIONS—continued.

ing petitions to Parliament was formerly judicial rather than legislative; and the triers were committees of prelates, peers, and judges; and latterly, of the members generally.

RECEIVING STOLEN GOODS. Receiving any chattel, money, valuable security, or other property whatsoever, feloniously obtained, knowing the same to have been so feloniously obtained, is a felony, for which the receiver may be indicted and convicted either as an accessory after the fact to the principal felony, or as for a substantive felony, and in the latter case, whether or not the principal felon shall have been previously convicted. The offence is punishable with penal servitude for any period between five and fourteen years, or with imprisonment for two years or under, with or without hard labour, and with or without solitary confinement, and (if a male under the age of sixteen years) with or without whipping (24 & 25 Vict. c. 96, s. 91).

See title **LARCENY.**

RECENT POSSESSION: See title **ANCIENT POSSESSION; POSSESSION OF STOLEN GOODS.**

RECITALS. The formal statements of matters of fact in any deed or writing in order to explain the grounds or reasons upon or for which the deed itself is executed. The recitals are situated in the premises of a deed; that is, in the part of a deed that is intermediate between the date and the habendum; and they usually commence with the formal word "whereas" (4 Cruise). They are a history of the previous facts and circumstances affecting the property. They sometimes modify the generality of the operative words in the deed, and this is more especially so in a deed of release to executors or trustees when executed by the residuary legatees. Under the Vendors and Purchasers Act, 1874 (37 & 38 Vict. c. 78), recitals in deeds twenty years old are made *prima facie* evidence of the truth of the facts therein contained. Recitals have under exceptional circumstances been held to even imply a covenant (Platt on Covenants, pp. 33, 34); and of course recitals of particular facts that are pertinent to the operation of the deed have the effect of an estoppel (*Carpenter v. Buller*, 8 M. & W. 209).

RECITE TO. To state or set forth in any deed or other writing such matters of fact as may be necessary to explain the nature of the transaction, or the reasons upon which it is founded. As used in the practice of conveyancing it is analogous to

RECITE, TO—*continued.*

the word "induce" as used in the practice of pleading.

See title **RECITALS**.

RECOGNITORS. A word which was frequently used to signify a jury impanelled upon an assize; so called because they acknowledge, *i.e.*, notify, cognise, or find, *e.g.*, a disseisin, by their verdict (Cowel; Bract. lib. 5, tract 2, c. 9).

See title **JURY, TRIAL BY, HISTORY OF.**

RECOGNIZANCE. A recognizance is an acknowledgment upon record of a former debt; and he who so acknowledges such debt to be due is termed the recognizor, or cognizor; and he to whom, or for whose benefit he makes such acknowledgment is termed the recognizee, or cognizee. A recognizance differs from a bond the difference being that a bond is the creation of a new debt, whereas a recognizance is merely an acknowledgment upon record of a debt which was previously due. A recognizance is certified to and witnessed by an officer of the court, and not by the seal of the party, as in the case of deeds (4 Cruise, 103). Recognizances are frequently taken from persons, either to answer their prosecution of a suit or their presence in court upon a certain day, or to secure their careful administration of property entrusted to them in some official capacity, *e.g.*, in the case of administrators in the Court of Probate and of receivers in the Court of Chancery.

See titles **BAIL; RECEIVER IN AN ACTION.**

RECOGNIZEE**RECOGNIZER**

} See title **RECOGNIZANCE.**

RECONSTRUCTION OF COMPANY.

There are two modes of reconstructing a company, formed or registered under the Companies Act, 1862:—(1.) By special Act of Parliament, and (2.) Under s. 161 of the Companies Act, 1862. The companies which seek for reconstruction by special Acts of Parliament are for the most part gas and water companies, or companies engaged in works of the like semi-public character; and as the result of such a re-construction, Parliament obtains control over the capital of the company which thenceforth can only borrow or issue new shares within the limits prescribed by the special Act. A reconstruction under s. 161 may be resorted to with advantage in a variety of cases, *e.g.*, when a company desires to do something *ultra vires*, *e.g.*, to issue preference shares having a priority over preference shares already issued, notwithstanding the holders of such last-mentioned shares, or some of them, refuse

RECONSTRUCTION OF COMPANY—*continued.*

to consent; or where the capital of the company is divided into several classes of shares (*e.g.*, preference, deferred, and founders' shares), and it is deemed expedient to convert all the shares into shares (or stock) of a uniform description, but a minority dissent. In order to carry out a reconstruction under s. 161, the old company must pass a special resolution or special resolutions: (1.) To wind up voluntarily; (2.) To appoint liquidators; (3.) To approve a scheme of reconstruction subject to specified conditions; and (4.) To authorize the liquidators to carry it into effect pursuant to s. 161 of the Act; and in due course the liquidators of the old company and the directors of the new company execute an agreement providing for the sale of all the property of the old company to the new company in consideration of the new company undertaking the debts and liabilities of the old company, paying the costs of winding it up, providing the funds necessary to purchase the interests of any dissenting members of the old company, and allotting to every assenting member of the old company one share in the new company in respect of each share held by him in the old company; and the property of the old company will be made over to the new company, which will allot its shares as provided by the agreement; and the debts and liabilities of the old company (if it has any) will be got rid of as soon as possible, either by payment, or by the creditors agreeing to accept the liability of the new instead of the liability of the old company (Buckley's Companies Acts; Palmer's Company Precedents, 475).

RE-CONVERSION IN EQUITY. Is that notional or imaginary process by which a prior notional conversion is annulled and taken away, and the notionally converted property restored in contemplation of a Court of Equity to its original actual unconverted quality. Reconversion may take place in either of two ways—*viz.*, either (I.) By the act of the parties, or (II.) By operation of law; and when it takes place by the act of the parties, then it is by their election so to take it, and such election may be shewn either (a.) By express direction, or (b.) By implied direction from conduct. On the other hand, when reconversion takes place by operation of law, there must be a concurrence of two requisites,—(1.) property must be in person entitled whether it be real or personal, and (2.) no declaration concerning its quality must have been made by him in his lifetime or by will (*Chichester v. Bick-*

RE-CONVERSION IN EQUITY—*contd.*
erslaff, 2 Vern, 295; *Pulteney v. Darlington*, 1 Bro. C. C. 223).

RE-CONVEYANCE. Upon payment off of money owing on mortgage of lands, the mortgagee reconveys same to the mortgagor or to such person and for such uses as the mortgagor may direct. The stamp on this deed is 6*d.* per £100 of the money at any time secured (Stamp Act, 1870).

RECORD. An authentic testimony in writing contained on rolls of parchment, and preserved in Courts of record. The record of *nisi prius* was an official transcript or copy of the proceedings in an action entered on parchment and sealed and passed, as it was termed, at the proper office; it served as a warrant to the judge to try the cause, and was the only document at which he could judicially look for information as to the nature of the proceedings, and the issues joined between the parties.

See titles ENTRY ON THE ROLL; ISSUE ROLL.

RECORD, COURTS OF. Courts whose acts and judicial proceedings were inrolled on parchment, and thereupon became the records of such Courts, and so were preserved as a perpetual memorial and testimony of the proceedings therein. All Courts of record were the King's Courts in right of his crown and dignity; but some of the King's Courts were not Courts of record strictly so called, as the Courts of Equity and the Admiralty Courts, which were at best only *quasi* of record, or of record to themselves. The distinction between Courts of record and Courts not of record was introduced soon after the Conquest; for by an edict of the Conqueror's it was ordained that all proceedings in the King's Courts should be carried on in the Norman instead of in the English language, in consequence of which the influence of the County Courts, Courts Baron, and other inferior jurisdictions, was much narrowed, for as the judges and suitors of such latter Courts were ignorant of that language, they were prevented from recording their acts (Com. Dig. tit. "Chancery"). One of the privileges which attached to a Court of record was the high authority which its records were allowed to possess, their truth not being permitted to be called in question, for nothing could be averred against a record, and no plea, or even proof, was admitted to the contrary. Also a plea of matter of record needed not to be put in on oath, but was sufficient without oath; and a decree even of the Court of Chancery, when it had been signed and inrolled (but not sooner), stood

RECORD, COURTS OF—*continued.*

on the same footing, at least for all purposes of litigation in that Court itself (1 Dan. Ch. Pr. 595). At the present day, all distinctions between the Court of Chancery and the Queen's Courts at Westminster have been abolished, and the Supreme Court in which they have been merged is a Court of record as well in its High Court (Judicature Act, 1873, s. 16) as in its Court of Appeal (Judicature Act, 1873, s. 18); and the decree or judgment or order need not now be enrolled but is entered merely. The County Courts are also Courts of record (9 & 10 Vict. c. 95, s. 3).

RECORD, PROOF OF. Upon issue joined of *nul tiel record*, the very record itself must be produced, if the record belongs to the Court in which the cause is; and if it belongs to another Court, then it is proved by an exemplification thereof under the Great Seal (2 Ph. Evid. 129; Bull. N. P. 226 b). But in other cases, *i.e.*, where no such issue is joined, the record is in general proved by an office copy thereof, sometimes by an examined copy thereof, sometimes by an exemplification thereof under the seal of the Court in which it is, and sometimes by a certified copy thereof.

RECORD, TRIAL BY. A species of trial adopted for the purpose of ascertaining the existence or non-existence of a record. When a record is asserted by one party to exist, and the opposite party denies its existence under the form of traverse, that there is no such record remaining in Court as alleged, and issue is joined thereon, this is called an issue of *nul tiel record*; and in such case, the Court orders a trial by inspection and examination of the record. Upon this, the party affirming its existence is bound to produce it in Court on a day given for the purpose; and if he fail to do so, judgment is given for his adversary. This mode of trial is not only that specially appropriated to try an issue of the above kind, but is, in fact, the only legitimate mode of trying such an issue (Co. Litt. 117 b, 260 a).

See title NUL TIEL RECORD.

RECORDS, KEEPER OF: See title MASTER OF THE ROLLS.

RECORDS AND WRITS CLERKS. Are the officers (formerly of the Court of Chancery, and now of the Chancery Division of the High Court) who issue writs of summons for commencing actions in Chancery, and with whom appearances to such actions are entered by the defendants thereto, and with whom the pleadings and other documents are filed, and with whom orders and decrees are entered as of record,

RECORDS AND WRITS CLERKS—continued.

and from whom execution issues. The office of these clerks has recently been transferred to the central office of the Supreme Court of Judicature.

See title **CENTRAL OFFICE (SUPREME COURT)**.

RECORDARI FACIAS LOQUELAM. An original writ once directed to the sheriff to remove a cause pending in an inferior Court into one of the superior Courts; as from a County Court or Court Baron to the Court of Queen's Bench or Common Pleas. It seems to have been called a *recordari* from the circumstance of its commanding the sheriff to whom it was directed to make a record of the proceedings in the Court below, and then to send such record up to the superior Court (Reg. Orig.; Cowel).

See title **REMOVAL OF ACTIONS**.

RECORDER. A barrister or other person learned in the law, whom the mayor or other magistrate of any city or corporate town (having a jurisdiction, or a Court of record within its precincts) doth associate to him for his better direction in the judicial proceedings of such Court (Cowel). Thus the Recorder of the City of London is practically the judge in the Lord Mayor's Court of the City, although in theory the Lord Mayor and Aldermen are the judges therein; and there are also recorders (appointed by the Lord Chancellor) in all municipal boroughs which have a separate Court of Quarter Sessions of the Peace.

See titles **CORPORATION, MUNICIPAL; LORD MAYOR'S COURT**.

RECOURSEMENT: See titles **CONTRIBUTION; SURETYSHIP**.

RECOVERY, COMMON. A common recovery was one of the ancient modes of transferring property from one party to another, and is said to have been introduced by the ecclesiastics. In order to avoid the Statutes of Mortmain, the religious houses used to set up (it is alleged) a fictitious title to the lands intended to be given or sold, and brought an action against the tenant to recover them; the tenant, by collusion, made no defence; and thereupon judgment was given for the religious house to recover the lands upon their supposed prior title.

The notoriety and evidence which attended these feigned recoveries was such, that they were soon adopted by lay persons in general as a usual or common mode of transferring lands, and ever afterwards they continued in use for that purpose, until they were abolished by the Act 3 & 4 Will. 4, c. 74, by which Act a disentailing deed was substituted for them, their prin-

RECOVERY, COMMON—continued.

cipal and almost exclusive use prior to that statute having come to be the barring of estate tails, one instance thereof being *Taltarum's Case* (12 Edw. 4). The first thing necessary to be done in suffering a common recovery in order to bar an estate tail, was that the person who was to be the demandant, and to whom the lands were to be adjudged, should sue out a writ of *præcipe* against the tenant of the freehold; whence such tenant was usually called the tenant to the *præcipe*. In obedience to this writ, the tenant appeared in Court, either in person or by his attorney; but, instead of defending the title himself, he called upon some other person (who, upon the original purchase, was supposed to have warranted his title), and prayed that that other person might be called in either to defend the title which he had warranted, or else to give the tenant lands of equal value to those which he should lose by the defect of warranty; and this was called the *vouching* to warranty. The person who was thus vouched to warrant (and who was usually called the *vouchee*) appeared in Court, was sued and entered into the warranty, by which means he took upon himself the defence of the title to the land. The demandant then desired leave of the Court to imparl, or confer with the vouchee in private, which was granted as a matter of course. Soon after the demandant returned into Court, but the vouchee disappeared or made default; in consequence of which default it was presumed by the Court that the vouchee had no title to the lands demanded in the writ, and therefore could not defend them, whereupon judgment was given for the demandant (who was then called the recoveror) to recover the lands in question against the tenant, and for the tenant to recover against the vouchee lands of equal value, in recompense for those warranted, and now lost (5 Cruise, 283, 284, 285, 286). By means of this common recovery, the demandant became seised in fee simple of the lands which were formerly in tail; and immediately by force of the statute of uses, the demandant became like a mere conduct pipe or graatee to uses, for either previously to suffering the common recovery he had executed to the tenant in tail a deed leading the uses, or immediately after suffering such common recovery he executed a deed declaring the uses thereof, and which uses were in favour of the tenant in tail, so that the tenant in tail became, as a consequence of the common recovery *plus* the deed leading or declaring the uses, seised in fee simple of the lands, freed and discharged of the former estate tail therein; and all remainders and re-

RECOVERY, COMMON—*continued.*

versions and executory interests subsequent to the tail were also destroyed.

See titles CONVEYANCES, sub-title *Deeds Lending or Declaring Uses*; DISTAILING ASSURANCE.

RECOVERY OF CHATTEL: *See* title DELIVERY, WRIT OF.

RECOVERY OF SMALL TENEMENTS.

Under the stat. 1 & 2 Vict. c. 74, upon compliance with the provisions of that statute, the landlord may obtain from the justices in petty sessions a warrant to a constable or police officer to put him into possession, using violence if need be; and similarly, under 11 Geo. 2, c. 19, s. 16, for deserted premises.

RECTIFICATION IN EQUITY. Documents which either through fraud or accident or mistake do not express the true intentions of the parties may be rectified by action in the Chancery Division (*Fane v. Fane*, L. R. 20 Eq. 698. Snell's Principles of Equity, 5th ed. 420-481).

RECTIFICATION OF REGISTER. If the name of any person is "without sufficient cause" entered in or omitted from the register of members of a joint stock company, or if default is made or unnecessary delay takes place in the removal of any name from such register, the person aggrieved may, upon motion in the Chancery Division, obtain a rectification of the register (Companies Act, 1862, s. 35). In the case of a company which is being wound up, the liquidator may also obtain an order for the rectification of the register of members.

See title CONTRIBUTORIES.

RECTO DE ADVOCATIONE ECCLESIE.

A writ of right, which lay when a man had a right of advowson, and the parson of the church dying, a stranger presented his clerk to the church, and the real patron did not bring his action of *quare impedit* or of *darrein presentment* within six months, but permitted the stranger to usurp on him, and so was left to his writ of right only, to recover his right. This writ lay only where the patron was entitled to the fee in the advowson (Reg. Orig. 29; Cowel).

RECTO DE DOTE. A writ of right of dower, which lay for a woman who had received part of her dower, and proposed demanding the remainder, against the heir of her husband, or his guardian if he were a ward (Old Nat. Brev. 5; Cowel). Under the C. L. P. Act, 1860, s. 26, no writ of right of dower was to be brought after the commencement of that Act in any Court whatsoever; but instead thereof, an

RECTO DE DOTE—*continued.*

action might be commenced by the ordinary writ of summons, with an indorsement thereon to the effect that the plaintiff intended to declare in dower; and all subsequent proceedings therein were as nearly as might be, to be taken in accordance with the C. L. P. Acts, 1852 and 1854; and that is now substantially the proceeding in such a case, with this exception that the plaintiff need not now make any indorsement upon the writ of her intention to declare in dower, but need indorse merely in the ordinary way that she claims her dower.

See title INDORSEMENT OF CLAIM.

RECTO DE DOTE UNDE NIHIL HABET.

A writ of right of dower, which lay when a man who had divers lands and tenements had assigned no dower to his wife, and she was thereby driven to sue for her dower against the heir or his guardian (Reg. Orig. 170; Cowel). Under the C. L. P. Act, 1860, the like provisions were made regarding this action as are stated in the title last preceding to have been made by the same Act regarding the writ of right of dower; and the present procedure is also the same as there stated.

RECTO DE RATIONABILI PARTE. A writ that lay between privies in blood, as brothers in gavelkind, or sisters co-heiresses, or other coparceners, for land in fee simple. As for instance, if a man leased his land for life, and afterwards died, leaving issue two daughters, and after that the tenant for life died also, and then one sister entered upon the whole of the land, and so deforced the other, then the sister so deforced might have had this writ to recover part (F. N. B. 9; Cowel).

RECTO QUANDO DOMINUS REMISIT.

A writ of right, which lay where lands or tenements that were in the seignior of any lord were in demand by a writ of right; for if in such a case the lord held no Court, or otherwise at the prayer of the demandant, sent to the King's Court his writ, to put the cause thither for that time (reserving to him at other times the right of his seignior), then this writ issued out for the party (Reg. Orig. 4; Cowel).

RECTO SUB DISCLAIMER. A writ that lay for a lord who had avowed upon his tenant in the Court of Common Pleas, and such tenant had disclaimed to hold of him; and if the lord averred and proved that the land was holden of him, he recovered the land for ever (Old Nat. Brev. 150; Cowel).

RECTOR. *Rector ecclesie parochialis* is he who has the cure or charge of a parish church, *qui tantum jus in ecclesia paro-*

RECTOR—*continued.*

chiali habet quantum prælatus in ecclesiâ collegiatâ. At the present day, a rector is either a *lay* rector or a *spiritual* rector, the former being otherwise called an impropiator, and having a vicar under him to discharge the services and sacraments of the church, and the latter being himself the officiating incumbent.

See titles ADVOWSON; TITHES; VICAR.

RECTORY. This word appears to be used for an entire parish church, with all its rights, glebes, tithes, and other profits (Spelm). The word was and is, however, often used to signify the rector's manse, or parsonage house (Ken. Par. Antiq. 549).

See titles ADVOWSON; TITHES; VICARAGE.

RECUSANTS. This word, as used in the statutes, has been expounded to mean all those who separate from the church as established by the laws of this realm (*Les Termes de la Ley*). Numerous laws against recusants were passed in the persecuting times of Charles II., in which reign these recusants were chiefly non-conformists. The term does not, in fact, appear to have ever been applied to Roman Catholics or Jews, but only to Protestant Dissenters.

See title NON-CONFORMISTS.

REDDENDO SINGULA SINGULIS. A rule of construction, whereby alternative sentences are construed by reading the single phrases with their respective correlatives.

REDDENDUM. The reddendum is a clause in a deed by which the grantor reserves something to himself out of what he has granted before. It is situated between the habendum and the covenants in deeds, and usually begins either with the word "yielding" or the word "rendering;" thus in a lease, that clause which commences with the words "yielding and paying" is the reddendum (4 Cruise, 26).

REDDITION. Was a judicial confession and acknowledgment that the land or thing in demand belonged to the demandant, and not to the person surrendering it (34 & 35 Hen. 8, c. 24; Cowel).

See title IN JURE CESSIO.

REDDITUS SICCUS. A rent for the recovery of which no power of distress is given by the rules of the Common Law (3 Cru. Dig. 314). It is also sometimes called a rent-seck (Litt. sec. 217, 218; Co. Litt. 143 a, 143 B, 153 a, n. (1). But a power of distress for this rent was given by stat. 4 Geo. 2, c. 28.

See title RENT.

REDEEMABLE RIGHTS. Such rights as return to the grantor of lands, &c., on

REDEEMABLE RIGHTS—*continued.*

repayment of the sum as security for which they were granted (Jacob; Tomlins).

RE-DEMISE: See titles DEMISE; ATTORNMENT CLAUSE IN MORTGAGE.

REDEMPTION, EQUITY OF: See title EQUITY OF REDEMPTION.

RE-DISSEISIN, WRIT OF. For a second disseisin made by a person who had once before been adjudged to have disseised the same man of his lands or tenements, there lay a special writ, termed a writ of re-disseisin (Reg. Orig. 204; Cowel).

REDUCTION. In French Law, when a parent gives away, whether by gift *inter vivos* or by legacy, more than his portion disponible, the donee or legatee is required to submit to have his gift reduced to the legal proportion.

See title HOTCHPOT; RAPPORTS.

REDUCTION OF CAPITAL. The Companies Act, 1867 (30 & 31 Vict. c. 131) empowers any joint stock company limited by shares to modify by special resolutions and with the sanction of the Court of Chancery the conditions of its memorandum of association so as to reduce its capital. And this power is extended by the Companies Act, 1877 (40 & 41 Vict. c. 26).

REDUCTION INTO POSSESSION. A trustee is bound to reduce into possession, i.e., to realize all the outstanding personal property of the deceased testator, unless the latter has expressly authorized him to continue it outstanding. Again, a husband upon reducing into possession his wife's choses in action becomes entitled to them for his own benefit; but what would be a reduction into possession (so called) in the case of a trustee would not invariably be so in the husband's case, for in the latter case the actual thing must be got in, not the purchase-money for it (*Hornsby v. Lee*, 2 Mad. 16).

RE-ENTRY. The entering again into or resuming possession of premises. Thus in leases there is a proviso for re-entry of the lessor on the tenant's not paying the rent, or not performing the covenants contained in the lease; and by virtue of such proviso the lessor may take the premises into his own hands again if the rent be not paid, or the covenants be not observed by the lessee; and this taking of possession again is termed re-entry (2 Cruise, 8; Cowel).

See title ENTRY.

RE-EXAMINATION: See title EXAMINATION OF WITNESSES.

RE-EXCHANGE. Was originally the cross-bill of exchange which the holder of

RE-EXCHANGE—continued.

an original bill drew upon dishonour of that bill for such a sum of money (and interest and expenses) as would at the existing rate of exchange between the two countries exactly purchase the amount of the original bill,—where that amount was in a foreign currency. It is now commonly used to denote the amount itself of the cross-bill. The drawer (but not the acceptor) is liable for the re-exchange.

RE-EXTENT. A second extent made on lands and tenements on complaint being made that the former extent was only partially performed (Cowel).

See title **EXTENT**, **WRIT OF**.

REFEREES. By consent of all parties any question or issue of fact in any civil cause or matter may be referred to a referee for him to try same, and to report the result of his trial (Judicature Act, 1873, ss. 57, 58); and by compulsory order of the Court or a judge, any question or issue of fact, or any question of account, in any civil cause or matter requiring either a minute examination of documents or of accounts, or a scientific or local investigation, may be referred to a referee either official or special for him to try same and to report the result of his trial (Judicature Act, 1873, ss. 57, 58). And the referee may, before the conclusion of the trial before him, or by his report, submit any question for the decision of the Court, or state any facts specially, with power to the Court to draw inferences therefrom (Order xxxvi., 34, March 1879). In either case the report may be either adopted or set aside by the Court; but if not set aside, it is equivalent to the verdict of a jury (Judicature Act, 1873, s. 58); and apparently judgment may be obtained upon it by subsequent motion for judgment, the judgment or order being entered in such form as the Court directs (Order xxxvi., 34, March 1879). And regarding such references (whether voluntary or compulsory) and such report, the Court or judge has all the powers of the Common Law Procedure Act, 1854 (Judicature Act, 1873, s. 59); and, in addition, the Court or judge either (1.) may require the referee to explain or give reasons for his report, and may remit to him or to some other referee the cause or matter or any part thereof for re-trial or further consideration, or (2.) may itself decide the question on the evidence taken before the referee with or without additional evidence as the Court may direct (Order xxxvi. 34, March 1879; *Dunkirk Colliery Co. v. Lever*, 9 Ch. Div. 20). *Nota Bene.*—No compulsory reference of the entire action can be made under the Judicature Acts (*Lorgman v. East*, 3 C. P. Div.

REFEREES—continued.

142; *Pontifax v. Severn*, 3 Q. B. Div. 295; and *Mellin v. Monico*, 3 Exch. Div. 144).

REFERENCE. The fact of something being referred. Thus in the proceedings in an action, matters frequently arise which would take up too much of the time of the Court to be brought before it for its decision; and such matters are therefore referred to the masters of the Common Law Courts, or the chief clerks in Chancery, or to the official referees, or to special referees, to be inquired into by them. The order of the Court authorizing such a reference is termed an order of reference.

See titles **ARBITRATION AND AWARD**; **REFEREES**.

REFERRING A CAUSE. When an action involves matters of account or other intricate details which require minute examination, and for that reason are not fit to be brought before a jury, it is not unusual to refer all matters in difference between the parties to the decision of an arbitrator, and in such a case the cause is said to be referred.

See titles **REFERENCE**; **REFEREES**.

REFORM ACT, 1832. Disfranchised boroughs having a less population than 2000, and reduced boroughs having a less population than 4000 to one member, and transferred the free seats to the larger towns (theretofore unrepresented), namely; Birmingham, Manchester, Leeds, &c.; the Act created also the four metropolitan boroughs of Marylebone, Finsbury, the Tower Hamlets, and Lambeth, with two members each. The Act also increased the number of the county members from 94 to 159. The Act retained the 40s. freehold qualification for counties, and added copyholders of 10*l.* per annum, leaseholders (sixty years) of 10*l.* per annum, or (twenty years) of 50*l.* per annum; and introduced the 10*l.* resident householder qualification for boroughs.

REFORM ACT, 1867: See title **ELECTORAL FRANCHISE**.

REFORMATION. The great change effected in the reign of Henry VIII. (as regards its political aspects) and in the reigns of Edward VI. and Elizabeth (as regards its religious aspects) is so called.

REFORMATORY. Under the stat. 29 & 30 Vict. c. 117, s. 14, where a juvenile, i.e., person to appearance under sixteen years of age, is convicted, whether on indictment or in a summary manner, of an offence punishable with penal servitude or imprisonment, and is sentenced to be imprisoned for the period of ten days or longer, he may be sent to a reformatory

REFORMATORY—*continued.*

school of his own religious persuasion for between two and five years.

REFRESHER. It frequently happens that after the briefs in an action have been delivered to counsel, the action from a press of business or some other reason, is adjourned, or allowed to stand over from one sittings to another, which imposes upon counsel the necessity of re-perusing their briefs, in order to refresh their memory upon the various points of the case; in consideration of which, it is usual for the attorney to mark on the briefs which have so been delivered a small additional fee, thence termed a refresher fee (*Harrison v. Waring*, 11 Ch. Div. 206).

REFRESHING MEMORY: See title MEMORANDA IN EVIDENCE.

REFUSAL: See titles OFFER; OPTION TO PURCHASE; PRE-EMPTION.

REGAL FISHES: See title FISH ROYAL.

REGALIA. The royal rights of a king; also occasionally the outward emblems of sovereignty. *Regalia facere* is to do homage or fealty when the king is invested with the regalia (Cowel).

REGARDANT. A villein regardant was regardant to the manor in respect that he was like a chattel annexed thereto, and because he was charged with doing all base services within the manor, and with seeing that it was freed from all things that might annoy it (Co. Litt. 120; Cowel).
See title VILLAINS.

REGE INCONSULTO. A writ issued from the king to the judges, commanding them not to proceed in a cause which might prejudice the king without the king being advised (18 Vin. Abr. 275, 280).

REGENCIES. During the absence of the Norman and early Plantagenet sovereigns, the chief justiciar used to exercise the powers of a regent; and latterly, during such absences, the government was committed to Lords Justices or *Custodes Regni*. But after hereditary succession to the Crown recognised the law of Primogeniture (Hen. III), the infancy of the king, or other physical or mental incapacity, required the appointment of a regent properly so called. And the chief instances of such regencies are the following:—

- (1.) Henry III.—Pembroke's regency;
- (2.) Edw. III.—Parliamentary regency;
- (3.) Richard II.—Council of Twelve;
- (4.) Hen. VI.—Bedford and Gloucester's regencies; and afterwards York's regency;
- (5.) Edw. V.—Gloucester's regency;

REGENCIES—*continued.*

(6.) Edw. VI.—Somerset's regency.

In recent reigns various Acts professing to regulate the regency have been passed, principally the following:—

24 Geo. II. c. 24;

Geo. III.—First Regency Act, 1765;

Second " " 1810;

1 Will. IV. c. 2;

Victoria—First Regency Act, 1837;

Second " " 1840.

See title SUCCESSION TO CROWN, LAW OF.

RÉGIME DOTAL. In French Law, the *dot*, being the property which the wife brings to the husband as her contribution to the support of the burdens of the marriage, and which may either extend as well to future as to present property, or be expressly confined to the present property of the wife, is subject to certain regulations which are summarized in the phrase *régime dotal*. The husband has the entire administration during the marriage; but as a rule where the *dot* consists of immovables, neither the husband nor the wife, nor both of them together, can either sell or mortgage it. The *dot* is returnable upon the dissolution of the marriage, whether by death or otherwise.

See title Dos.

RÉGIME EN COMMUNAUTÉ. In French Law is the community of interests between husband and wife which arises upon their marriage. It is either (1.) legal or (2.) conventional, the former existing in the absence of any agreement properly so called and arising from a mere declaration of community, the latter arising from an agreement properly so called. Legal community extends to all the moveable and immoveable property of both parties (and the profits thereof) at the time of and during the marriage, and also to all the debts with which either spouse is burdened at the date of the marriage, or which the husband or the wife (with his consent) contracts during the marriage. Under such a community, the husband has the sole management and disposal of the property, but he cannot give it away for nothing, unless it should be for the advancement of the children of the marriage. This community is destroyed by a judicial separation *de corps et de biens*, and the wife recovers the free administration of her goods. Conventional community may be as diverse as the parties choose by their conventions to make it, these conventions most commonly regulating the amount of property which shall be held in common, excluding the after-acquired property from the community, or making other such restrictive regulations.

REGISTER. A book wherein things are registered for the preservation of the same, *e.g.*, a parish register of baptisms, marriages, and burials; a register of writs, &c. (Co. Litt. 159; Cowel).

REGISTER, EXTRACTS FROM, PROOF OF. This proof is by certified copy, the person to certify being (usually) the person having the legal custody of the register (Lord Brougham's Evidence Amendment Act, 1851, 14 & 15 Vict. c. 99, and Documentary Evidence Act, 1845, 8 & 9 Vict. c. 113).

See titles DOCUMENTS, PROOF OF; RECORD, PROOF OF.

REGISTRAR. An officer who has the custody or keeping of a registry. There are several officers of this kind. The principal are the registrars of the Courts of Chancery and Bankruptcy and the Registrars of Births, Deaths, and Marriages.

REGISTRARS IN BANKRUPTCY. Are officers of the Court of Bankruptcy in London appointed under the 61st section of the Bankruptcy Act, 1869, by the Chief Judge in Bankruptcy. And they perform such duties as are from time to time assigned to them by the chief judge with the assent of the Lord Chancellor; and the chief judge may delegate his duties (or any of them) to the registrars, in which case the registrars sit and act as chief judge, and the appeal from their decisions when so sitting and acting is not to the chief judge, but to the Court of Appeal.

REGISTRARS OF BIRTHS, &c. The registrars of births, deaths, and marriages are officers appointed under the 6 & 7 Will. 4, c. 86, 7 Will. 4 & 1 Vict. c. 22, and 3 & 4 Vict. c. 92, for the purpose of keeping in their respective districts an exact register of every birth, death, and marriage which may take place therein. The registrars of each union are subjected to the supervision of the "superintendent registrar" of the union; and these again are subject to the authority of a superior officer appointed under the great seal, and holding office during the pleasure of the Crown, called the "Registrar General of Births, Deaths, and Marriages in England."

See title REGISTRATION OF BIRTHS, &c.

REGISTRARS IN CHANCERY. Are officers of the Chancery Division of the High Court of Justice, whose duty it is to attend (in regular rotation) the Lord Chancellor, the Lords Justices, the Master of the Rolls, the three Vice-Chancellors, and the Additional Chancery Judge in court, and also (whenever so required) in chambers. Their principal duties are defined by Consolidated Order I. rules 17 to 33, and consist

REGISTRARS IN CHANCERY—contd.

in drawing up and entering (by themselves or their clerks) all decrees and orders made by these judges in court, and occasionally the orders made in chambers. The registrar first delivers out a draft of the decree or order, and with it gives the party having the carriage of the decree or order, an appointment for settling same, and the party receiving such appointment gives notice of it to the other side, and both parties attend on the day appointed to settle the decree or order.

REGISTRARS OF DISTRICT REGISTRY: See title DISTRICT REGISTRARS.

REGISTRATION. Bills of sale, judgments, and various other legal documents require to be registered, in order to their complete efficacy. And in other matters, registration is optional.

REGISTRATION OF BIRTHS, &c. A civil registration was first established in 1836 of births, deaths, and marriages. Previously to that year, births, baptisms, &c., were registered in the parochial registries, or merely in private books, *e.g.*, Bibles, &c.

REGISTRATION OF TITLE: See title REGISTRY OF LAND.

REGISTRY OF DEEDS. By certain Acts of Parliament all deeds, writs, and other conveyances (with some exceptions) which affect lands in the counties of Middlesex and York, are required to be registered; the statute for Middlesex being 7 Anne c. 20, and the statutes for Yorkshire being 2 & 3 Anne, c. 4 (West Riding), 6 Anne, c. 62 (East Riding), and 8 Geo. 3, c. 6 (North Riding). The object of this is that purchasers and mortgagees of lands in these counties by referring to this register may have an opportunity of ascertaining whether the lands they are about to purchase are in any way incumbered or otherwise affected by any prior transactions; and therefore by these statutes, deeds and conveyances are void against subsequent purchasers or mortgagees, unless registered before the conveyances under which such purchasers or mortgagees claim, unless, indeed, the subsequent purchaser or mortgagee had express notice of the prior charge (*Le Neve v. Le Neve*, 2 Wh. & Tud. L. C. 28). But as regards wills, it is provided by the Vendors and Purchasers Act, 1874 (37 & 38 Vict. c. 78), that where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period (six months) allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him shall, if registered before, take precedence of and

REGISTRY OF DEEDS—*continued.*

prevail over, any assurance from the testator's heir-at-law.

See title **REGISTRY OF LAND**.

REGISTRY OF LAND: See title **LAND TRANSFER ACT, 1875**.

RE-GRANT. Prior to the stat. 3 & 4 Will. 4, c. 74, a mode of barring an estate-tail in copyhold lands was a forfeiture and re-grant; i.e., the tenant in tail (in collusion with the lord or his steward) forfeited his lands, and the lord granted them out anew to the same tenant in fee simple, according to the custom. An exception of mines and minerals with the right of working out of the conveyance of the lands, is sometimes compared to a re-grant; but that is only a mode of speaking, because the exception is in reality a slice of the original ownership.

See title **EXCEPTION**.

REGRATING. In one sense, this word signified the scraping or dressing of cloth or other goods for the purpose of selling them again. But in its more ordinary sense, it means the offence of buying or getting into one's hands at a fair or market any provisions, corn, or other dead victual with the intention of selling the same again in the same fair or market, or in some other within four miles thereof, at a higher price; and he who does so commits a criminal offence, and is termed a regrator (3 Inst. 195; 5 Ed. 6, c. 14).

See title **FORESTALLING**.

REGULATORS OF CORPORATIONS: See title **ELECTIONS, CROWN'S INFLUENCE IN**.

RE-HEARING. When a party desired to have a decree of the Court of Chancery reversed or altered he petitioned for a re-hearing; that is, for the cause to be heard again. Such re-hearing was usually had before the same judge that had previously heard the case. It was obtained upon a petition to the Lord Chancellor, accompanied with the certificate of two counsel, one of whom, at least, must have been engaged on the occasion of the former hearing; and the usual ground of it was that there had been an oversight on the part of the judge, resulting in a miscarriage of justice. The certificate was, however, in the most general form, merely stating that the cause was a proper one to be re-heard. In case the re-hearing was that of an order made on motion, then no certificate of counsel was required, and neither was any petition of appeal necessary, but counsel merely moved the Court of Appeal on motion with notice. All re-hearings have been abolished under the Judicature Acts, 1873-1875 (*In re St. Nazaire Land Co.*, W. N. 1879, p. 124);

RE-HEARING—*continued.*

and now a party desirous of a re-hearing must content himself with an appeal.

See titles **APPEAL**; **BILL OF REVIEW**.

RE-INSURANCE, CONTRACTS OF: See title **RE-ASSURANCE**.

REJOINDER: See title **REBUTTER**.

REJOINING GRATIS. Rejoining voluntarily, or without being required to do so by a rule to rejoin. When a defendant was under terms to rejoin gratis, he had to deliver a rejoinder, without putting the plaintiff to the necessity and expense of obtaining a rule to rejoin (*Atkins v. Anderson*, 10 M. & W. 12; Lush's Pr. 396).

See title **PLEADING ISSUABLY**.

RELATION: See title **RELATOR**.

RELATION BACK. Where a legal status (whether of ability or of disability) accruing at any specified date is considered as dating from any earlier date, it is said to relate back to such earlier date.

See titles **ADJUDICATION ORDER**; **PROTECTED TRANSACTIONS**.

RELATIVE RIGHTS. As opposed to those rights which are called absolute, are rights correlating (i.e., corresponding) with duties lying on assignable individuals, and not (primarily at least) on the world at large. Rights of property are usually relative; and rights to one's person (whether life, or limb, or reputation) are absolute.

RELATOR. An informer. In the case of an information being filed by the Attorney-General at the relation of some informant, such informant is termed a relator, and the information is said to be at the relation of such person.

See title **INFORMATION**.

RELEASE. A release is a discharge or conveyance of a man's right in lands or tenements to another who already has an estate in possession; as if A. has a lease of lands for a term of years, and B. has the remainder or reversion in fee; here the fee simple of the lands may become vested in A. by B. executing a release of the lands to A. (4 Cruise, 84). Such a release is said to operate by way of enlargement of the estate of A.

See title **CONVEYANCES**, sub-title *Release*.

RELEASE OF OBLIGATIONS. Is an acquittance or discharge of obligations; and is commonly under seal.

See title **ACQUITTANCE**.

RELEASE TO USES. The conveyance by a deed of release to one party to the use of another is so termed. Thus when a conveyance of lands was effected, by those instruments of assurance termed a lease

RELEASE TO USES—*continued.*

and release, from A. to B. and his heirs, to the use of C. and his heirs, in such a case C. at once took the whole fee simple in such lands, B. by the operation of the Statute of Uses, being made a mere conduit pipe for conveying the estate to C.; and B. was called the releasee to uses.

RELEASEE TO USES: See title **RELEASE TO USES**.

RELEGATIO VEL DEPORTATIO. Were forms of punishment known to the Roman Law, and were (in effect) banishment or transportation. *Deportatio* was the severer of the two, involving loss of citizenship, and consequently of the *patria potestas* and other civil rights, whereas *relegatio* involved no such loss, but simply restricted the banished person to some particular place.

RELIEF. A fine or acknowledgment, which, during the feudal system, the heir paid to the lord on being admitted to the feud which his ancestor possessed; it generally consisted of houses, arms, money, and the like; it was called a relief, either because it raised up and re-established the inheritance, or because by it the heir took up or lifted up the inheritance, or in the words of the feudal writers, "*incertam et caducam hereditatem relevabat*" (Knight, 14). It seems that a relief is still payable, if demanded (Wms. R. P. p. 120); in amount it is one year's quit rent.

RELIGION: See title **MONK**; **NUV.**

RELIGIOUS SECTS: See titles **DISSENTERS**; **JEWS**; **NON-CONFORMISTS**; **CHURCH AND STATE, &c.**

REM, IN: See title **IN PERSONAM**.

REMAINDER. A remainder is defined to be an estate limited to take effect and be enjoyed after another estate is determined. As if a man who is seised of lands in fee simple grants them to A. for twenty years, and after the determination of that term, to B. and his heirs for ever; in this case the estate of A. (that is, the interest which A. has in the lands for the twenty years) is termed an estate for years; and the estate of B. (that is, the interest which B. has in the lands after the end of the twenty years) is termed a remainder. In order to constitute or to create a remainder, it is a rule that there must be some particular estate (as it is termed) to support it, that is, at the time of creating a remainder there must be some estate (in the same lands to which the remainder applies) created at the same time to precede the remainder, which preceding estate is termed the particular estate. Remainders are said to be either

REMAINDER—*continued.*

vested or contingent. Vested remainders (or remainders executed) are those on the creation of which a present interest passes to the party, though to be enjoyed at a future time, and by which the estate is invariably fixed to remain to a determinate person after the particular estate is spent. As if an estate is conveyed to A. for twenty years, remainder to B. in fee; here B.'s is a vested remainder, which nothing can defeat or set aside; so that a person entitled to a vested remainder has an immediate fixed right of future enjoyment, that is, an estate in *presenti*, though it is only to take effect in possession and receipt of the profits at a future period. Contingent (or executory) remainders are such as are limited to take effect in favour of a dubious and uncertain person; as if an estate is conveyed to A. for life, with remainder to B.'s eldest son (then unborn) in tail; this is a contingent remainder, for it is quite uncertain whether B. will have a son or not; but the instant that a son is born, the remainder is no longer contingent, but vested (2 Cruise, 231). These two varieties of remainder are defined in Williams's Real Property as follows:—

(1.) A vested remainder is one which is always ready from its creation to its close to come into possession the moment the prior estate determines;

(2.) A contingent remainder is one which is not always so ready.

See title **INCORPOREAL HEREDITAMENTS**.

REMAINDER, CROSS. Where lands are granted to two or more people as tenants in common for particular estates, and it is expressed that upon the determination of the particular estates in any of the shares they are to remain over to the other or surviving or continuing grantees, so as that the reversioner or remote remainderman is not to be let in until all the particular estates have determined, the grantees (tenants in common) are said to have cross-remainders limited to them. Such remainders may be created either in deeds or in wills; but in deeds the words must be express, whereas in wills it is not unfrequent to find cross-remainders implied (*Holmes v. Meynell*, T. Raym. 452). Cross-remainders may be implied between more than two tenants in common, but the implication does not very frequently arise (*Pery v. White*, Coup. 780); in these cases it is therefore better to use express words to create them, where that is the intention.

REMAINDER, FORMEDON IN: See title **FORMEDON**.

REMANET. The causes which are deferred being tried from one sittings to

REMANET—continued.

another, are termed remanets (1 Arch. Pract. 375).

REMEDIES BY ACT OF THE PARTY.

These remedies are, *e.g.*, self-defence, entry, abatement of nuisances, distress, seizure of heriots, &c.; and in a less appropriate sense, arbitration, accord and satisfaction, and such like.

REMEDIES, LEGAL AND EQUITABLE.

The effect of the new procedure, introduced by the Judicature Acts, 1873-75, has been generally to reduce every action, no matter upon what ground, to a simple action on the case; commencing with a writ, and being followed up by a statement of claim, and in which statement of claim the plaintiff gives a simple narrative of the circumstances, and concludes by claiming the redress which he believes himself entitled to or such other relief as the Court may think he is entitled to, upon these circumstances. But notwithstanding that such has been the effect of these acts, it is nevertheless desirable, and indeed essential, to possess a knowledge of the old distinctions between the different classes and objects of actions; for in many cases the nature of the action is the best explanation of the nature of the right, and of the elements which constitute its invasion, and in every case more or less of technicality in pleading still survives. Also, where formerly the action would have been at law and not in equity, or *vice versa*, the action should still be brought in the appropriate division. Now the principal legal remedies were, (1.) Trespass; (2.) Trover; (3.) Case; (4.) Ejectment; (5.) Covenant and assumpsit; and (6.) Action for use and occupation; and the principal equitable remedies were, (1.) Injunction with or without damages; (2.) Action for account; (3.) Specific enforcement of covenant; (4.) Specific performance of contract (whether of sale or of lease); (5.) Appointment of receiver or manager; (6.) Foreclosure; and (7.) Declaration of rights. See these several titles.

REMEDIES BY OPERATION OF LAW.

There are principally two, viz., (1.) Retainer by an executor or administrator of his own debt out of the assets, in priority to other creditors of equal degree; and (2.) Remitter.

See titles **RETAINER**; **REMITTER**.

REMEDIES SURVIVE BUT NOT RIGHTS. This is a maxim of legal procedure, applicable under certain circumstances, but its applicability has been much reduced, *semble*, since the Judicature Acts assimilated the law and equity procedures. However, the maxim still holds good in the case, *e.g.*, of the decease of one

REMEDIES SURVIVE BUT NOT RIGHT—continued.

of several co-partners entitled to receive money, or of one of several co-debtors liable to pay money; for in each of these cases the survivor or survivors alone sue or (as the case may be) are sued. Nevertheless, the money recovered in the one case, and the liability borne in the other case, are afterwards distributed *pro rata* in equity between the survivor and the estate of the deceased.

REMEMBRANCER, CITY OF LONDON.

An officer of the corporation, whose duties are partly ceremonial (*e.g.*, in regard to presentations, &c.) and partly legal and parliamentary (*e.g.*, in respect of his inspection of bills before Parliament likely to affect the corporation in any way, and reporting same to the corporation). He has for that purpose a right of constant access to the House.

REMEMBRANCERS OF THE EX-CHEQUER.

Were three officers, or clerks, of the Exchequer. One was called the *king's remembrancer*; another the *lord treasurer's remembrancer*; and the third, the *remembrancer of the first fruits*. (1.) The king's remembrancer entered in his office all recognizances taken before the barons for any of the king's debts, or for appearances, or for observing of orders; he wrote process against the collectors of customs, subsidies, and fifteenths for the accounts, &c. (2.) The lord treasurer's remembrancer made process against all sheriffs, escheators, receivers, and bailiffs, for their account; also of *fieri facias* and extent for any debts due to the king either in the pipe or with the auditors, &c. (3.) The remembrancer of the first fruits took all compositions and bonds for the first fruits and tenths, and made process against such as did not pay the same (Cowel). The duties of all these officers have for a long time been discharged by the king's (now Queen's) remembrancer, and the office (together with the duties) of the latter has been now transferred to the Central Office of the Supreme Court.

See title **CENTRAL OFFICE (SUPREME COURT)**.

RÉMÉRÉ: See title **RACHAT**.

REMISE DE LA DETTE. In French Law is the release of a debt.

See title **RELEASE OF OBLIGATIONS**.

REMITTER. In real property law is a restitution of one who has two titles from the latter defective title, in respect of which he is in possession, to the former complete title which he has to the lands, but in respect of which he is not in possession. It was necessary in order to the

REMITTER—*continued.*

principle of remitter taking effect, that the latter title should have come to the party by act of law; for if it came to him by his own act, he was taken to have waived his former or more ancient title (Co. Litt. 358). At the present day, real actions having been abolished, and the fact of possession acquired by whatever title being actively protected by the Courts, the doctrine of remitter has lost its importance, at least in regard to the ownership of lands.

REMITTITUR. This word was ordinarily used in two senses; first, for an entry or minute which a plaintiff sometimes made expressive of his intention to give up or waive the damages which he had originally demanded in his declaration, whence the entry was called a *re-mittitur damna*; secondly, to signify the returning or sending back by a Court of Appeal (e.g., by the House of Lords) of the record and proceedings to the Court whence the appeal came (Tidd's Forms, 574, 615, &c.).

RE MOTENESS OF DAMAGES. Where damages of an indirect or consequential character are refused at a trial, they are said to be refused on the ground of remoteness.

See title DAMAGES.

RE MOTENESS OF ESTATES. Any estates in land, or so-called estates in personal property, attempted to be created in excess of the Rule of Perpetuities are void for remoteness; and estates in lands contravening the rules for the creation of contingent remainders are also occasionally said to be void for the same cause.

See titles CONTINGENT REMAINDERS; PERPETUITIES.

RE MOTENESS OF EVIDENCE. Evidence, whether direct or circumstantial, which is merely conjectural, that is, which does not present an open and visible connection between the *factum probandum* and the *factum probans*, is rejected for remoteness.

REMOVAL OF ACTIONS. Any party to an action proceeding in London may obtain an order, but not as of right, from the Court or judge to remove the action from the High Court (i.e., from London Chambers) into the District Registry (Order xxxv., 13). And conversely the removal of an action from the District Registry into the High Court is authorized in the following cases:—(1.) The removal is of right on the part of a defendant where the writ is not specially indorsed (Order xxxv., 11), unless the defendant asking removal is merely formal (Order xii., 5; Order xxxv.,

REMOVAL OF ACTIONS—*continued.*

12). (2.) The removal is also of right on the part of a defendant (where writ of summons is specially indorsed under Order iii., 6) in either of the following cases:—(a.) Where plaintiff, within four days after appearance of defendant does not apply (under Order xiv., 1 a) for an order to sign final judgment on affidavit of no defence (Order xxxv., 11); or (b.) Where plaintiff has so applied, but defendant has obtained leave (under Order xiv., 5) to defend (Order xxxv., 11). (3.) The removal is in the discretion of the Court in all other cases, on the application of either plaintiff or defendant. As regards removal of action generally from county court into High Court, see 28 & 29 Vict. c. 99 for Chancery matters, and 19 & 20 Vict. c. 108 for Common Law matters; and conversely as regards removal of action generally from High Court into county court, see 30 & 31 Vict. c. 142, s. 7 for Chancery and Common Law matters equally; and see *Osborne v. Homburg*, 1 Exch. Div. 48; *Foster v. Underwood*, 3 Exch. Div. 1; *Welpby v. Bull*, 3 Q. B. Div. 80, 253; and distinguish *Insley v. Jones*, 4 Exch. Div. 16.

RENDER. To give up, to yield, to surrender. Thus, when a defendant who has been arrested, and has obtained his liberty by procuring bail, yields himself up again into custody, in order that the bail may be discharged from their obligation and liability, he is said to render himself in discharge of his bail (1 Arch. Pract. 872).

RENEWAL OF LEASE. Some leases are renewable as of right, and others at the option of the landlord only: all renewals are usually upon terms, including the payment of some premium or renewal fine; and they may be either for lives or for years. A trustee renewing a lease holds it for the benefit of his *cestui que trust*, but with a lien for his renewal expenses.

RENEWAL OF WRIT: See titles EXECUTION, WRIT OF; SUMMONS, WRIT OF.

RENOUNCING PROBATE. Refusing to take upon oneself the office of executor or executrix. The effect of this renunciation is, that the renouncing executor or executrix or administrator or administratrix, is wholly debarred thereafter from the right to obtain a grant of probate or administration (21 & 22 Vict. c. 95, s. 79).

RENT. Defined to be an annual return made by the tenant to the landlord, either in labour, or in money, or in provisions, in consideration of the lands or tenements which such tenant holds of his landlord; from which it follows, that though rent must be a profit, yet there is no occasion

RENT—*continued.*

that it should consist of money. The principal varieties of rent are, —

- (1.) RENT SERVICE, *see* that title;
- (2.) RENT SECK, *see* that title;
- (3.) RENT CHARGE, *see* that title;
- (4.) QUIT OR CHIEF RENT, *see* these two titles;
- (5.) FEE FARM RENT, *see* that title; and
- (6.) GROUND RENT, otherwise called a BUILDING RENT, *see* title GROUND RENT.

RENT CHARGE. Is a sum of money charged upon and issuing out of land, and payable at annual or other periodical periods. Such a rent-charge may be created as a means of repaying money lent, and in that case the deed creating it required, at one time (under the Annuity Act, 53 Geo. III., c. 141), to be enrolled in the Court of Chancery, and it now requires to be registered in the Court of Common Pleas (18 & 19 Vict. c. 15), but not to be re-registered. A rent-charge is also very commonly created upon the settlement of lands (whether by deed or will), *e.g.*, the pin-money, jointure, and portion provisions contained in settlements are rent-charges; but these require neither enrolment nor registration. They are usually aided by an express clause of distress for the arrears, but in the absence of such an express clause, the stat. 4 Geo. II., c. 28 gives an implied power to distrain for the arrears.

RENT SECK. Is a rent-service severed from its reversion, or a chief or quit rent severed from its seignior. At Common Law it was not distrainable for, the right of distress at Common Law being incident only to the reversion or seignior; but the stat. 4 Geo. II., c. 28 has given to the owner of a rent seck the right of distraining for the arrears. *Seck* literally means dry (*siccus*), *i.e.*, dry of (or without) the power of distress or the relationship of fealty to which that power was incident.

RENT SERVICE. Is the usual rent payable by a lessee to his lessor, and it carries with it even at Common Law the right to distrain for arrears. Rent-service was originally entire and indivisible, but by the stat. *Quia Emptores* (18 Edw. I., c. 1) it was rendered divisible, and by modern statutes it has been made apportionable.

See titles APPORTIONMENT; APPORTIONMENT OF RENT.

RENTS AND ROYALTIES: *See* title ROYALTIES.

RENTAL. A roll on which the rents of a manor, or other estate, are registered or set down, and in accordance with which the landlord's bailiff collects them. It contains the lands and tenements let to

RENTAL—*continued.*

each tenant, the names of the tenants, and other particulars connected therewith (Cunningham).

RENT-ROLL: *See* title RENTAL.

RENTS OF ASSISE. The certain and determined rents of the freeholders and ancient copyholders of manors are called rents of assise, apparently because they were assised or made certain, and so distinguished from a *redditus mobilis*, which was a variable or fluctuating rent (3 Cruise, 314).

REPAIR, COVENANT TO. This covenant (when in its usual form) binds the lessee as from the date of the execution of the lease and not sooner (although the lease may have commenced sooner); and it runs with the land. As applying to houses it obliges the tenant to keep the house in substantial repair, *having regard to the age and character of the building*, *i.e.*, having regard to the condition of the premises at the time when the covenant began to operate (*Walker v. Hatton*, 10 M. & W. 258).

REPAIRS. In the absence of express agreement to repair, a tenant from year to year is bound to keep the demised premises (if houses) wind and water-tight, and (whether lands or houses) to use them in a tenant-like manner, and generally to replace breakages; and that is all. Tenants for a term of years, as for life, are liable even for permissive waste, *semble* (*Harnett v. Maitland*, 16 M. & W. 257; *Yellowley v. Gower*, 11 Exch. 294). As regards the repairs of party-walls, when these are ancient party-walls, either tenant in common may repair them, and when they are not ancient but of known modern origin, each several owner may repair his own wall.

See titles REPAIR, COVENANT TO; REPARATIONE FACIENDÂ, WRIT OF; WASTE.

REPARATIONE FACIENDÂ, WRIT OF. A writ which lay in various cases; as if, for instance, there were three tenants in common, joint tenants, or tenants *pro indiviso*, of a mill or house which had fallen into decay, and one of the three was willing to repair it, and the other two not, in such a case the party who was willing to repair it might have this writ against the other two (Reg. Orig. 153; Cowel).

REPETITION OF LEGACIES: *See* title SATISFACTION IN EQUITY.

REPLEADER. When, after issue had been joined in an action and a verdict given thereon, the pleading was found (on examination) to have miscarried, and failed

REPLEADER—*continued.*

to effect its proper object, viz., of raising an apt and material question between the parties, the Court would, on motion of the unsuccessful party, award a repleader, that is, would order the parties to plead *de novo*, for the purpose of obtaining a better issue. The Court would after trial grant a repleader only if that would be the means of effecting substantial justice between the parties; and the Court would not grant it, where it could give judgment *non obstante veredicto* on the whole record. If a repleader was granted where it should have been refused, or *vice versa*, that was a ground of error. At the present day, under the large powers of amendment given by (and which may be exercised even at the trial of the action under) the Judicature Acts, 1873-75, the Court would probably direct all necessary amendments in the pleadings to be made, instead of granting a repleader. Or, if the parties discovered before trial that their pleadings had not raised proper issues, then upon the application of either the Court might direct issues to be prepared (2 Arch. Pract. 1553-4).

See titles **AMENDMENT**; **ISSUES**, **PREPARATION OF**.

REPLEVIABLE. Property is said to be repleviable or replevisable when proceedings in replevin may be resorted to for the purpose of trying the right to such property. Thus goods taken under a distress are repleviable, for the validity of the taking may be tried in an action of replevin; but goods delivered to a carrier and unjustly detained are not repleviable, for the unjust detention of goods delivered on a contract is not an injury to which the action of replevin applies, but forms the ground of an action of detinue or trover (*Galloway v. Bird*, 4 Bing. 299; *Mennie v. Blake*, 6 El. & Bl. 842).

See title **REPLEVIN**.

REPLEVIN. A personal action adapted to try the validity of a distress, or to recover the possession of goods unlawfully distrained. Where goods have been distrained, and the tenant thinks the distress unlawful, and wishes to contest its validity, the action of replevin (or now an action on the case in the nature of an action of replevin) is the appropriate remedy to resort to for the purpose. The mode adopted is by the aggrieved party making plaint (i.e., complaint) in the County Court, and his goods are thereupon replevied, that is, delivered to him upon his giving security to prosecute an action against the distrainer for the purpose of trying the legality of the distress; and if upon such trial the right be determined in favour of the distrainer, then the goods are returned; but if

REPLEVIN—*continued.*

the right is otherwise determined, then the plaintiff recovers damages for the illegal taking and detaining of the goods and chattels (Com. Dig. tit. "Replevin"; 2 Arch. Pr. 1081; Woodfall's Land. and Ten. lib. 3, c. 6, s. 1).

See title **REPLEVIABLE**.

REPLEVY. This word, as used in reference to the action of replevin, signifies to re-deliver goods (which have been distrained) to the original possessor of them, on his pledging or giving security to prosecute an action of replevin against the distrainer.

See title **REPLEVIN**.

REPLICATION. A reply made by the plaintiff in an action to the defendant's statement of defence.

See title **REPLY**.

REPLY. The reply is the third pleading properly so called in an action, and is put in either by the plaintiff in answer to the defendant's statement of defence, with or without counter-claim, or by some third party to the defendant's counter-claim, or other claim over. The reply of a plaintiff to a simple defence is usually simply a joinder of issue thereon; but occasionally his reply to a simple defence, and invariably his reply and that of a third party to a statement of defence and counter-claim, introduces new matter of substance, in answer to what is alleged in the defence with or without counter-claim; and in that case a fourth pleading (called a rejoinder) must follow, in order by joining issue thereon to close the pleadings.

REPLY, AFFIDAVITS IN: See title **AFFIDAVITS, EVIDENCE BY**.

REPLY, RIGHT TO. The person who has the right to begin at the trial of any action has also as a general rule the right to reply, that is to say, assuming that the opposite party adduces any evidence; and in the case of a prosecution when the Attorney-General appears officially, he or his representative has a right to reply whether evidence is adduced or not (17 & 18 Vict. c. 125, s. 18 for civil cases, 28 & 29 Vict. c. 18, s. 2, for criminal cases).

See titles **BEGIN, RIGHT TO**; **RIGHT TO BEGIN**.

REPORT OF COMMITTEE. The report of a parliamentary committee is that communication which the chairman of the committee makes to the House at the close of the investigation upon which it has been engaged.

REPORT OF REFEREE: See title **REFEREES**.

REPORTS. The published periodical volumes, which contain the various cases argued and determined in the several Courts of Law and Equity, are so termed. Since the year 1866 inclusive, the chief of these reports are brought out under the superintendence of a council styled the Incorporated Council of Law Reporting for England and Wales; formerly the matter was left to the enterprise of private publishers or of private reporters; and in very early times the reports, then called Year-Books, were brought out at the cost of the State.

See title YEAR-BOOKS.

REPRESENTATION. Representation is the act of one person representing or standing in the place of another; and he who so represents or stands in the place of another is termed his representative. Thus, an heir is the representative of the ancestor; and an executor is the representative of the testator; the heir standing in the place of his deceased ancestor with respect to his realty, the executor standing in the place of his deceased testator with respect to his personalty; and hence the heir is frequently denominated the *real* representative, and the executor the *personal* representative.

In the law of contracts, a representative is an agent; but the term "representative" is little used for this purpose.

In Constitutional Law, representatives are those chosen by the people to represent their several interests in Parliament.

REPRESENTATION IN PARLIAMENT. The custom of sending representatives to Parliament appears to have grown up at a very early period, but the first extant traces of it are comparatively recent. Thus,

(1.) As regards *County Representation*—The earliest extant trace is in 1214, King John having in that year directed the sheriffs to send four discreet knights (*quatuor discretos milites*) of the county to represent it at the Parliament which was to be held at Oxford; and

(2.) As regards *Borough Representation*—The earliest extant trace is in 1265, Simon de Montford having in that year issued writs to the sheriffs directing them to return two citizens or burgesses for every city or borough in their shrievalty; but as Montford was assuming an excess of authority in issuing those writs, that instance of borough representation is not considered of much value, while on the contrary the writs issued to the like effect by Edward I. in 1295 are considered of great value, and they afford the first distinct legal trace that is extant of the summoning of burgesses to Parliament.

It has been suggested, however, that all

REPRESENTATION IN PARLIAMENT —continued.

that Edward I. did in 1295 was to remodel, and for the time being complete, an already existing system of borough representation; and the cases of the boroughs of St. Albans (1315) and of Barnstable (1345) are commonly adduced in support of the earlier origin of borough representation. For the borough of St. Albans in its petition to the king claimed that to send two burgesses to Parliament was its prescriptive right existing from immemorial antiquity, and the borough of Barnstable in its petition to the king claimed that to send two burgesses to Parliament was its right under a charter of King Athelstan. Now, the interval between 1295 and 1315 being only twenty years, and the interval between 1295 and 1345 being only fifty years, it is clear that the claims put forward by these two boroughs in the manner and to the extent that the same were put forward, would have been egregious and self-confuting if borough representation had *originated* in 1295, or even in 1265.

But the probability, or rather certainty, of an earlier origin of borough representation is borne out and corroborated by the causes which led to the deputies from boroughs being summoned at all, these causes having been the following:

The boroughs were increasing in wealth from the growing prosperity of commerce; and the spirit of liberty in England, which had always been strong, and which since Magna Charta grew stronger still, prevented the king or his government from laying tallages at his own will and pleasure upon the townspeople; and the Crown being in constant want of money, it became a constitutional usage to summon deputies from boroughs for the express and single purpose of granting the necessary tallages.

See titles CONSTITUTION, GROWTH OF; ELECTORAL FRANCHISE.

REPRESENTATIVE: See title REPRESENTATION.

REPRESENTATIVE PEERS. The representative peers are those, who at the commencement of every new parliament are elected to represent Scotland and Ireland in the British House of Lords; namely, sixteen for the former, and twenty-eight for the latter country. At the union of Scotland with England in 1707, and of Ireland in 1800, the peers of those two countries were not admitted *en masse* to seats in the British Parliament, but were allowed to elect a certain number of their body to represent them therein; hence the term "representative peers." The Scottish representative peers must have descended from

REPRESENTATIVE PEERS—contd.

ancestors who were peers at the time of the union.

See title REPRESENTATION IN PARLIAMENT.

REPRIEVE. The withdrawing, or suspending, for a time sentence of execution against a prisoner (*Les Termes de la Ley*).

See title RESPITE.

REPRISALS. Are the violent taking by private individuals in time of peace of the property of any subjects of a country, some or one of whose subjects have injured the property of one or more of the subjects of the reprising individuals' country, and are in pretended satisfaction and retaliation for such latter injuries.

See title MARQUE AND REPRISALS, LETTERS OF.

REPUBLICATION OF WILL. Upon the re-execution of a will, the act of the testator in informing the attesting witnesses that the document they were about to attest was his will was so called. It is no longer necessary (1 Vict. c. 26, s. 13).

See title PUBLICATION.

REPUDIATION. A plaintiff who recovers lands in ejectment, is not liable to the charges or mortgages (if any) created thereon by the defendant, inasmuch as he recovers by adverse title. In such a case he need not even repudiate the charges or mortgages. Similarly, when a sovereign succeeding to an empire or kingdom adversely to the previous ruling family (e.g., when Will. III. succeeded to Jac. II.), the right to repudiation of the public debt created by his predecessors undoubtedly arises, as it arose in 1688; and again, as it arose upon the termination of the war of secession between the Federals and the Confederates in the United States.

See title BANKERS' CASE.

REPUGNANCY. Everything that is repugnant to, that is, inconsistent with, plain common sense,—as that is ascertained by the aggregate and not the merely individual mind—is of necessity absolutely void in law; likewise every attempted adjunct to a principal subject-matter, when the adjunct is inconsistent with the essential nature of the principal matter.

See title CONDITIONS REPUGNANT.

REPUTATION, EVIDENCE OF: See title CHARACTER, EVIDENCE AS TO.

REPUTATION, INJURIES TO. These are (1.) Libel, and (2.) Slander.

See titles LIBEL; SLANDER.

REPUTATION, MARRIAGE BY: See title HABIT AND REPUTE.

REPUTATION, WHEN EVIDENCE.

Reputation evidence is a branch of hearsay evidence, and is admissible when hearsay is admissible, and subject to the like restrictions attaching to the admission thereof.

See title EVIDENCE, sub-title Hearsay.

REPUTED. Accepted by general, vulgar, or public opinion. Thus, land may be reputed part of a manor, though not really so, and a certain district may be reputed a parish or a manor, or be a parish or a manor in reputation, although it is in reality no parish or manor at all.

See titles REPUTED MANOR; REPUTED OWNER.

REPUTED MANOR. Whenever the demense lands and the services become absolutely separated, the manor ceases to be a manor in reality, although it may (and usually does) continue to be a manor in reputation, and is then called a reputed manor, and it is also sometimes called a seignior in gross. So likewise if all the frank tenements of the manor escheat to or become otherwise vested in the lord, the manor ceases as a strict manor, and becomes a manor in reputation only (*Soane v. Ireland*, 10 East, 259). Reputation alone, and without proof of the actual exercise of manorial rights, is admissible evidence to prove the existence of a manor; and a manor by reputation is sufficient to entitle the lord to the manorial estates (*Steel v. Prickett*, 2 Sta. 466; *Curson v. Lomas*, 5 Esp. 60).

See title MANOR.

REPUTED OWNER. He who has the general credit or reputation of being the owner or proprietor of goods, is said to have the reputed ownership in them or to be the reputed owner thereof.

Under the Bankruptcy Act, 1869, s. 15, sub-s. 5, all goods and chattels being at the commencement of the bankruptcy in the possession, order, and disposition of the bankrupt *being a trader* by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner, vest in his trustee for the benefit of his creditors; but this order and disposition clause does not extend to *choses in action*, not being debts due to the bankrupt in the course of his trade or business. By the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 20, chattels comprised in a duly registered bill of sale are not subject to the doctrine of order and disposition.

REQUEST. Request, in contract law, is one of the three particular requisites to every valid simple contract. It is sometimes expressed, and sometimes it is im-

REQUEST—*continued*.

plied,—and when implied, then either from the circumstances of the case or by mere act and operation of law.

See title **CONTRACTS**.

REQUEST, LETTERS OF: See title **LETTERS OF REQUEST**.

REQUESTS, COURT OF: See titles **CONSCIENCE, COURTS OF**; **SMALL DEBTS COURTS**.

REQUISITIONS ON TITLE. Are questions raised by purchasers and mortgagees for the vendor or mortgagor to satisfy, in order to render his abstract of title acceptable or (it may be) intelligible to the purchaser or mortgagee, before they pay or advance their money. Their scope is usually limited by the conditions of sale. The vendor must do his utmost to answer all reasonable requisitions that are within the scope allowed by the conditions of sale.

RES GESTÆ. Literally, matters or events that have occurred or taken place. Sometimes the *res gestæ* are admissible in evidence, and they are invariably so when (as in rape) they constitute or form part of the very offence charged to have been committed, or go to shew the criminal character of the act.

See title **EVIDENCE**, sub-title *Hearsay*.

RES INTER ALIOS ACTA. A matter (e.g., a decree) or an admission made between two parties (*res inter alios acta*) does not prejudice in effect a third person (*alteri nocere non debet*), and consequently is not binding upon such third person in any way, unless he is the privy of one or other of the original parties to the decree or admission.

RES JUDICATA, PLEA OF: See title **JUDGMENT, PLEA OF**.

RES JUDICATA PRO VERITATE ACCIPTUR. A judgment (or verdict) even although erroneous is accepted for the truth, and estops the parties and their privies, until it is set aside (in civil cases) or quashed (in criminal cases).

RES PERIT DOMINO: See title **SALE**.

RES, VARIETIES OF. These have been variously divided and classified in law, e.g., in the following ways,—(1.) Corporeal and incorporeal things; (2.) Moveables and immoveables; (3.) *Res Mancipi* and *Res nec Mancipi*; (4.) Things real and things personal; (5.) Things in possession and choses (i.e. things) in action; (6.) Fungible things and things not fungible (*fungibiles vel non fungibiles*); and (7.) *Res singulæ* (i.e., individual objects) and *universitates rerum* (i.e., aggregates of things). Also, persons are for some purposes and in certain respects regarded as things.

See titles **CORPOREAL**; **FUNGIBLES**, &c.

RESCISSION OF CONTRACTS. A contract may be rescinded on the ground of fraud, and sometimes also on the ground of accident or of mistake. The remedy is peculiar to equity, and is usually granted upon terms only, that is, upon condition that the plaintiff do what under the circumstances is equitable, as a condition of his getting out of his contract.

See titles **ACCIDENT**; **FRAUD**; **MISTAKE**.

RESCRIPTUM. An edict of the Roman Emperor, issued by him to some local governor upon the request and for the guidance of the latter in some difficulty or emergency which has arisen in his administration. It was in the first instance particular only, but it afforded a precedent for the magistrate's guidance in other similar cases which might arise.

RESCUE. Is generally all resistance against lawful authority; for instance, the taking back by force goods which have been taken under a distress; or the violently taking away a man who is under arrest, and setting him at liberty, or otherwise procuring his escape. For this offence, writs of *rescous* used to lie against the offender, offending party, or *rescussor*, as he was called (Co. Lit. lib. 2, cap. 12; *Parrett Navigation Company v. Stower*, 6 M. & W. 564); and of course now an ordinary prosecution will lie, and occasionally an action.

See titles **ACTION OR PROSECUTION, WHICH**; **ESCAPE**.

RESERVATION. In conveyancing a clause of reservation is a clause whereby the grantor or lessor reserves either to himself or to the lord of the fee some money, chattel, or service not being part of the thing granted or demised or an appurtenant thereto. A reservation, strictly so called, cannot be made in favour of a stranger, although such an attempted reservation might be good as a condition for payment of an annual sum in gross. And it follows from the definition, that a man cannot grant an estate and reserve part thereof, or make a feoffment in fee, and reserve a lease for life; also, that a man cannot reserve rent to his heirs without first reserving it to himself. A *reservation* is often confounded with an *exception*, but the true distinction between them is, that in a reservation some new hereditament is created, and that usually of an incorporeal kind, whereas in an exception a slice (so to speak) of an already existing hereditament is merely withheld from, or (as the name denotes), excepted out of, the conveyance.

See title **EXCEPTION**.

RE-SETTLEMENT: See titles ESTATE TAIL PERPETUAL; SETTLEMENT OF REAL ESTATE.

RESIDENCE: See titles ELECTIONS, MUNICIPAL; ELECTIONS, PARLIAMENTARY; ELECTORAL FRANCHISE; MINISTERIAL POWERS; POOR RATE; RATING.

RESIDUARY. The remaining portion or residue. Thus residuary estate or property signifies the remaining part of a testator's estate and effects after payment of debts and legacies, &c., or that portion of his estate and effects which has not been particularly devised or bequeathed.

See titles LAPSE; LEGACY; RESIDUARY DEVISE OR BEQUEST.

RESIDUARY DEVISES: See title SPECIFIC DEVISES.

RESIDUARY DEVISE OR BEQUEST: See titles BEQUEATH; DEVISE; LAPSE; LEGACY.

RESIGNATION BOND. A bond is so called whereby the interim presentee of a living binds himself under the stat. 9 Geo. 4, c. 94, to resign in favour of any one person named, or in favour of one of two persons, each of whom are by blood or marriage an uncle, son, grandson, brother, nephew, or grand-nephew of the patron, or of one of the patrons, beneficially entitled to the living.

RESIGNATION OF LIVINGS: See titles RESIGNATION BOND; SIMONY.

RESOLUTIONS, VARIETIES OF. Resolutions are distinguished in bankruptcy and in company law as being either special or extraordinary. A special resolution in company law is a resolution passed by a majority of not less than three-fourths of the voting members present at a general meeting, and confirmed by a majority of the like members at another general meeting held between one fortnight and one month subsequently to the former general meeting; and an extraordinary resolution in company law is a resolution so passed, but not confirmed. In bankruptcy law, a special resolution is a resolution passed by a majority in number and three-fourths in value of the voting creditors present; and an extraordinary resolution is a special resolution which has been confirmed by a majority in number and value of the voting creditors present at a second meeting of the creditors held between one week and one fortnight subsequently to the former meeting. In bankruptcy law, an ordinary resolution is one passed by a majority in value of the voting creditors present; and in company law, it is one passed by a majority of votes.

RESPITE, TO. To adjourn, to forbear, &c. Thus to respite an appeal at the sessions appears simply to mean to adjourn it to some future period, or to forbear bringing it on at the time it was first entered for. Respiting of homage is forbearing to enforce the duty of homage from a tenant who holds his lands in consideration of doing homage to his lord.

See title REPRIEVE.

RESPITE OF HOMAGE. The forbearing or dispensing with the performance of homage by tenants who hold their lands in consideration of performing homage to their lords. Such a respite was, most frequently, granted to those who held by knight service *in capite*, and who paid into the Exchequer every fifth term some small sum of money to be respited from doing their homage (Cowel).

RESPONDEAT OUSTER. Upon an issue in law arising on a dilatory plea, the form of the judgment was that the defendant should answer over; and this judgment was thence called a judgment of *respondeat ouster*. Not being a final judgment, the pleading was resumed, and the action proceeded (Steph. Pl. 115).

RESPONDEAT SUPERIOR. The phrase is thus used in an old work,—*Pur insufficiency del bayliff d'un liberty respondeat dominus libertatis*, i.e., for the insufficiency of the bailiff of a liberty, let the lord of the liberty answer (4 Inst. 114; Cowel). The phrase, as used at the present day, simply denotes that the principal is to answer for the act of his agent, special or general, done within the limits of his agency. A landlord also answers for, i.e., defends his tenant.

See title PRINCIPAL AND AGENT.

RESPONDENT. The party who appeals against the judgment of an inferior Court, is termed the appellant; and he who contends against the appeal the respondent. The word also denotes the persons upon whom an ordinary petition in the Court is served, and who are, as it were, defendants thereto. The term co-respondent, as used in the Divorce Court, means a *joint* respondent.

RESPONDENTIA. A contract by which the master or owner of a ship borrows money upon the goods and merchandize in the vessel; and as the borrower personally is bound to answer the contract, he is therefore said to take up money at *respondentia*. The general nature of a *respondentia* bond is this, the borrower binds himself in a large penal sum, upon condition that the obligation shall be void if he pay the lender the sum borrowed and so much a month from the date of the

RESPONDENTIA—*continued.*

bond till the ship arrives at a certain port, or is lost or captured in the course of the voyage (2 Park on Insurance, 615). But such a contract is now usually called a *bottomry bond*, although (as the name denotes), the latter phrase is appropriate only where the vessel itself, or *bottom*, was included in the security (Maude & P. Merch. Sh. 433; Kay's Law of Shipmasters and Seamen).

See titles BOTTOMRY; HYPOTHECATION; CARGO.

RESPONSA PRUDENTIUM. In Roman Law, were the answers (i.e., opinions) of certain jurists specially authorized by the state, and their relative authority was regulated by the Law of Citations. These answers are enumerated by Justinian as one of the six sources of the *jus scriptum* (i.e., of written or enacted law).

See title LAW OF CITATIONS.

RESTITUTIO IN INTEGRUM. Where by act of the party or otherwise, his legal position was altered or compromised, and yet the law allowed him upon the happening of some event or the doing of some act to resume his original position, he was said to have been *restitutus in integrum*, i.e., restored to his original legal status or position.

RESTITUTION OF CONJUGAL RIGHTS: See title CONJUGAL RIGHTS, RESTITUTION OF.

RESTITUTION OF STOLEN GOODS. May be ordered under s. 100 of the Larceny Act (24 & 25 Vict. c. 96), upon conviction of the thief; also, under s. 8 of the Summary Trial for Larceny Act (18 & 19 Vict. c. 126) upon conviction.

RESTITUTORIA INTERDICTA: See title INTERDICT.

RESTRAINT ON ANTICIPATION: See titles ANTICIPATION; SEPARATE ESTATE.

RESTRAINT OF TRADE: See titles CONTRACTS IN RESTRAINT OF TRADE; MONOPOLY; PATENTS.

RESTRAINTS UPON MARRIAGE. Being general are void as tending to immorality, excepting in the case of a widow (*Newton v. Marsden*, 2 J. & H. 356), or of a widower (*Allen v. Jackson*, 1 Ch. Div. 399); but such restraints when partial are valid.

See title CONDITIONS, VOID.

RESTS. This word is used with reference to accounts between debtors and creditors, and signifies the making a pause in the accounts by striking a balance therein (*Butter v. Harrison*, Cowp. 566). The account which is taken against a mortgagee in possession is commonly directed to be taken with *rests*; that is to say, when the

RESTS—*continued.*

mortgagee's receipts are more than sufficient to cover the interest, the annual surplus is applied in reduction of the principal money (*Thornycroft v. Crockett*, 2 H. L. C. 239). Rests are not usually (but may for any special reason be) directed where the interest is in arrear at the time of taking possession.

RESULTING TRUSTS: See title TRUSTS, RESULTING.

RESULTING USE: See title USES, RESULTING.

RESUMPTION. This word, as used in the stat. of 31 Hen. 6, s. 7, signifies the taking again into the king's hands such lands or tenements as before, upon some false suggestion or other error, he had delivered to the heir, or granted by letters patent to any man (Cowel; *Les Termes de la Ley*). The policy of the resumption of royal grants of lands was much agitated after the Revolution in 1688, owing chiefly to the lavish way in which William III. made such grants to the Duke of Portland and others.

See title REPUDIATION.

RETAINER. Is commonly used in two senses, viz. (1.) To signify the right of an executor or administrator, being a creditor of the deceased testator or intestate, to pay himself his own debt (at least out of legal assets) in priority to all other creditors of the deceased who are in equal degree (see titles ADMINISTRATION OF ASSETS; EXECUTOR; PRIORITY); and (2.) To signify a notice given to counsel by a solicitor on behalf either of the plaintiff or of the defendant in an action, in order to secure his services in the cause; and this notice is invariably accompanied with a fee called a retaining fee or retainer.

RETORNO HABENDO, WRIT OF. A writ that lay for the distrainer of cattle, goods, and chattels, &c. (and who, on *replevin* brought, had proved his distress to be a lawful one), against him who was so distrained, to have the goods returned to him according to law, together with damages and costs (2 Arch. Pract. 1091). If to the *retorno habendo* the sheriff returned that the goods, &c., were eloigned, the defendant might then sue out a writ of *capias in withernam*, requiring the sheriff to take other goods, &c., of the plaintiff instead of those eloigned; and in the absence of any such other goods, the goods of the pledges might then be taken on a *sci. fa.* (2 Arch. Pract. 1096).

See titles CAPIAS IN WITHERNAM; ELOIGNMENT.

RETORSION. As distinguished from the taking of reprisals, is the application of the *Lex Talionis* to nations in respect only of violations of comity and of imperfect obligations, and not in respect of rights of property or other legal rights.

See title REPRISALS.

RETRAXIT. A *retraxit* was an open and voluntary renunciation in Court of a suit by the plaintiff, by which he for ever lost his action. A *retraxit* was like a *nolle prosequi*, the difference between them being that a *retraxit* was a bar to any future action for the same cause, whereas a *nolle prosequi* was not, unless made after judgment (2 Arch. Pract. 1515; *Herber v. Sayer*, 2 Dowl. & L. 65, n. (b)).

See title JUDGMENT, VARIETIES OF.

RETURN. This is a word which is commonly applied to writs and judges' summonses, and literally signifies much the same as it does in its popular sense, viz., to return or send back anything. Thus, writs are directed to certain persons (as to sheriffs) commanding them to perform certain acts, and after a certain time to return the same into the Court again, together with a certificate or memorandum certifying or stating what they have done in pursuance of such command. This memorandum or certificate is written on the back of the writ, and is now commonly called the *return* to it; so that when a writ is directed to a sheriff commanding him to perform certain acts (as to arrest a man, or to return an M.P., for instance), and the sheriff in due time returns the writ, together with such a memorandum as above described, indorsed thereon, this memorandum is then called the sheriff's return; and for a *false return*, he is civilly responsible, but for a *double return* (i.e., a return of two or more members as both elected, and between whom he the sheriff could not distinguish) he is not responsible (*Barnardiston v. Soame*, 6 St. Tri. 1063). The meaning of the word "returnable," as applied to a judge's summons, is nearly the same, signifying the time appointed by the judge in the summons for hearing the parties on the subject-matter of dispute; the summons is said to be returnable at such a time, because the party who takes out such summons returns with it at the time therein appointed to the place whence he took it out (1 Arch. Pract. 160; *Smith's Action at Law*, 241).

See title BARNARDISTON v. SOAME.

REUS PROMITTENDI: See title REUS STIPULANDI.

REUS STIPULANDI. The party to a stipulation is so called if he is the creditor or obligee, and the debtor or obligor to such a stipulation is called the *reus pro-*

REUS STIPULANDI—continued.

mittendi. Where there are several creditors or several debtors jointly entitled to or jointly liable under a stipulation, they were respectively called *correi*, i.e., joint rei.

See title STIPULATIO.

REVE. The bailiff of a franchise or manor; hence, shire reve is used for a sheriff, &c. (Cowel). The word is sometimes written GREEVE.

REVELAND. Such land as having reverted to the king after the death of his thane, who had it for life, was not afterwards granted out to any other person by the king, but remained in charge on the account of the reve or bailiff of the manor, who it seems usually kept the profit of it himself, till it was discovered and presented to the king (Domesday: Spelman on Feuds).

REVENUE. The sources of the revenue of the Crown, at different periods in the history of England, will be found stated under the title TAXATION, HISTORY OF; and the sources of that revenue, as existing at the present day, will be found stated under the title TAXATION, VARIETIES OF. The particular items of taxation referred to under these two titles should also be consulted for further information regarding them.

See titles CUSTOMS; EXCISE; INCOME TAX, &c.

REVENUE CASES. Are within the exclusive competence of the Exchequer Division of the High Court of Justice as a Court of Revenue. Notwithstanding that actions for offences against the revenue laws are in effect penal, still they are (for the purposes of evidence) to be deemed civil and not criminal actions.

See titles PRIVILEGE OF PARTIES; REVENUE, COURT OF.

REVENUE, COURT OF. This is the Court of Exchequer, now the Exchequer Division of the High Court of Justice, which, notwithstanding the fusion of jurisdiction effected by the Judicature Acts, 1873-75, still retains its practically exclusive jurisdiction in matters of revenue (Judic. Act, 1873, s. 34); and the practice of this Division on its revenue side is not affected by the new rules of procedure in civil actions (Order LXII.; but see Order LXII., rules 1 to 6, April 1880).

See title COURTS OF JUSTICE.

REVERSAL. The annulling or making void a judgment or an outlawry.

REVERSION. An estate in reversion is defined, or rather described by Lord Coke to be "the returning of the land to the

REVERSION—continued.

grantor or his heirs after the grant is determined." The idea of a reversion is founded on the principle that where a person has not parted with his whole estate or interest in a piece of land, all that which he has not given away remains in him, and the possession of the land reverts or returns to him upon the determination of the preceding estate. Thus, if a person who is seised in fee of lands conveys them to A. for life, he still retains the fee simple of the lands, because he has not parted with it; but as that fee simple can only return or fall into possession upon the determination or ending of the preceding estate (i.e., of A.'s estate for life), it is only a fee simple estate in reversion. So that, perhaps, a reversion may be shortly defined as "the residue of an estate left in the grantor." The interest which a man has in lands in reversion is commonly called a reversionary interest (2 Cruise, 395, 396).

See title INCORPoreal HEREDITAMENTS.

REVERSIONARY INTEREST. The right, title, or interest, which a person has in or to the reversion of lands or other property. A right to the future enjoyment of property at present in the possession or occupation of another is also frequently so called. With regard to the disposition of such reversionary interests in property, Firstly, if the property was *Real*,—A deed of grant at common law was the mode of alienation to a stranger, and a deed of release was the mode of alienation to a prior estate man with whom the reversioner was in privity; and if the alienor was a married woman, a fine was necessary in addition, and at the present day the woman would acknowledge the deed under 8 & 4 Will. 4, c. 74; Secondly, If the reversion was *Personal* property,—then (a.) If leasehold, the mode of alienation was by assignment; and if the property was the wife's leasehold, the husband's assignment of it (being legal) was absolutely effective without the wife's concurrence, and it is so still; and (b.) If pure personalty, the husband and wife must have assigned same together; but the wife could not levy any fine thereof nor, until Malins's Act (20 & 21 Vict. c. 57) enabled her to, acknowledge the deed of assignment, which was therefore practically inoperative as against her, and she would have taken by right of survivorship if she survived her husband. But now Malins's Act has enabled the wife to acknowledge the deed in such latter case.

See titles EQUITY TO A SETTLEMENT; SURVIVORSHIP, WIFE'S RIGHT OF; REVERSION.

REVERSIONS, SALES OF. These are no longer to be set aside on the ground of undervalue merely (31 Vict. c. 4); but this statute does not affect the jurisdiction of Courts of Equity over improper sales by unwary young men (*Tyler v. Yates*, L. R. 6 Ch. 665).

See title FRAUD.

REVERTER, FORMEDON IN : See title FORMEDON.

REVEST. To replace one in the possession of anything of which he has been divested, or put out of possession (*Roper, Husband and Wife*, 353). It is opposed to *DIVEST*. The words *revest* and *divest* are also applicable to the mere right or title, as opposed to the possession.

See titles VESTED INTEREST; VESTED LEGACY; VESTED REMAINDER.

REVIEW, BILL OF. A bill filed to reverse a decree in Chancery, which, after it had been duly inrolled, a party might find good grounds for having reversed, either (1.) from error apparent on the face of the decree, or (2.), from new facts discovered since the decree was made, or since publication had passed in the cause, and which consequently could not be used when the decree was made (2 Dan. Ch. 1422; *Hunter's Suit in Eq.* 182). This bill was the alternative remedy with an appeal to the House of Lords. At the present day, no such bill would be required or permitted; but in either case an appeal would be brought against the decree or judgment, and upon the argument of the appeal, the fresh evidence would be admitted.

See titles APPEALS, EVIDENCE UPON; BILL OF REVIEW; RE-HEARING.

REVIEW, COMMISSION OF. A commission sometimes granted in extraordinary cases to reverse the sentence of the Court of Delegates when it was apprehended they had been led into some material error.

See title COURTS ECCLESIASTICAL.

REVIEW, COURT OF. A Court established by 1 & 2 Will. 4, c. 56, for the adjudicating upon such matters in bankruptcy as before were within the jurisdiction of the Lord Chancellor. It formed a constituent part of the Court of Chancery, and exercised a general jurisdiction in bankruptcy, with an appeal to the Lord Chancellor on matters of Law and Equity, or on the wrongful refusal or admission of evidence. This Court has long ceased to exist, and in lieu of it there has been established the Court of Bankruptcy with an appeal to the Lords Justices in Chancery and with an ultimate appeal (but by leave

REVIEW, COURT OF—*continued*.

only) to the House of Lords (Bankruptcy Act, 1869).

REVIEWING TAXATION. The re-taxing or re-examining an attorney's bill of costs by the Master or Taxing Master. The Courts sometimes order the Masters or Taxing Masters to review their taxation, when it appears that items have been allowed or disallowed on some erroneous principle, or under some mistaken impression (Arch. Pract.).

See title **TAXATION OF COSTS**.

REVISING BARRISTERS. Are officers appointed by and acting under the authority of the stat. 6 & 7 Vict. c. 18, as amended by the stats. 28 & 29 Vict. c. 36, 30 & 31 Vict. c. 102, and 36 & 37 Vict. c. 70, in which several statutes their powers and the procedure before them are prescribed, the object of their appointment being to secure a correct register of voters in Parliamentary Elections.

REVIVING. In law signifies much the same as it does in its popular sense, viz., renewing, calling to life again, &c. Thus, when a certain time (formerly a year and a day, but now six years) has elapsed after judgment is signed, without execution being sued out upon it, the law presumes that the judgment has been executed, or that the plaintiff has released the execution; and the plaintiff, in order to sue out execution, must in that case first revive the judgment.

See the two following titles.

REVIVOR, BILL OF. A bill in Chancery which was filed for the purpose of reviving the proceeding in a suit, when, from some circumstances (as for instance, the death of a sole plaintiff), the suit had abated. Wherever the right of the party dying survived to his co-plaintiff or co-defendant, and the cause was in the same condition after the party's death as it was before, then the suit did not abate, and consequently did not require to be revived. Under recent statutes the trouble of resorting to a bill of revivor is dispensed with.

See titles **REVIVOR, ORDER OF**; **SUPPLEMENTAL BILL**; **EXECUTION**.

REVIVOR, ORDER OF. In case any party to an action dies, marries, or becomes bankrupt, and thereby some devolution of estate or interest arises by operation of law, the action is not to be deemed abated (Order L., 1; *Eldridge v. Burgess*, 7 Ch. Div. 411); but the Court may order (as the case may require) the personal representative, or the husband, or the trustee, or other the successor in interest to be made (if necessary) a party to the action or to be

REVIVOR, ORDER OF—*continued*.

served with notice thereof (*Boynston v. Boynston*, 9 Ch. Div. 250). The order is made on summons or motion supported by an affidavit of the event occasioning the devolution of interest (Order L., 4). And where, pending the action, there is any devolution of interest by act of the party, the action is not to be deemed abated (Order L., 1), but may be continued against the successor in interest (Order L., 3); and the requisite order may be obtained upon an *ex parte* application (by summons or motion) supported by an affidavit of the fact of the devolution of interest (Order L., 4). The like procedure applies where any person interested comes into existence after writ issued, his subsequent coming into existence operating, in fact, as a devolution of interest (Order L., 4; *Haldane v. Eckford*, W. N. 1879, p. 80). The order in all the foregoing cases is called an order of revivor; and the order of revivor is to be served on the continuing party or parties, and also upon the new (or substitutionary) parties or party to the action, and becomes binding as from the time of service on the party served therewith (Order L., 5), subject, nevertheless, to be discharged upon application at any time within twelve days after service (Order L., 6), or (in case of effective disability) within twelve days after the removal of such effective disability (Order L., 7).

REVOCATION OF OFFER: See title **OFFER**.

REVOCATION, POWER OF. The power to revoke or call back something granted. As if any one makes a conveyance of any lands, with a clause of revocation, at his will and pleasure, of such conveyance; here the clause by which such person reserves to himself the power of revoking such conveyance is termed a power of revocation (4 Cruise, 466).

REVOCATION OF USES: See title **CONVEYANCES**, sub-title *Deeds revoking Uses*.

REVOCATION OF WILL: See title **WILLS**.

RIDER. A rider, or rider-roll, signified a schedule or small piece of parchment annexed to some part of a roll or record. In familiar use any kind of schedule or writing annexed to a document which cannot well be incorporated in the body of such document is called a rider.

RIDINGS. The three great divisions of the county of York are called the North, West, and East Ridings. The word "riding" is said to be a corruption of tri-thing, meaning the third part of a county.

See title **REGISTRY OF DEEDS**.

RIENS ARREAR. A plea used in an action of debt upon arrearages of account, by which the defendant alleged that there was nothing in arrear (Cowel).

See titles ACCOUNT, ACTION OF; ANNUITY.

RIENS PER DESCENT. A plea pleaded by an heir to an action brought against him for debt due by his ancestor to the plaintiff, signifying that he had received nothing from his ancestor, and therefore was not liable for his ancestor's debt.

See title ASSETS.

RIGHT. A lawful title or claim to anything.

See title RIGHTS, VARIETIES OF.

RIGHT OF ACTION: See title ACTION OF SUIT.

RIGHT, WRIT OF: See title WRIT OF RIGHT.

RIGHT CLOSE, WRIT OF. A writ which the king's tenants in ancient demesne lands were entitled to, in order to try the right of their property in a peculiar Court of their own, called a Court of ancient demesne.

RIGHT TO BEGIN. This is the phrase which denotes the right of the one or other party to an action to open the case. It involves the right to reply; the reply being often most effective especially in trials before a jury, the right to begin is sometimes a considerable advantage to the party who has it. The general rule deciding the matter is the following:—Supposing no evidence were adduced on either side, the party against whom the verdict would be given has the right to begin. This rule, however, does not mean that the defendant (if it should so happen) must open the pleadings; for in every case, without any exception, the pleadings are opened by the plaintiff or his counsel. The rule has therefore reference to the evidence merely. There are the three following principal applications of the rule:—

(1.) The plaintiff begins, if the onus of proving any one of the issues rests on him;

(2.) The defendant begins, if the onus of proving not a single issue rests on the plaintiff, but all of them on the defendant; and

(3.) Where the burden of proving all the issues lies on the defendant, and the burden of proving the amount of the damage only lies on the plaintiff, then the plaintiff begins (*Carter v. Jones*, 6 C. & P. 64), although formerly the rule in that case was that the defendant should begin (*Cooper v. Wakley*, 3 C. & P. 474).

See titles BEGIN, RIGHT TO; REPLY, RIGHT TO.

RIGHTS, VARIETIES OF. Rights have been variously distinguished, as being either (1.) Rights *in rem*, or (2.) Rights *in personam*; or again, as being either (1.) Legal rights, or (2.) Moral rights, otherwise as being either (1.) Rights of perfect obligation, or (2.) Rights of imperfect obligation; or again, as being either (1.) Relative rights, or (2.) Absolute rights; or again, as being either (1.) Vested or (2.) Contingent; and so forth. And Austin in his *Province of Jurisprudence Determined*, divides rights into primary rights on the one hand, being rights which are ends in themselves, and into sanctioning (i.e., Secondary) rights on the other hand, being rights (or rather remedies or rights of action) which are merely instruments for enforcing or securing the rights called primary.

RINGS, GIVING. A custom anciently observed by sergeants-at-law on being called to that degree or order. These rings bore the inscription of some motto selected by the sergeant about to take the new degree.

See title SERGEANT.

RIOT. If three or more persons assemble together with an intent mutually to assist each other against any one who shall oppose them in the execution of some enterprise of a private nature, with force or violence against the peace, or to the manifest terror of the people, whether the act intended were of itself lawful or unlawful, and though they after depart of their own accord without doing anything, it is an *unlawful assembly*. If after their first meeting they move forward towards the execution of their intended purpose, whether they actually execute that purpose or not, this, according to general opinion, is a *riot*. And if they put it into execution, then it is a *riot*. And if any person encourages, promotes, or takes part in such riot, whether by words, signs, or gestures, or by wearing the badges or ensigns of the rioters, he is considered a rioter (1 Hawk. c. 65, s. 1; Arch. Crim. Law, 841).

See title RIOT ACT.

RIOT ACT. Is the statute 1 Geo. 1, s. 2, c. 5, which enacts that if twelve or more persons, riotously assembled and being ordered by proclamation to disperse, riotously remain together for one hour thereafter, they are guilty of felony; the punishment of death prescribed by the Act was reduced by 7 Will. 4, and 1 Vict. c. 91 to transportation (now penal servitude) for life or for any term not less than fifteen years, or imprisonment not exceeding three years.

RIPARIAN PROPRIETORS: See titles EASEMENTS, sub-title WATER; NAVIGABLE AND NON-NAVIGABLE RIVERS; RIVERS.

RIVERS. With reference to *navigable* rivers, see title **NAVIGATION**, **PUBLIC RIGHT OF**. The law as to *non-navigable* rivers is as follows :—

(1.) The soil, *usque ad medium flum* *vie*, usually belongs to the adjoining proprietors on each side of the river, and that in proportion to their estates along the bank (*Bickett v. Morris*, L. R. 1 H. L., Sc. 47).

(2.) Accretions from the gradual change or deflection of the course of the river become the property of the adjoining proprietor (*Ford v. Lacey*, 7 Jur. (N.S.) 684); similarly accretions by *alluvio* (*Mussumat Imam Bandi v. Hurgovind Ghose*, 4 Moo. Ind. App. 403).

(3.) The use of the river belongs primarily to the adjoining proprietors, but in most private rivers of any size, the public have asserted various limited rights of user, not always readily acquiesced in by the proprietor.

(4.) The use of the banks is incident to the use of the river, and persons having the latter right have the former also.

(5.) The right of fishing in non-navigable rivers belongs to the adjoining proprietors, and such right is protected by the stat. 30 Vict. c. 18, and its violation is made a criminal offence by stat. 24 & 25 Vict. c. 96.

See titles **ALLUVIO** ; **EASEMENTS** ; **FISHERY**.

ROADS : See titles **EASEMENTS** ; **HIGHWAYS** ; **WAYS** ; &c.

ROBBERY. The felonious and forcible taking of goods or money to any value from the person of another by violence or putting him in fear (1 Hawk. P. C. 25 ; Arch. Crim. Law, 412).

See title **LARCENY**.

ROGUES AND VAGABONDS : See title **VAGABONDS**.

ROLL. A schedule or sheet of parchment on which legal proceedings were or are entered. Thus the roll of parchment on which the issue used to be entered was termed the issue roll. So the rolls of a manor, wherein the names, rents, and services of the tenants are copied and inrolled, are termed the Court rolls. There are also various other rolls, *e.g.*, those which contain the records of Chancery, and which are called the Rolls of the Chancery ; those which contain the registers of the proceedings of Parliaments, and which are called the rolls of Parliament ; &c. (Orig. Jur. 199 ; Cowel).

ROLLS COURT : See title **MASTER OF THE ROLLS**.

ROMAN CATHOLICS. Were excepted

ROMAN CATHOLICS—*continued*.

from the Toleration Act (1 Will. & Mary, s. 1, c. 18), but were relieved from their disabilities by the Catholic Emancipation Act, 1829 (10 Geo. 4, c. 7). The later Acts, 2 & 3 Will. 4, c. 115, 7 & 8 Vict. c. 102, and 9 & 10 Vict. c. 59, have placed Roman Catholics on the same level in all respects as Protestant Dissenters.

See titles **DISSENTERS** ; **NON-CONFORMISTS** ; **TOLERATION ACT**.

ROMAN LAW. The Civil Law comprised in the Digest, Code, and Institutes of Justinian is so called. It has no authority in England, otherwise than as it is approved by the Courts as being consistent with honour, in the absence of any statute or common law principle to the contrary.

ROOT OF TITLE. The document with which an abstract of title properly commences is called the root of the title.

See title **ABSTRACT OF TITLE**.

ROTTEN BOROUGHES. Small boroughs which prior to Reform Act, 1832, returned one or more members.

See title **REFORM ACT, 1832**.

ROUT : See title **RIOT**.

ROYAL ASSENT. The royal assent is the last form through which a bill goes previously to becoming an Act of Parliament ; it is, in the words of Lord Hale, "the complement and perfection of a law." The royal assent is given either by the queen in person, or by royal commission by the queen herself signed with her own hand. It is rarely given in person, except when at the end of the session the queen attends to prorogue Parliament, if she should do so.

See title **LE ROY LE VEUT**.

ROYAL COURTS OF JUSTICE. Under the stat. 42 & 43 Vict. c. 78, s. 28, this is the name given to the buildings together with all additions thereto erected under the Courts of Justice Building Act, 1865 (28 & 29 Vict. c. 48), and Courts of Justice Concentration (Site) Act, 1865 (28 & 29 Vict. c. 49).

ROYAL FISH. The whale and sturgeon are so called ; and these, when either thrown ashore or caught near to the shore, belong to the Crown.

ROYAL MINES. Those mines which are properly royal, and which the king is entitled to when found, are mines of gold and silver, and no other mines (Bainbridge on Mines, by Brown, 4th ed.)

ROYAL PREROGATIVE : See title **PREROGATIVE**.

ROYALTIES. The rights or superiorities of the king were so called. The dues of the lessor or landlord of mines are also called *royalties*, apparently in analogy to the *superiorities* of the Crown. Such last mentioned royalties are also frequently called tonnage rents or uncertain rents, varying as they do with the amount of mineral gotten; and it is a not unusual thing in leases comprising divers minerals to reserve divers such tonnage or uncertain rents in respect of the divers minerals respectively gotten. The rent certain (if any) reserved in such cases is rent proper, and is called dead rent, because it is payable whether any mineral is gotten or not. Rents and royalties may also be reserved upon patents, copyrights, &c.

RUBRICS. The directions contained in the Book of Common Prayer for the ordering of public worship are so called. In addition to the ecclesiastical statutes and the proclamations in the nature of ecclesiastical statutes, these rubrics have the operation of statutes, the Act of Uniformity of 1662 (13 & 14 Car. 2, c. 4), s. 2, having enacted that the Book of Common Prayer attached thereto should thenceforth alone be used in manner and form as appointed (Brice's Public Worship).

RULE. This word is used in various senses. In its most common acceptation it signifies an order made by the Court at the instance of one of the parties in a suit, usually commanding the opposite party to do some act, or to shew cause why some act should not be done. A rule of this kind is said to be either a rule nisi, *i.e.*, to shew cause, or a rule absolute. A *rule nisi* or *to shew cause* commands the party to shew cause why he should not do the act required, or why the object of the rule should not be enforced. A *rule absolute* commands the subject-matter of the rule to be forthwith enforced. There are some rules which the Courts authorize their officers to grant as a matter of course without formal application being made to them in open Court, and these were termed *side-bar rules*, because moved for by the attorneys at the side bar in Court; such, for instance, was the rule to plead, the rule to reply, to rejoin, and many others, which have all been rendered unnecessary by recent statutory changes.

RULE ABSOLUTE: See title **RULE**.

RULE OF COURT. The rules for regulating the practice of the different Courts, and which the judges are empowered to frame, and to put in force as occasion may require, are termed Rules of Court.

See title **ORDERS AND RULES**.

RULE NISI: See title **RULE**.

RULE OF THE ROAD. The sailing and steering rules which prescribe the course to be taken by sailing vessels and steam ships upon meeting each other, especially when there is any risk of collision between them, prescribe what is called the Rule of the Road. These rules have been established partly by statute, partly by the Trinity House, and partly by the Board of Trade (Kay's Shipmasters; Maude and Pollock).

RULE IN SHELLEY'S CASE: See title **SHELLEY'S CASE**, **RULE IN**.

RULE, TO. Is commonly used in two senses: (1) for commanding or requiring by a rule or order of Court, as to rule a sheriff to return a writ, &c.; (2) for laying down, or deciding, or settling a point of law.

RULE IN WILD'S CASE: See title **WILD'S CASE**, **RULE IN**.

RULES OF THE KING'S BENCH PRISON. Were certain limits without the walls, within which all prisoners in custody in civil actions were allowed to live, upon giving security by bond with two sufficient sureties to the marshal not to escape, and paying him a certain percentage on the amount of the debts for which they were detained (Bagley's Pract.)

RULES OF PRACTICE: See title **ORDERS AND RULES**.

RUMOURS. Common rumours are not admissible in evidence for any purpose; nor do such rumours affect a purchaser or mortgagee with notice. But a common rumour may suggest inquiry, and in that way lead to notice or to the discovery of evidence properly so called. Also, when the conduct of a person is in question, he may be asked whether a certain rumour had reached his ears at a particular time, because in such a case the rumour so reaching him or not might be part of the *res gestæ*.

RUNNING DAYS: See title **LAY DAYS**.

RUNNING WITH THE LAND. A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that land. Thus, if A. grants B. a lease of the land for twenty-one years, and the lease contains, amongst other covenants, a covenant on the part of A. for the quiet enjoyment of the land by B. during the term, and also a covenant on the part of B. to cultivate the land demised in a particular manner, and B. afterwards assigns the land to C. for the residue of the term, in this case the liability to per-

RUNNING WITH THE LAND—contd.

form the covenant made by B. and the right to take advantage of the covenant made by A. would devolve upon C. as assignee of the land to which the covenants related, and in so doing they would be said to run with the land (*Noke v. Auder*, Cro. Eliz. 436; *Cockson v. Cook*, Cro. Jac. 125). In *Spencer's Case*, otherwise *Spencer v. Clark*, 5 Rep. 16, decided in the twenty-fifth year of the reign of Elizabeth, it was resolved what covenants were personal and what real, so as to run or not with the land (or with the reversion); and the reasons for such resolution are given in the case of *Baily v. Wells*, reported in Wilmot, 344.

See title COVENANT, sub-title *Real and Personal Covenants*.

RUNNING WITH THE REVERSION.

A covenant is said to run with the reversion when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that reversion. Thus, if A. grants a lease of land to B. for twenty-one years, and the lease, among other covenants, contains a covenant on the part of A. for the quiet enjoyment of the land by B. during the term, and also a covenant on the part of B. to cultivate the land demised in a particular manner, and A. afterwards assigns the reversion in the land to C., in this case the liability to perform the covenant made by A., and the right to take advantage of the covenant made by B., would devolve upon C. as assignee of the reversion in the land to which the covenants related; and in so doing they would be said to run with the reversion (*Noke v. Auder*, Cro. Eliz. 436; *Campbell v. Lewis*, 3 B. & A. 392; *Middlemore v. Goodall*, Cro. Car. 503; *Cockson v. Cook*, Cro. Jac. 125). In *Spencer's Case*, otherwise called *Spencer v. Clark* (5 Rep. 16), 25 Eliz., as explained in *Baily v. Wells* (Wilm. 344), the principle of covenants running or not with the reversion (or with the land) is expounded.

See title COVENANT, sub-title *Real and Personal Covenants*.

RURAL DEAN: See title RURAL DEANERY.

RURAL DEANERY. The circuit or jurisdiction of a rural dean is so called, that is to say, of a dean, who (as opposed to the dean of a cathedral church) acts generally as overseer for the bishop within the group of parishes constituting his diaconal territory, for the purpose of inspecting and reporting upon the conduct of the clergy of such parishes, and the condition of the fabrics of the church therein; he is also usually the bishop's examiner of candidates for Holy Orders. In these re-

RURAL DEANERY—continued.

spects a rural dean is very different from the Dean of a Cathedral.

See titles ARCHDEACON; DEAN.

RUTA CÆSA. In Roman Law, were things dug up (*ruta*) and things cut down (*cæsa*), out of or upon land; and unless they were expressly included, they were not deemed to pass with the land sold (Dig. xix. 1, 17, 6).

S.

SAC AND SOC: See titles MANOR; SOC.

SACRAMENTI ACTIO. In Roman Law, was the general *legis actio*, to which resort might always be had, failing a right to use any of the four other or shorter forms of the *legis actiones*.

See title LEGIS ACTIONES.

SACRILEGE. A desecration of any thing that is holy, *e.g.*, a church or consecrated burial-ground. The alienation to laymen of lands which had been given to religious purposes, or the application of such lands to profane and common purposes, was also termed sacrilege (Cowel). Injuring the fabric or ornaments of a church is punishable under the stat. 1 Mary, sess. 2, c. 3; and setting fire to or attempting to set fire to any church or place of religious worship is a malicious injury to property within the stat. 24 & 25 Vict. c. 97.

See title MALICIOUS INJURY TO PROPERTY.

SAFE CONDUOT. A guarantee or security granted by the sovereign under the great seal to a stranger for his safe coming into, and passing out of the kingdom (Cowel).

See title SAFE-GUARD.

SAFE-GUARD. A security given by the sovereign to a stranger who fears the violence of any subject for seeking his rights by course of Law (Reg. Orig. 26; Cowel).

See title SAFE CONDUOT.

SAILORS: See title SEAMEN.

SALE. Is the transferring of property from one person to another in consideration of some price or recompense in value. The contract of sale in English Law is a *real* contract, or in the nature of a real contract, some tender or transfer being required by the Common Law to make the sale complete; in Roman Law, on the other hand, the contract of sale is a *consensual* contract, being complete as soon as the price is agreed on. The two systems of law agree, however, in this, that so soon as the sale of

SALE—continued.

a specific article or ascertained bulk is complete, all risk attaching to it forthwith rests upon the purchaser, the Roman Law expressing this rule in the maxim "*Periculum rei vendite statim ad emptorem pertinet*," and the English law in the maxim "*Res perit domino*;" and that in the case of a non-specific article or unascertained bulk the risk does not so rest, until the article or bulk becomes specific or is ascertained. But there is this very striking difference between the English and the Roman Law in the contract of sale, namely, that in English law the PROPERTY in a specific article (or in a non-specific article or unascertained bulk so soon as the same becomes specific or ascertained) passes to and vests in the purchaser even before delivery, the vendor retaining only a lien on it while in his possession for the price; whereas, in Roman Law such property does not pass into the purchaser until after payment of the price and also delivery of the article (Benjamin on Sales; Just. Inst. ii. 1. 41, and iii. 23 (24), pref.).

SALE ON APPROVAL. This phrase and the corresponding phrases "sale on trial" and "sale or return," denote a sale dependent upon a condition precedent, viz., the condition of the purchaser being satisfied with or approving the goods. The approval may be implied from keeping the goods beyond a reasonable time (Benjamin, 483).

SALE, BILL OF: See title BILL OF SALE.

SALE OF GOODS: See title SALE.

SALE OF LAND. Is either by public auction or by private contract; and in either case is according to certain previously agreed upon conditions of sale. A deposit is usually paid, but unless by the express agreement of the parties no deposit is necessary to complete the bargain as a binding contract. In due course, an abstract of title is delivered by the vendor to the purchaser, who examines same and satisfies himself regarding the title,—its sufficiency or insufficiency; in case the title is insufficient or bad, and cannot be perfected or cured, the contract is usually off, and the deposit-money is returned; but otherwise the contract proceeds, and is finally completed by payment of the residue of the purchase-money and obtaining a legal conveyance of the land, free from incumbrances, and by delivery over of the title-deeds to the purchaser.

See titles ABSTRACT OF TITLE; CONDITIONS OF SALE; CONVEYANCES.

SALE OR RETURN: See title SALE ON APPROVAL.

SALE BY SAMPLE. When goods are sold by sample, there is implied in the contract a warranty that the bulk shall correspond in quality with the sample (*Parier v. Palmer*, 4 B. & Ald. 387); and the buyer is entitled to satisfy himself upon this correspondence (*Longmer v. Smith*, 1 B. & C. 1). But in this case (as in other cases) the express negative of any such warranty would of course displace it, and the intending purchaser would then have to inspect the bulk for himself or purchase at his own risk (Benjamin on Sales).

SALE OF SHIP: See title SHIPS, SALE AND MORTGAGE OF.

SALE ON TRIAL: See title SALE ON APPROVAL.

SALE WITH ALL FAULTS. In this case, unless the seller fraudulently and inconsistently represents the article sold to be faultless, or contrives to conceal any fault from the purchaser, the latter must take the article for better or worse (*Baglehole v. Walters*, 3 Camp. 154).

SALIQUE LAW. An ancient law made by Pharamond, King of the Franks, by which males only were capable of inheriting (Cowel). It remained applicable to the French succession to the Crown.

SALUS REI PUBLICÆ SUPREMA LEX. The safety of the state is the supreme law. This maxim overrides all the more particular or special rules of law, and renders void many Acts which (but for contravening the principle of the maxim, i.e., public policy) would or might hold good.

See titles FRAUD; POLICY, PUBLIC.

SALVAGE. Is the compensation allowed to persons by whose assistance a ship or boat, or the cargo of a ship, or the lives of the persons belonging to her, are saved from danger or loss in cases of shipwreck, derelict, capture, and the like. And a salvor is he who renders such assistance. The chief statutory provisions at present in force with reference to wreck and salvage are contained in Part VIII. of the stat. 17 & 18 Vict. c. 104 (Merchant Shipping Act, 1854).

The services entitling to salvage must be such as demanded skill, enterprise, and risk on the part of the salvors; for mere ordinary services, as towage, no salvage is claimable (*The Princess Alice*, 3 W. Rob. 138). Moreover, these services must have been attended with success (*The Edward Hawkins*, 31 L. J. (Adm.) 46); for salvage, it is said, is a reward for services actually conferred, not for services attempted to be conferred (*The Chetah*, 5 Moo. P. C. C. (N.S.) 621). There may be a valid agree-

SALVAGE—continued.

ment regarding salvage between the master of a vessel and the salvors, and such agreement will be binding on the owner of the ship (*The Firefly*, Sw. 240), unless proved to be dishonest and exorbitant, or to have been obtained by compulsion or fraud (*The Helen and George*, Sw. 368).

The right to salvage may be forfeited either totally or partially by misconduct on the part of the salvors, but the evidence of misconduct must be conclusive (*The Charles Adolphe*, Sw. 153). A towing ship, if it render salvage services, will be entitled to salvage reward like any other ship (*The Retriever v. The Queen*, 17 L. T. (N S.) 329). Similarly, one of the vessels which have been in collision may, if the innocent party, be entitled to salvage for services rendered to the other party, and that notwithstanding 25 & 26 Vict. c. 63, s. 33; but not so, if both ships were equally in fault (*Cargo ex Capella*, L. R. 1 A. & E. 356).

The following persons may become entitled to salvage; (1.) Officers and crews of Her Majesty's ships; (2.) Pilots, but not for mere pilotage services; (3.) Seamen of the abandoned wreck; (4.) Ship agents; (5.) Ship-owners; (6.) Masters of vessels; (7.) Beachmen, coast-guardsmen, and others; but not *passengers* on board the wreck.

With reference to the amount of salvage, the Court of Admiralty never allows more than a moiety for salvage, however meritorious the salvage services may have been (*The Inca*, Sw. 370); the value is to be calculated at the place where the services terminate; also, *pro rata itineris peracti*, and the other equities of the case (*The Norma*, Lush. 124). Ship and cargo must each pay its own share of salvage (*The Pyrennee*, B. & L. 189); and as between different salvors, the Court is able, under the Merchant Shipping Act, 1854, s. 498, to decree an equitable apportionment (*The Enchantress*, Lush. 93; and see generally Kay on Shipmasters).

SAMPLE, SALE BY : See title SALE BY SAMPLE.

SANCTIONS, VARIETIES OF. Sanctions have been described as *civil* (i.e., private) and as *criminal* (i.e., public)—the difference between them according to Austin being that the civil sanction may be remitted or enforced at the option of the individual, but that the criminal sanction cannot be so remitted or so enforced, but that only the public (i.e., Crown) may remit or at its option enforce the sanction. A criminal sanction is in fact merely a punishment: and a civil sanction is simply a right or a right of action with its con-

SANCTIONS, VARIETIES OF—contd.

sequences to the unsuccessful party. In a more general sense, a sanction has been defined as a conditional evil annexed to a law to produce obedience to that law; and in a still wider sense, a sanction means simply an authorization of anything. Occasionally, sanction is used (e.g., in Roman Law) to denote a statute, the part (penal clause) being used to denote the whole.

SANCTUARY. A consecrated place which had certain privileges annexed to it, and to which offenders were accustomed to resort in order to evade the severity of the law (Staunf. Pl. Cor. lib. 2, c. 38).

See titles ABJURATION; ARREST.

SANE MEMORY. Sound mind, memory, and understanding. This is one of the essential elements in the capacity of contracting; and the absence of it in *lunatics* and *idiots*, and its immaturity in *infants*, is the cause of their respective incapacities or partial incapacities to bind themselves. The like circumstance is the ground of their exemption or partial exemption in cases of crime.

SANITARY LAWS. The principal Sanitary Acts have been the Public Health Act, 1848 (11 & 12 Vict. c. 63), the Local Government Act, 1858 (21 & 22 Vict. c. 98), the Local Government Act, 1858, Amendment Act, 1861 (24 & 25 Vict. c. 61), and the Local Government Act Amendment Act, 1863 (26 & 27 Vict. c. 16),—all which four Acts have been wholly repealed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), and the last mentioned Act also repeals (but not as regards the Metropolis or Metropolitan Police District) the Common Lodging Houses Acts, 1851 and 1853, the Nuisances Removal Acts, 1855, 1863, and 1866, the Sanitary Act, 1868 (31 & 32 Vict. c. 115), the Sanitary Loans Act, 1869 (32 & 33 Vict. c. 100), the Sanitary Act, 1870 (33 & 34 Vict. c. 53), the Public Health Act, 1872 (35 & 36 Vict. c. 79), and the Sanitary Law Amendment Act, 1874 (37 & 38 Vict. c. 89), and one or two minor Acts relating to the like matters. And the Public Health Act, 1875 (which as regards nuisances and some few other matters extends also to the metropolis) now consolidates the whole law of health for districts other than the metropolis, constituting local districts and local authorities (urban and rural), and empowering them to see to the effective sewerage and drainage, scavenging, and cleansing, and watering, and supplying with pure water their respective districts, and generally to the health thereof, including the regulation of cellar and other dwellings, and of streets, the repression of diseases and their preven-

SANITARY LAWS—continued.

tion, the regulation of offensive trades, &c., &c., with all powers incidental to the effectuation of these purposes.

SAPIENTIA SUPPLET ÆTATEM. A maxim of evidence applicable to children of tender years, *e.g.*, under seven or thereabouts. *Primâ facie* the evidence of such children is not receivable, by reason of a supposed immaturity of intellect or defectiveness in the appreciation of an oath. But upon this maxim, the child may be examined in order to ascertain the measure of its intelligence and religious feeling; and when its intelligence and sentiments are found to be sufficient, then its deficiency of years is supplied by this maxim—Intelligence and sobriety supply the defect of years.

See titles **MALITIA SUPPLET ÆTATEM**; **VOIR DIRE**.

SATISDATIO. In Roman Law, was the security (consisting in money or in some other form) given by certain persons in certain legal proceedings, whether actions or not; usually, a trustee or tutor, unless appointed by will or *ex inquisitione* (*i.e.*, after inquiry), was required (just as in English Law) to give security for his faithful administration of the trust. And in actions, a person suing or being sued *per procuratorem* (*i.e.*, by proxy) was required to give the *satisfactio* called *de rato*, otherwise *ratam rem dominum habiturum* (*i.e.*, that his principal would ratify or abide by the result whatever it was). And a defendant had usually to give also the *satisfactio* called *judicatum solvi*, *i.e.*, that the judgment (if against him) would be carried out by him,—which carrying out involved in the case of lands the restitution of the possession and also of the interim rents and profits (*prædes litis et vindictiarum*). There was also a species of *satisfactio* called *pro sua tantum persona*, *i.e.*, for the person of the defendant only, and this was and in English Law corresponds to bail by defendant to appear in a personal action.

SATISFACTION. The satisfying a party by paying him what is due by judgment or otherwise. Thus a judgment is satisfied by the judgment debtor's payment of the amount due on the judgment, or by the judgment creditor's levying the amount on execution. A *satisfaction piece* was a memorandum written on a piece of parchment, stating that satisfaction was acknowledged between the plaintiff and the defendant. This memorandum or satisfaction piece was taken to one of the masters of the Court, and from it he entered the satisfaction. Entry of satisfaction on the roll was a memorandum entered

SATISFACTION—continued.

on the judgment roll, by which the judgment creditor acknowledged that he had been satisfied (1 Arch. Pract. 722).

SATISFACTION, ENTRY OF: See title **SATISFACTION**.

SATISFACTION IN EQUITY. Is a doctrine somewhat analogous to Performance in Equity, but differs from it in this respect, that satisfaction is always something given either in whole or in part as a substitute and equivalent for something else, and not (as in Performance) something that may be construed as the identical thing covenanted to be done. It is a presumption raised by the Courts of Equity, and only in cases where there are no express words excluding the presumption. The subject of satisfaction divides itself into four, or rather three branches, *viz.* :—

- (1.) The satisfaction of debts by legacies;
- (2.) The satisfaction of legacies by legacies; and

- (3.) The satisfaction of legacies by portions, and of portions by legacies.

(1.) *Debts by Legacies.*—The general rule in this case is, that a legacy equal to or greater than the debt is a satisfaction; but that a legacy less than the debt is not even a satisfaction *pro tanto*; and in determining what is less, that may be either in amount, or in time of payment, or in certainty of payment. And as the leaning of the Court in this case is against satisfaction, very slight circumstances are allowed to rebut the doctrine of satisfaction, so that the creditor may take cumulatively both his debt and the legacy.

(2.) *Legacies by Legacies.*—The general rule in this case is, that if the two legacies are: (a.) In the same instrument, and different in amount, the legatee takes both, but if equal in amount, one only; and duplicate codicils count as one and the same instrument (*Whyte v. Whyte*, L. R. 17, Eq. 50); but if the two legacies are, (b.) In different instruments, then whether they are different or equal in amount, the legatee takes both; with one exception, *viz.*, that where the legacies are equal in amount, and the same motive is assigned in each case for giving the legacy, then the legatee will take one only.

(3.) *Legacies by Portions, and Portions by Legacies.*—The general rule in this case is, that the legatee or portionist shall take one only, and not both; nor does it matter since *Pym v. Lockyer* (5 My. & Cr. 29) whether the will or the settlement comes first, excepting to this extent, that what is due under the settlement is in the nature of a debt, and recoverable accordingly, while what is due under the will (so far as

SATISFACTION IN EQUITY—contd.

it is in excess of that due under the settlement) is a voluntary bounty only; liable to fail or abate accordingly. There is one curious anomaly connected with satisfaction in this case, viz., that as the word "portion" is applicable to children only, and a bastard is not a child, therefore the bastard takes both the gift under the settlement and that under the will, and is therefore better off than either a child or one in whom the settlor-testator has put himself *in loco parentis* (*Ex parte Pye*, 18 Ves. 140).

Nota Bene.—In all cases and varieties of satisfaction, both sums are and remain unpaid at the time the question arises (*Thynne v. Glengall*, 2 H. L. Ca. 131).

SATISFACTION PIECE : See title SATISFACTION.

SATISFIED TERMS : See title TERMS OF YEARS OUTSTANDING.

SAVE AS AFORESAID : See title ABSQUE Hoc.

SAVING THE STATUTE OF LIMITATIONS. A creditor is said to save the Statute of Limitations when he saves or preserves his debt from being barred by the operation of the statute. Thus, in the case of a simple contract debt, if a creditor commence an action for its recovery within six years from the time when the cause of action accrued, he will be in time to save the statute.

See title LIMITATION OF ACTIONS.

SAVINGS BANK, TRUSTEE. All the Acts relating to these institutions were repealed by the stat. 9 Geo. 4, c. 92, and that Act has been in its turn repealed by the stat. 26 & 27 Vict. c. 87, which, together with the stat. 16 & 17 Vict. c. 45, now expresses the law upon the subject. A savings bank is not necessarily a banking company within the meaning of the Joint Stock Companies Acts; nor can a depositor maintain an action against the trustees of the society, but the question must be settled between them by arbitration; and in case of embezzlement, the remedy is by mandamus to compel the trustees and managers to appoint an arbitrator (*Rex v. Mildenhall Savings Bank*, 6 A. & E. 952). When a trustee savings bank is closed, it may be (in effect) merged in, by transfer of its funds and depositors to, a Post Office Savings Bank under the stat. 26 & 27 Vict. c. 14.

See title POST OFFICE SAVINGS BANKS.

SCANDAL AND IMPERTINENCE. *Scandal* was defined to be anything alleged in a bill, answer, or other pleading, in such language as was unbecoming the Court to

SCANDAL AND IMPERTINENCE—continued.

hear, or as was contrary to good manners; or anything set forth which charged some person with a crime not necessary to be shewn in the cause. *Impertinence* was defined to be the encumbering the records of the Courts with long recitals, or with long digressions of matters of fact, which were altogether unnecessary and totally immaterial to the point in question. Exceptions might formerly have been taken to pleadings for scandal and impertinence; but after the Jurisdiction Act, 1852 (15 & 16 Vict. c. 86), s. 17, the practice of excepting for impertinence was abolished, and the only check upon impertinent pleadings was visiting them with costs; but after that Act, exceptions for scandal might still have been taken. And now under the Judicature Act, 1873, all exceptions as such are abolished, but the faulty pleading may be objected to by motion in a summary manner.

See title PLEADING.

SCANDALUM MAGNATUM. Scandal, i.e., spreading false reports, against peers and certain other great officers of the realm is so called, and was subjected to peculiar punishment by divers ancient statutes (Cowel).

See title SEDITION.

SCHEDULE. A piece of paper or parchment containing a list or inventory of things, usually annexed to deeds and to Acts of Parliament.

SCHEME OF ARRANGEMENT : See titles ARRANGEMENT, SCHEME OF; RE-CONSTRUCTION OF COMPANY.

SCHEME FOR CHARITY. Either upon an information in the name of the Attorney-General (acting either *ex officio* or *ex relatione*) or upon a petition under Sir Samuel Romilly's Act (52 Geo. 3, c. 101), the proceedings being (unless when by the Attorney-General *ex officio*) previously sanctioned by the Charity Commissioners, the High Court of Justice in its Chancery Division will settle and approve a charity scheme, that is, a scheme or plan for the general conduct or management of the charity, or of the application of the charity funds (*Attorney-General v. Duke of Northumberland*, 7 Ch. Div. 745; *School Board for London v. Faulconer*, 8 Ch. Div. 571; *In re Poplar and Blackwall Free School*, 8 Ch. Div. 543).

See titles CHARITABLE INFORMATION; CHARITABLE PETITION.

SCHOOLS. The schools in England are chiefly of three kinds, viz. : (1.) Grammar Schools, called also Endowed Schools, and some of which have acquired the name *par eminence* of Public Schools; (2.) Proprie-

SCHOOLS—continued.

tary Schools; and (3.) Public Elementary Schools. The first and third varieties are regulated by statutes, the Endowed or Grammar School Acts beginning with 3 & 4 Vict. c. 77, and comprising 32 & 33 Vict. c. 56, 36 & 37 Vict. c. 87, and 37 & 38 Vict. c. 87, relating to the scheme of education in and admission to the schools, appointment of masters, and of governing bodies, and the Public Elementary Schools Acts being 33 & 34 Vict. c. 75 (Elementary Education Act, 1870), and some Amendment Acts; the second variety of schools are under the exclusive control of the Common Law. And with reference to those Grammar Schools, such as Eton, Harrow, &c., which have acquired the name of Public Schools, two Acts have been recently passed for their government, viz., 31 & 32 Vict. c. 118 (Public Schools Act, 1868), and 35 & 36 Vict. c. 54 (Public Schools Act, 1872), relating principally to the constitution and powers of their respective governing bodies (*Hayman v. Rugby School (Governors)*, L. R. 18 Eq. 28).

SCIENTER. A term used in pleading to signify that part of the declaration which alleged the defendant's previous knowledge of the cause which led to the injury complained of; or rather, his previous knowledge of a state of things which it was his duty to guard against, and his omission to do which had led to the injury complained of. Thus, in an action upon the case for keeping dogs that chased and killed the plaintiff's cattle, that part of the declaration which, after stating that the "defendant wrongfully kept dogs," added "knowing them to be accustomed to chase and kill cattle," was termed the *scienter* (*Jackson v. Pecked*, 1 M. & S. 238; Steph. Pl. 178, 4th edit.) It was not invariably necessary to either allege or prove a *scienter*; e.g., for injuries by a dog to cattle (and in which formerly, as above appears, a *scienter* was necessary) no *scienter* is now necessary (28 & 29 Vict. c. 60), yet the *scienter* remains necessary in the case of injuries by a dog to human beings; again, no *scienter* need be alleged or proved for an injury to cattle by other cattle, where there is a positive contract to take care of the cattle that are injured (*Smith v. Cook*, 45 L. J., Q. B. 122).

SOILICET. A word frequently used in pleadings to point out or particularize that which had been previously stated in general terms only.

See title VIDELICET OR SOILICET.

SCIRE FACIAS. A *scire facias* is a judicial writ (in the nature of a writ original) founded upon some matter of

SCIRE FACIAS—continued.

record, and requiring the person against whom it is brought to shew cause why the party bringing it should not have the advantage of such record, or (as in the case of a *scire facias* to repeal letters patent) why the record should not be annulled and vacated. One of the most common uses of a *scire facias* was to revive a judgment after it had become extinct; and in such a case, the writ of *scire facias* stated the judgment recovered by the plaintiff, and that execution still remained to be had, and commanded the sheriff to make known to the defendant that he should be in Court on the return day, in order to shew why the plaintiff ought not to have execution against him (2 Arch. Pract. 1122). The writ of *scire facias* is not now required for the purpose of reviving a judgment, an order of revivor being substituted for it; however, the writ still lies on a judgment against an executor of *assets quando acciderint*, and in some other peculiar cases (Sm. Act. at Law, 292).

See titles PATENTS; REVIVOR, ORDER OF.

SCIRE FIERI. When to a writ of execution issued against an executor or an administrator, the sheriff returns *nulla bona*, the plaintiff, if he can prove a *devastavit*, may sue out a *scire fieri* inquiry, which is a writ directed to the sheriff, commanding him that in case there shall be no goods of the testator remaining in the hands of the executor, he shall summon a jury to inquire whether the defendant has wasted the goods of the testator, and if a *devastavit* be found, that he shall warn the defendant that he be in Court upon a day mentioned, to shew cause why the plaintiff should not have a *fieri facias de bonis propriis* against him (2 Arch. Pract. 1233).

See titles DEVASTAVIT; EXECUTION, WRIT OF.

SCOT AND LOT: See title LOT AND SOOT.

SCOTLAND: See title IRELAND.

SCRIBERE EST AGERE. To write is to act; that is, writing is acting. This maxim of law appears to have no application excepting (and even then doubtfully) in cases of prosecution for treason; e.g., in *Peacham's Case* (*tempore*, Jac. 1), the writing (without publication) of an alleged seditious sermon was taken as the overt act required in order to convict for treason.

See titles OVERT ACT; TREASON.

SCRIP: See title SHARE-CERTIFICATES.

SCRIVENER. An agent to whom property was entrusted for the purpose of lending it out to others at an interest pay-

SCRIVENER—continued.

able to his principal, and for a commission or bonus for himself, whereby he sought to gain his livelihood. In order to make a man a money scrivener, he must carry on the business of being entrusted with other people's moneys to lay out for them as occasion offers. See *Arch. Bank.* 36; *Adams v. Malkin*, 3 Cramp. 534, per Gibbs, C.J.; *Scott and Another v. Melville and Others*, 3 Scott's N. B. 346; 9 Dow. 882.

SCULPTURE, COPYRIGHT IN. The Sculpture Copyright Acts are the Acts 38 Geo. 3, c. 71, and 54 Geo. 3, c. 56. Under these Acts, the artist who makes any new and original sculpture or model or copy of the human figure or of any animal, or of any alto-relievo or basso-relievo or of any cast from nature, shall have the sole right and property therein for the term of fourteen years, and apparently (*Lunn v. Thornton*, 1 C. B. 379) for the further period of other fourteen years from the first publication of same, provided he register thereon his name and the date of publication. The copyright is to be registered under the Act 13 & 14 Vict. c. 104, s. 6, and when so registered the proprietor may sue for any infringement thereof, and recover under section 7 of the last-mentioned statute for every such offence a sum not less than £5 and not more than £30, provided the sculpture, &c., have on it the word registered with the date of the registration. The action must be brought within six calendar months next after discovery of the infringement committed.

SCUTAGE: See title ESCUAGE.

SCUTAGIO HABENDO, WRIT OF. A writ that lay for the king or other lord against his tenant, who held by knight-service, to compel him to serve in the wars, or to find a substitute, or to pay escuage (*F. N. B.* 83; Cowel).

SEA-BED. Is all that portion of land under the sea that lies beyond the sea-shore, and which, equally with the sea-shore, belongs *prima facie* to the Crown, but may be acquired by the subject, either by grant or adverse possession.

See title SEA-SHORE.

SEA-SHORE. In contemplation of law belongs in property to the sovereign as a *jus privatum*, subject to the *jus publicum*, or public right of the sovereign and people together, to pass and re-pass over it, which latter right is in the nature of an easement or quasi-easement (*Att.-Gen. v. Burridge*, 10 Price, 350). The king may grant his private right to a corporation being *caput portus*, but subject always to the public right (*Att.-Gen. v. Parmeter*, 10 Price, 378). In the absence of all other evidence, the

SEA-SHORE—continued.

extent of the Crown's right to the sea-shore landwards is the line of the medium high tide between the springs and the neaps (*Att.-Gen. v. Chambers*, 4 De G. M. & G. 206). The bed of all navigable rivers where the tide flows and re-flows, and of all estuaries or arms of the sea, is vested in the Crown, but subject to the right of navigation which belongs by law to the subjects of the realm, and of which the right to anchor forms a part; and every grant thereof made by the Crown is subject to such public right of navigation (*Gann v. Free Fishers of Whitstable*, 11 H. L. C. 192), and for which, therefore, the grantee cannot (in the general case) charge anchorage dues. As evidence of such a grant of the sea-shore to the lord of the manor, the exclusive taking of sand, stones, and sea-weed may be called in aid, in the absence of documentary evidence of the grant (*Calmady v. Rowe*, 6 C. B. 861). If the sea, by gradual and imperceptible progress, encroaches upon the land of a subject, the land thereby covered with water accrues to the Crown (*In re Hull & Selby Railway*, 5 M. & W. 327); and in the case of a like retirement of the sea, the land accrues to the adjoining owner (*Att.-Gen. v. Chambers*, 4 De G. & J. 55).

See titles ALLUVIO; NAVIGATION, PUBLIC RIGHT OF; SEA-BED, &c.

SEAMEN. Under the Merchant Shipping Acts of 1854 and subsequent years, numerous provisions for the regulation and benefit of seamen have been made; and, under two recent Acts, seamen may insist upon the vessel being seaworthy before sailing, although no warranty of seaworthiness exists at Common Law (34 & 35 Vict. c. 110; 36 & 37 Vict. c. 85). Any attempted sale of, or charge upon, their wages is invalid. If discharged abroad, the master is to give them a certificate of discharge, and to send them home at expense of shipowner, and also to return them their certificate of competency. The effects of deceased seamen, if under £50, will be paid over by the Board of Trade to persons entitled to them as next of kin or under will, without probate or administration; the Board may recognise the claim, even after six years from death (see *Kay's Shipmasters and Seamen*).

SEA-WALL. The expense of maintaining (or of originally constructing) a sea-wall may by means of a commission of sewers be thrown upon the frontagers and others deriving immediate or proximate benefit from the sea-wall. But there is no liability at Common Law as between frontagers and other landowners for the frontager to construct or to maintain such a

SEA-WALL—continued.

wall; by prescription, such a liability may, however, arise (*Hudson v. Tabor*, 1 Q. B. D. 225; 2 Q. B. D. 290).

SEAWORTHINESS. There is an implied warranty of seaworthiness at the time a policy of ship-insurance (being a voyage-policy) is effected; *secus*, in the case of a time-policy. But there is no such warranty at Common Law with passengers or with seamen; under the Passenger Acts (*see* that title), the safety and comfort of passengers are otherwise provided for; and seamen are now protected under Plimsoll's Act.

See title SEAMEN.

SEALS. Are annexed to legal instruments, which thereupon become deeds. The signature of the sealing party is usually affixed in addition to the seal, but does not appear to be necessary.

See titles GREAT SEAL; SIGNATURE.

SEARCH-WARRANTS. In the case of *Leach v. Money* (19 St. Fri. 1001), in 1765, it was held, that a general warrant issued by a Secretary of State to search for and seize the author (not named) of a seditious libel was illegal; and in the case of *Wilkes v. Wood* (19 St. Fri. 1153), in 1763, the like decision had been given regarding a general warrant issued by the same authority to search for and seize the papers of such an author (not named); and in *Entick v. Carrington* (19 St. Fri. 1030), in 1765, the warrant was held illegal even when the author was named. And it seems that the sovereign cannot personally arrest a man or commit a man by word of mouth, though she may do so by matter of record, or warrant *setting forth the offence charged* in order that the Court may determine whether it be known to the law; and if so, whether it be bailable or not. The power thus inherent in the sovereign has by her been in practice delegated to the Privy Council, or to a Secretary of State; but the power of the latter to interfere with the subject's liberty is restricted to cases of alleged treason or treasonable practices (*R. v. Despard*, 7 T. R. 736). The power does not extend to authorise the seizure of papers of an accused. A justice of the peace may issue a search-warrant for alleged stolen goods, in the case of their being believed to be in the possession of a person apprehended for the felony; and under 24 & 25 Vict. c. 96, s. 103, upon the sworn information of any credible witness, the justice may grant a search-warrant against any person whomsoever alleged to have in his possession or on his premises any property, stolen, embezzled, or in other like manner misappropriated. Also, under the Public

SEARCH-WARRANTS—continued.

Health Act, 1875 (38 & 39 Vict. c. 55), s. 119, a justice of the peace may on sworn complaint by medical officer of health, inspector of nuisances, &c., grant a search-warrant for putrid meat, fruit, &c.

See title POST OFFICE.

SECOND DELIVERANCE, WRIT OF.

A writ which lay for a plaintiff after he had been nonsuited in an action of *replevin*, in pursuance of which the sheriff again delivered to the plaintiff the goods that were distrained, on his giving security, as he did in the first instance, to re-deliver them, if the distress proved a justifiable one (2 Arch. Pract. 1087, 1094).

See title REPLEVIN.

SECONDARY. Was an officer of the Courts of King's Bench and Common Pleas, and he was so called because he was *second* to the chief officer, *i.e.*, to the sheriff, *semble*, for he was and is the chief *executive* officer, the Judge being judicial merely and not executive. The secondaries of these Courts were abolished by 7 Will. 4 & 1 Vict. c. 30 (1 Arch. Pract. 11), and the existing Masters were by the same Act appointed in their stead. But at the present day there is still a law officer in the City of London who bears the name of Secondary, *scil.*, because he is second to the chief officer (*i.e.*, *semble*, the Judge) of the City of London Court, and who was originally the sheriff; whence the Secondary is for some purposes like an Under-Sheriff. His principal duties as Secondary are to assess damages on writs of inquiry upon judgments given in any of the Courts sitting within the City.

SECONDARY CONVEYANCES. Conveyances are sometimes divided into primary or original conveyances, and secondary or derivative. The primary are such as do not depend upon any previous conveyance, but are independent and original; the *secondary* are such as pre-suppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance; thus an assignment of a lease may be considered a secondary conveyance with respect to the lease itself; so also, a release with respect to the lease, in the conveyance by Lease and Release.

See title CONVEYANCES.

SECONDARY EVIDENCE: *See* title DERIVATIVE EVIDENCE.

SECONDARY PARTIES: *See* title COUNTER-CLAIM.

SECONDARY USE: *See* title SHIFTING USE.

SECRET COMMITTEE. A secret committee of the House of Commons is a committee specially appointed to investigate a certain matter; and secrecy being deemed necessary in furtherance of its objects, its proceedings are conducted with closed doors, to the exclusion of all persons (including even members) who are not members of such committee. All other committees are open to members of the House, although they may not be serving upon them.

SECRET TRUSTS. Where property (whether real or personal) is given by will to a trustee, or, being personal, is bequeathed to or vests in the executor, and nothing on the face of the will suggests that the beneficial interest was to be taken by such devisee-trustee or legatee-executor, or simple executor, and, *à fortiori*, if the contrary intention appears, then the beneficial interest is undisposed of by the will; and a further writing to be executed as a will is necessary to dispose of the beneficial interest. Therefore no *secret trust* declared by word of mouth only, or even in writing (the same writing not being duly executed and attested as a will, or in existence at the date of and incorporated into the will), is permitted to be valid (contrast *Adlington v. Cann*, 3 Atk. 141, with *Muckleston v. Brown*, 6 Ves. 52); but the property will go, so far as it consists of real estate, to the heir-at-law or residuary devisee, and, so far as it consists of personal estate, to the next of kin or residuary legatees. On the other hand, if the devisee or legatee (whether he be executor or not) appear on the face of the will to be entitled to take the beneficial interest as well as the legal interest, then no parol evidence to disprove that plain effect of the will is admissible, with this one exception, viz., that parol evidence may be admitted to prove a fraud on the part of the devisee or legatee in procuring the gift to be made to him by the will, in that, for example, he undertook a certain *secret trust*; and in that case, the Court, if it find the secret trust to be *lawful*, will decree execution thereof, and if it find same unlawful, will give the property, if real, to the heir-at-law, and if personal, to the next of kin of the testator (*Strickland v. Aldridge*, 9 Ves. 519).

See title TRUSTS, RESULTING.

SECTA. By this word the witnesses, or *followers*, of the plaintiff were anciently understood.

SECTA AD CURIAM, WRIT OF. A writ that lay against him who refused to perform his suit, either in the County Court or in the Court Baron (Cowel).

See title JURY.

SECTA AD MOLENDINUM, WRIT DE. A writ which lay for the owner of a mill against the inhabitants of the place where such mill was situated, for not doing suit to the plaintiff's mill; that is, for not having their corn ground at it.

See title SUBTRACTION.

SECTA REGALIS. A suit so called by which all persons were bound twice in the year to attend in the sheriff's tourn, in order that they might be informed of things relating to the public peace. It was so called because the sheriff's tourn was the king's leet, and it was held in order that the people might be bound by oath to bear true allegiance to the king (Cowel).

See title ALLEGIANCE.

SECUNDUM ALLEGATA ET PROBATA. Means literally according to the pleadings and the evidence; and is a maxim whereby a party recovers in his action only according to his claim as stated and as proved.

SECURITY. Is the general name for all mortgages, charges, debentures, &c., whereby the repayment or payment of money is secured otherwise than by the mere personal undertaking of the debtor.

SECURED AND UNSECURED CREDITORS. In the administration by the Court of Bankruptcy of the estates of bankrupts, and in the administration of insolvent estates by the Chancery Division of the High Court of Justice, the same rules are now observed as regards the method of proving for their debts by secured creditors, that is to say, the secured creditor may either throw up his security and prove for his entire debt, or he may realise (or put a value on) his security, and in that case he proves only for the excess (if any) of his debt over the proceeds realised out of his security, or over his valuation thereof.

See title PROOF OF DEBTS IN BANKRUPTCY.

SECURITY FOR COSTS. When the plaintiff in an action resides out of the jurisdiction of the Court in which the action is pending, and the defendant is apprehensive that the plaintiff, in the event of being defeated, will evade payment of the costs or expenses of the suit, it is usual for him to apply to the Court to compel the plaintiff to give security for such payment; and the Court usually orders this to be done, there being grounds for the application. The security is commonly effected by the plaintiff and two sureties entering into a bond to a sufficient amount to cover the supposed costs of the suit (2 Arch. Pract. 1414), and sometimes by the payment of money into Court. The mere poverty of a plaintiff is, however, no ground for requiring him to give security

SECURITY FOR COSTS—continued.

for costs, unless to a limited extent in some proceedings in tort proper for the County Court, but which the plaintiff chooses to institute in a superior Court (County Courts Act, 1867, 30 & 31 Vict. c. 142, s. 10). An appellant used invariably to give security for costs, commonly making a deposit of money in Court; but under the present practice, security for the costs of an appeal is not invariably (or even usually) given or ordered, special circumstances requiring to be shewn in every case before the order to give security is made (Order LVIII., 15). The application for security should be made speedily (Weekly Notes, 1879, p. 99); but when proper to be made, it may be extended as well to the past costs as to the future costs of the appeal (Weekly Notes, 1879, p. 131). Any order directing or refusing security for costs either of the original action or of the appeal may be appealed to a higher Court (*Northampton, &c. Co. v. Midland Waggon Co.*, 7 Ch. D. 500), although usually orders regarding costs merely are not appealable (Judicature Act, 1873, s. 49).

See titles COSTS; TAXATION OF COSTS.

SECURITY FOR GOOD BEHAVIOUR, &c.: See title ARTICLES OF THE PEACE.

SECUS. Means "*It is otherwise.*"

SE DEFENDENDO, PLEA OF. A plea pleaded by one who is charged with the death of another, to the effect that he was obliged to do what he did in his own defence, otherwise his life would have been in danger (*Staunf. Pl. Cor. Lib. 1 c. 7*).

See titles HOMICIDE; SON ASSAULT DEMESNE, PLEA OF.

SEDITION: See titles SEDITIOUS ASSEMBLY; TREASON.

SEDITIOUS ASSEMBLY. Sedition embraces all those practices whether by word, writing, or conduct, which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Queen or the Government, the laws or constitution of the realm; and generally all endeavours to promote public disorder (*R. v. Sullivan, R. v. Pigott*, 11 Cox, 44, 45). For instance, if a man curse the Queen, wish her ill, give out scandalous stories concerning her (*R. v. Harvey*, 2 B. & C. 257), or do anything that may lessen her in the esteem of her subjects, or that may weaken her government, or that may raise jealousies between her and her people; or if he deny the Queen's right to the throne, even in common and unadvised discourse, all these

SEDITIOUS ASSEMBLY—continued.

are seditious acts, words, or libels, and are punishable with fine and imprisonment; and the assembly at which any of these things are done or uttered is a seditious assembly.

See title RIOT.

SEDUCTION is a tort committed against a parent or master by having illicit sexual intercourse, through persuasion, with his daughter or female servant. The foundation of the action is loss of services; and a parent can only maintain the action if his daughter was in his service at the time. But the slightest degree of service will suffice; and the jury will give damages not at all in proportion to the value of the services, but in proportion to the meanness of the conduct of the seducer,—this excess of damages being awarded as a *solatium* to the feelings of the injured parent, and with which (although it is contrary to the principles of our law) the judge rarely chooses to interfere. When a master sues for the seduction of his servant, he must prove a subsisting contract of service valid in law at the time of the seduction (*Bracegirdle v. Heald*, 1 B. & Ald. 722).

SEIGNOR, or SEIGNEUR. In its most general signification means a lord; but in law it is particularly applied to the lord of a manor; and the manor is thence termed a *seignory*, i.e., a lordship (*Kitchin*, 206; *Cowel*).

See title SEIGNORY.

SEIGNORAGE. A privilege or prerogative of the king, by which he claimed an allowance in respect of gold and silver brought in the mass to be exchanged for coin (*Cowel*).

See title MINT.

SEIGNORY. The having a free tenant holding lands of oneself in fee simple constitutes one a seignor, and the seignor is said to have a seignory. The seignory and lands constitute the manor; and rent is incident to the seignory.

See titles MANOR; REPUTED MANOR.

SEISED IN DEMESNE AS OF FEE. Is the expression used to describe the ownership so called of "an estate in fee simple in possession in a corporeal hereditament,"—the word "seised" expressing the "seisin" or owner's possession of a freehold property; the phrase "in demesne" or "in his demesne" (*in dominico suo*), signifying that he is seised as owner of the land itself, and not merely of the seignory or services; and the concluding words "as of fee" importing that he is seised of an estate of inheritance in fee simple (*Co. Litt. 17 a.; Fleta*, l. 5, c. 5, s. 18; *Bract*, l. 4, tr. 5. c. 2, s. 2).

SEISIN. Feudal Possession, or Possession of a Freehold estate. Upon the introduction of the Feudal Law into England the word "seisin" was applied only to the possession of an estate of freehold, in contradistinction to that precarious kind of possession by which tenants in villenage held their lands, which was considered to be no possession at all in the villeins, but the possession of those in whom the freehold continued. The word still retains its original signification, being applied exclusively to the possession of land of a freehold tenure, it being inaccurate to use the word as expressive of the possession of leaseholds or terms of years, or even of copyholds. *To seise* signifies to take possession of lands of a freehold tenure by the ceremony of livery of seisin, or delivery of possession; *to be seised* signifies to be in possession of such land; and the possession of the land itself, which has been acquired by the ceremony of livery of seisin, is thence denominated "seisin" or "seizin." The following passage from Cruise's Dig. tit. 8, c. 1, s. 10, affords a good illustration of the word: "A tenant for years is not said to be seised of the lands, the possession not being given to him by the ceremony of livery of seisin; nor does the mere delivery of a lease for years vest any estate in the lessee, but only gives him a right of entry on the land; when he has actually entered, the estate becomes actually vested in him, and he is then possessed, not properly of the land, but of the term for years, the seisin of the freehold still remaining in the lessor." It may be observed, however, that the word "seise" is sometimes used in reference to the possession of goods. Thus, in *Taylor v. Fisher* (Cro. Eliz. 245, 246), the following passage occurs: "Trespass for breaking his house and taking away a coralet and a pike of the plaintiffs. The defendant pleaded that long time before the supposed trespass, J. Bamfield was seised of the said corslet and pike, as of his own goods, &c." (Watk. Introd. Conv. by Morley; Coote & Cov. 7th edit.; pp. 32, 33; 1 Cru. Dig. tit. 8, c. 1, s. 10; 2 C. M. & R. 41, n. (a.); 3 Camp. 116, per Lord Ellenborough, C.J.; Cro. Eliz. 245).

SEISINA FACIT STIPITEM. "The seisin maketh the stock." This maxim determined anciently the stock of descent, in every application of the rules or canons of descent to real property. It ceased to be applicable for this purpose, after the stat. 3 & 4 Will. 4, c. 106.

See titles DESCENTS; PURCHASER.

SEIZING OF HERIOTS. The seizing of heriots, when due on the death of a tenant, is a species of self-remedy, resembling that

SEIZING OF HERIOTS—continued.

of taking cattle or goods in distress: excepting that a distress is merely taken as a pledge for other property, whereas the heriot instantly becomes the actual property of him who seizes it.

See title HERIOT.

SEIZURE QUOUSQUE: See title QUOUSQUE.

SELECT COMMITTEE: See title COMMITTEE, SELECT.

SELF-DEFENCE: See titles SE DEFENDENDO, PLEA OF; SON ASSAULT DEMESNE, PLEA OF.

SELF-REGARDING EVIDENCE. Evidence which either serves or dis-serves the party is so called. This species of evidence is either self-serving (which is not in general receivable) or self-dis-serving (which is invariably receivable, as being an admission against himself, and that either in Court or out of Court).

SEMARYNE'S CASE. This case, decided in 2 Jac. 1, that "every man's house (meaning his dwelling-house only) is his castle," and that the defendant may not break open outer doors in general but only inner doors, but that (after request made) he may break open even outer doors to find goods of another wrongfully in the house.

SEMBLE. It appears, &c., e.g., a married woman even if she have separate estate cannot, *semble*, be made a bankrupt (*Ex parte Holland, In re Heneage*, L. R. 9 Ch. App. 307); and this rule of law has now been positively decided to be in fact what it only appeared formerly to be (*Ex parte Jones, In re Grissel*, 12 Ch. Div. 484).

SEMI-MALUS, SEMPER MALUS: See title MALUS IN UNO, &c.

SEMI-SOVEREIGN STATES: See title SOVEREIGN STATES.

SENATUS CONSULTA. In Roman Law, were decrees or enactments of the Senate, and are enunciated by Justinian as one of the six sources of the *jus scriptum* (i.e., written or enacted law). The principal *senatus consulta* were the following:—

(1.) *Senatus consultum Claudianum*,—an enactment supposed to have been made in the reign of Claudius, and which was repealed by Justinian. It rendered a slave the woman who after express warning had had sexual intercourse with another man's slave, against the will of such slave's master.

(2.) *Senatus consultum Macedonianum*,—an enactment passed in the reign either of Claudius or of Vespasian, on account of the rapacities of a money-lender (Macedo)

SENATUS CONSULTA—continued.

or the losses of a young debauchee (Macedo), and intended to repress money lending by rendering the sums lent to children in *potestas* irrecoverable at law.

(3.) *Senatus consultum Neronianum*,—an enactment passed in the reign of Nero, the object and effect of which was to abolish (in effect) while retaining (in name) all the distinctions between legacies, whether as being *per vindicationem*, or *per damnationem*, or *sinendo modo*, or *per praeceptionem*.

(4.) *Senatus consultum Orphitianum*,—an enactment passed in 178 A.D. in the reign of Marcus Aurelius, and which enabled children (even although being illegitimate) to succeed to their mother as her *agnati*.

(4A.) *Senatus consultum Tertullianum*,—an enactment passed in 158 A.D. in the reign of Hadrian, and which enabled a mother to succeed as an *agnata* to her children (even although being illegitimate).

(5.) *Senatus consultum Pegasianum*,—an enactment passed in 70 A.D., in the reign of Vespasian, and which authorized the *heres* to retain to himself out of the *hereditas* one equal fourth part of the value thereof.

(5A.) *Senatus consultum Trebellianum*,—an enactment passed in or about 62 A.D. in the reign of Nero, and which relieved the *heres* of, and imposed upon the *fideicommissarius* (beneficial owner) all liability for, the debts of the deceased testator. Justinian amended this enactment, by incorporating into it the provisions of the *Senatus consultum Pegasianum* (which he repealed); and Justinian left it optional with the *heres* to retain the fourth part or not, and generally rendered him liable only to the extent of the value of the estate (if any) which he retained.

SEPARATE DEMISE IN EJECTMENT.

A demise in a declaration in ejectment used to be termed a separate demise when made by the lessor separately or individually, as distinguished from a demise made jointly by two or more persons, which was termed a joint demise. No such demise, either separate or joint, is now necessary in this action.

See titles EJECTMENT; SINGLE DEMISE IN EJECTMENT.

SEPARATE ESTATE. Property which a married woman, under certain circumstances, is entitled to retain for her separate and independent use. By the custom of London a married woman may acquire a separate estate by carrying on trade on her own separate account. And under the stat. 21 & 22 Vict. c. 85, a woman judicially separated from her husband holds her property to her own separate use, and such use continues in case the cohabitation is

SEPARATE ESTATE—continued.

afterwards resumed. So also under the M. W. P. Act, 1870 (33 & 34 Vict. c. 96) numerous species of property are made the wife's separate estate. But the separate estate exists more often than not, apart from any statute or separate trading; and in that case, the right of the wife to the enjoyment of property separately from her husband is usually secured by trustees being appointed on her behalf, to whom the property is conveyed in trust for her sole and separate use; and when no trustees are appointed for the wife, under a limitation to her separate use, Equity converts her husband into a trustee for her, and she would still be entitled to the enjoyment of the separate estate.

The Court of Chancery, to further secure to married women the enjoyment of separate estate, allows of a restraint upon anticipation, i.e., alienation, to be attached to the property (*Pybus v. Smith*, 3 Bro. C. C. 839); and the operation of that restraint was settled in the case of *Tullett v. Armstrong* (1 Beav. 1) to be this,—that it attaches upon marriage, dis-attaches upon widowhood, re-attaches upon a re-marriage, and so on.

To the extent that a married woman has separate estate she is a *feme sole*; and unless restrained from anticipation she may alienate it by any of those voluntary or involuntary modes by which a *feme sole* or a man may do (*Taylor v. Meade*, 34 L. J. (Ch.) 203; *Matthewman's Case*, L. R. 3 Eq. 787); the wife may also permit her husband to receive her separate estate, and in that case she is entitled to only one year's account of the arrears; nevertheless, she cannot be made a bankrupt, even in respect of her separate estate (*Ex parte Jones, In re Grissel*, 12 Ch. Div. 484); and her husband takes all her separate personal estate that is undisposed of at her death, if chooses in possession or chattels real, by his marital right (*Molony v. Kennedy*, 10 Sim. 254), and if chooses in action, by his right as her administrator (*Proudley v. Fielder*, 2 My. & K. 57).

SEPARATION DEED: See title SEPARATION OF HUSBAND AND WIFE.

SEPARATION OF HUSBAND AND WIFE. A deed providing for an immediate separation between husband and wife, and containing a covenant by the husband with a trustee, to allow his wife an annuity, and a covenant by the trustee to indemnify the husband against his wife's debts,—whether contracted before the separation, or to be contracted after it,—is valid and binding. And if a separation deed contained a covenant by the husband, not to compel or endeavour to compel the wife to cohabit

SEPARATION OF HUSBAND AND WIFE—continued.

with him, a Court of Equity would restrain him by injunction, from proceeding in a suit for the restitution of conjugal rights (*Hunt v. Hunt*, 31 L. J. C. 161); conversely, the wife, if she seek the like restitution (*Besant v. Wood*, 12 Ch. Div. 605). So, an agreement to execute a deed of separation will be specifically performed. But a deed providing for a *contingent* or *future* separation of the parties, at the will of either, and not intended to take immediate effect, or which is calculated to prevent a future reconciliation between them, is void (*Westmeath v. Salisbury*, 5 Bligh, N.S. 339. 366). Similarly a covenant, before marriage, that in case of any separation taking place, the husband should make a certain provision for his wife. A reconciliation and return to cohabitation, even where the deed contains no provision to that effect, will of itself avoid a deed of separation (*Westmeath v. Westmeath*, 1 Dow. & C. 519).

SEPTENNIAL ACT. This was the stat. 1 Geo. 1, c. 38, which is still in force, and provides that Parliament, unless sooner dissolved, should come to a natural end at the expiration of seven years from its first assembling. It was a Whig Act, passed as a precautionary measure against the Jacobites; and it is now maintained principally as a means of protecting members against the expense and turmoil of too frequent elections.

See title TRIENNIAL ACT.

SEQUESTER. As used in the Civil Law signified to renounce or disclaim, &c. As when a widow came into Court and disclaimed having anything to do with her deceased husband's estate, she was said to sequester. The word more commonly signifies the act of taking in execution under a writ of sequestration the ecclesiastical goods and chattels of a beneficed clerk or clergyman.

See title SEQUESTRATION.

SEQUESTRARI FACIAS DE BONIS ECCLESIASTICIS. A writ of execution against a clergyman, directed to the sheriff and commanding him to enter the rectory and parish church, and to take and sequester the same and hold them until of the rents, tithes, and profits thereof, and of other ecclesiastical goods of the defendant, he shall have levied the plaintiff's debt (2 Arch. Pract. 1284).

See titles EXECUTION, WRIT OF; FI. FA, IN BONIS ECCLESIASTICIS.

SEQUESTRATION. (1.) This word, in its most ordinary sense, signifies a kind of

SEQUESTRATION—continued.

writ of execution. Sequestration issued in Chancery when a defendant had eluded the process of the Court, and a commission of rebellion had been awarded against him to no effect; by virtue of which sequestration his personal estate, and the profits of his real, were seized and detained until the defendant obeyed the commands of the Court; and under the present practice, a writ of sequestration may issue, and that even without leave of the Court, in the following cases,—(1.) To enforce the doing of any act other than the payment of money into Court ordered to be done within a limited time; (2.) To enforce the payment of money into Court ordered to be so paid within a limited time; and (3.) To enforce the recovery of any property (not being either land or money). And apparently no previous writ of attachment need have been issued. The sequestrators appointed by the Court (and who are usually four in number) enter upon the real estate and receive and sequester and take the rents and profits thereof, and also all the personal estate of the person against whom the sequestration has issued; and the Court may subsequently direct a sale of the goods or any of them, and will direct the application of all rents and of the proceeds of all sales. The sequestrators are accountable to the Court. (2.) A sequestration also means sometimes the separating of a thing in controversy from the possession of both those who contend for it, and in this sense it is considered either as voluntary or necessary,—voluntary, when done by the consent of each party, necessary when done by the judge of his own authority, whether the parties will or not. (3.) The word "sequestration" used also to signify the act of the ordinary in disposing of the goods and chattels of a deceased person whose estate no man would intermeddle with (2 Arch. Pract. 1284; Cowel).

See titles EXECUTION, WRIT OF; SEQUESTRARI FACIAS DE BONIS ECCLESIASTICIS.

SEQUESTRATION, WRIT OF: See title SEQUESTRATION.

SEQUESTRATORS: See title SEQUESTRATION.

SEQUESTRE. In Roman Law, was a deposit made with a stakeholder or middleman pending the decision of a certain event, or dispute. He had the interim *possessio civilis*, and not merely the detention of the thing, or *possessio naturalis* (Dig. xvi. 3, 17, s. 1).

See titles DEPOSITUM; DEPÔT.

SERIATIM. Severally, separately, in-
2 I 2

SERIATIM—*continued*.

dividually, one by one; *e.g.*, "Their lordships delivered their judgments *seriatim*."

SERJEANT-AT-ARMS is the title of an officer in each of the two Houses of Parliament. His duties in the House of Lords are to attend upon the Chancellor with the mace, and to execute the orders of the House for the apprehension of delinquents; and in the Commons, this officer attends upon the Speaker with the mace, carries messages from the bar to the table, and executes the orders of the House with respect to delinquents to be taken into custody for breaches of its privileges.

SERJEANT-AT-LAW. A serjeant-at-law was and is a barrister of the Common Law Courts of high standing, and of much the same rank as a doctor of law was in the Ecclesiastical Courts. These serjeants derived their title from the old knights templars, amongst whom there existed a peculiar class under the denomination of "*frères sergens*," or *fratres servientes*; wherefore amongst all the serjeants the practice was and still is to address each other by the familiar epithet of "brother." Until a very recent period (the 25th of April, 1834, 9 & 10 Vict. c. 54) the serjeants-at-law always had the exclusive privilege of practice in the Court of Common Pleas; also, every judge of a Common Law Court, previous to his elevation to the bench, used to be created a serjeant-at-law; but since the Judicature Act, 1873, that is no longer necessary, and, in fact, serjeants as a body have voluntarily dissolved themselves since that Act came into operation (Cowel; Addison's Knights Templars, 318; *The Serjeants' Case*, 6 Bing. N. C. 235).

SERJEANTY. A species of tenure by knight service, which was due to the king only, and was distinguished into grand and petit serjeanty. The tenant holding by *grand serjeanty* was bound, instead of serving the king generally in his wars, to do some honorary service to the king in person, as to carry his banner, his sword, or the like; or to be his butler, champion, &c. *Petit serjeanty* differed from grand serjeanty in that the service rendered to the king was not of a personal nature, but consisted in rendering him annually some small implement of war—as a bow, a sword, a lance, an arrow, or the like (Cowel). Both these species of tenures were spared at the general abolition of feudal tenures in 1660 (12 Car. 2, c. 24). The estates of Strathfieldsaye (Duke of Wellington) and Blenheim (Duke of Marlborough) are examples at the present day of the tenure by petit serjeanty.

See title FEUDAL SYSTEM.

SERVANT, MASTER AND; See titles MASTER AND SERVANT; SERVICE, CONTRACTS OF.

SERVICE. The consideration which the feudal tenants were bound to render to their lord in recompense for the lands they held of him. This service in original feuds was only twofold; to follow, or do suit to their lord, in his courts in time of peace, and in his armies or warlike retinue in times of war. Generally, however, these services varied much; some being of a personal nature, others not; some of an honourable, others of a menial or servile character (Britton, c. 66).

See title FEUDAL SYSTEM.

SERVICE, CONTRACTS OF. Wherever there is a contract to perform any work, or to transact any business, the law implies an engagement on the part of the person undertaking to do the work, that it shall be performed with due care, diligence, and skill, according to the orders given and assented to; and—where there is no agreement as to the price—a promise by the party who employed the workman, to pay him, in money, a reasonable remuneration to be ascertained by a jury. To maintain an action for work and labour, the plaintiff must prove a performance of the work according to the terms of the contract; or if he has deviated from those terms, he must shew that the defendant acquiesced in such deviation. Contracts for services are of numerous varieties, being entered into either (1) by agents, (2) by builders, (3) by physicians, surgeons, &c., (4) by printers, (5) by surveyors, (6) by authors, (7) by attorneys, and so forth. And every such contract must comply with the general law regulating contracts, as explained under the title Contracts.

See title CONTRACTS.

SERVICE OF WRITS, &c. The service of writs, summonses, rules, &c., signifies the delivering or leaving them to or with the party to whom, or with whom, they ought to be delivered or left; and when they are so delivered they are then said to have been served. Usually a copy only is served, and the original is shewn. Usually also the service must be personal, but in cases of peculiarity substituted service may be made with the leave of the Court, or notice of the writ, &c., given in lieu of service thereof.

See titles NOTICE IN LIEU OF SERVICE; SUBSTITUTED SERVICE.

SERVICES FONCIERS. These are in French Law the easements of English Law. See title EASEMENTS.

SERVIENT TENEMENT. In the law of easements the tenement whose owner

SERVIENT TENEMENT—*continued.*

as such is subject to an easement enjoyed by an adjoining tenement, is called by this name.

See title EASEMENTS.

SERVITIUM LIBERUM. A sort of free or liberal service which certain feudatory tenants, called *liberi homines*, were bound to perform. And as these tenants themselves were different from vassals, so were their services of a more honourable nature; as to attend the lord's Court, to find a man and horse to go with the lord into the army, and such like (Cowel).

See title SERVICE.

SERVITIUM REGALE. Royal service, or the rights and prerogatives of manors belonging to the king as lord thereof. These rights were generally reckoned to be six; viz., (1), power of judicature in matters of property; (2), power of life and death in felonies and murders; (3), a right to waifs and strays; (4), a right to assessments; (5), the minting of money; and, (6), the assize of bread, beer, weights, and measures (Cowel).

See titles MANOR; SOC.

SERVITORS OF BILLS were messengers of the marshal of the King's Bench, and were usually sent to serve bills or writs to summon men to Court. They are the tipstaves (2 Hen. 4, c. 23; Cowel).

See title TIPSTAFF

SERVITUDE, in its original and popular sense, signifies the duty of service, or rather the condition of one who is liable to the performance of services. The word, however, in its legal sense, is applied figuratively to things. When the freedom of ownership in land is fettered or restricted, by reason of some person, other than the owner thereof, having some right therein, the land is said to serve such person; the restricted condition of the ownership, or the right which forms the subject-matter of the restriction, is termed a servitude; and the land so burdened with another's right is termed a servient tenement, while the land belonging to the person enjoying the right is called the dominant tenement. The word "servitude" may be said to have both a positive and a negative signification: in the former sense denoting the restrictive right belonging to the entitled party; in the latter, the restrictive duty entailed upon the proprietor or possessor of the servient land.

See titles EASEMENTS; SERVITUTES.

SERVITUTES. In Roman Law were the Easements and the Profits à Prendre of English Law. They were either *Prædial* or *Personal*; and the *Prædial* were sub-

SERVITUTES—*continued.*

divided into *Rural* (i.e., easements over land simply as land) and *Urban* (i.e., easements over houses, &c., or land built upon). The rural servitudes were *Iter, Actus, Via, Aquæductus*; the urban servitudes were ancient lights (*ne luminibus officiatur*), lateral support to houses from houses (*jus immittendi*), protection from rain-spouts of neighbouring house (*jus stillicidiæ*), &c. The personal servitudes are sometimes said to have been the *ususfructus, usus*, and *habitatio, sed quære*; because probably they were only the *profits à prendre*, which may exist in gross, i.e., in the person as apart from his property.

See titles EASEMENTS; PROFITS À PRENDRE.

SESSIONAL ORDERS. These are certain resolutions which are agreed to by both Houses at the commencement of every session of Parliament, and have relation to the business and convenience thereof; but they are not intended to continue in force beyond the session in which they are adopted. They are principally of use as directing the order of business.

SESSIONS. There are various kinds of sessions, viz., (1), Session of Parliament; (2), Session of Gaol Delivery; (3), Session of the Peace. (1.) *Session of Parliament* signifies merely the sitting of Parliament, in order to transact the business of the State. (2.) *Session of Gaol Delivery* is a session held for delivering a gaol of the prisoners therein confined. (3.) *Session of the Peace* is a Court of record, and is held before two or more justices of the peace, one of whom must be of the quorum. The jurisdiction of this Court, by stat. 34 Edw. 3, c. 1, extended to the trying and determining all felonies and trespasses whatsoever, although the later practice has been not to try any greater offence than small felonies. There are four sessions of the peace: (a.) *General sessions*, which may be held at any time of the year for the general execution of the authority of the justices; (b.) *The general quarter sessions*, which are held at four stated times in the year; (c.) *Petty sessions*, which are held by the justices periodically (usually weekly) for the transaction of smaller business between the intervals of the general sessions; and (d.) *A special or special petty session*, which may be holden on any special occasion for the execution of some particular branch of the authority of the justices (2 Hale, P. O. 42; Tomlins). There was also at one time a Great Session of Wales, which was a session or Court held in Wales twice in every year, similar to the assizes; this session, however, was abolished by the 1 Will. 4, c. 70, and the judges now

SESSIONS—continued.

go the circuits in Wales and Cheshire just as in the English counties.

See title **GENERAL SESSIONS**.

SESSIONS FOR WEIGHTS AND MEASURES. A session in London, which may be held before four justices, selected from the mayor, recorder, and aldermen (of which the mayor or recorder must be one), to inquire into the offences of selling by false weights and measures, contrary to the statutes, and to receive indictments, punish offenders, &c. (Cunningham).

SET. This word appears to be nearly synonymous with the word "lease." A lease of mines is frequently termed a "mining set."

SET-OFF. A demand which the defendant in an action sets up against the plaintiff's demand, so as to counterbalance that of the plaintiff, either altogether or in part. As if the plaintiff sues for ten pounds due on a note of hand, the defendant may set off nine pounds due to himself from the plaintiff, for merchandise sold to the plaintiff; and if he pleads such set-off in reduction of the plaintiff's claim, such plea is termed a plea of set-off. A set-off may therefore be defined to be a claim which a defendant has upon a plaintiff, and which he sets up or places against the plaintiff's demand. Under the Judicature Acts, a defendant may set-off even unliquidated damages by means of a counter-claim (Act 1873, s. 24, sub-s. 3; Order XIX. 3). Prior to that Act, the leading principles of set off were the following:—1st. At *Law*, there was no set-off in case of mutual unconnected debts, until the Statutes of Set-off, 2 Geo. 2, c. 22, and 8 Geo. 2, c. 24, permitted it in the case of the bankruptcy of either debtor; but as to connected accounts, the balance was in the general case recoverable at *Law*. 2ndly. In *Equity*, these Courts generally followed the rules of the Common Law in allowing or in refusing a set-off, but they allowed a set-off in the following further cases,—(a.) In the case of mutual independent debts, contracted upon the faith of a *mutual credit* (*Lanesborough v. Jones*, 1 P. Wms. 326); (b.) In the case of cross demands admitting a set-off at *Law*, but of which the one was of an equitable nature; and even (c.) In the case of cross demands arising in different rights, but in this last case only under circumstances of particularity, e.g., of fraud (*Ex parte Stephens*, 11 Ves. 24).

SETTING ASIDE. All judgments obtained by default may usually be set aside, upon terms, proper grounds to excuse the default being shewn (*Wall v. Barnett*,

SETTING ASIDE—continued.

8 Q. B. D. 183, 363); also, in any case of mistake, surprise, or accident, any judgment of non-suit may be set aside upon terms (Order XLI., 6).

SETTLED ACCOUNT: See title **ACCOUNT SETTLED**.

SETTLED ESTATES: See title **SETTLED ESTATES ACT, 1877**.

SETTLED ESTATES ACT, 1877. This is the stat. 40 & 41 Vict. c. 18, which came into force on the 1st of November, 1877, repealing and consolidating in one Act the prior imperfect enactments of a like kind, viz., 19 & 20 Vict. c. 120, and the Acts amending same. The Act of 1877 defines a "*settlement*" as any Act of Parliament, deed, agreement, copy of court roll, will, or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure or any estates or interests in any such hereditaments stand limited to or in trust for any persons by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively; and the Act defines "*settled estates*" as all hereditaments of any tenure, and all estates or interests in any such hereditaments, which are the subject of a settlement, including all estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor or descending to the heir of a testator.

See title **MINISTERIAL POWERS**.

SETTLEMENT, ACT OF. The stat. of 12 & 13 Will. 3, c. 2, by which the Crown was limited to the house of Hanover, and some new provisions were added for the better securing the religion, laws, and liberties of England. Omitting temporary provisions (since repealed), the principal provisions are:—

- (1.) That the sovereign shall be a member of the Established or National Church;
- (2.) That judges shall hold office *quamdiu se bene gesserint*; and
- (3.) That the Crown's pardon shall not be pleadable to an impeachment.

See titles **PLACE BILL**; **SUCCESSION TO CROWN, LAW OF**.

SETTLEMENT, DEED OF. A deed made for the purpose of settling property, i.e., arranging the mode and extent of the enjoyment thereof. The party who settles the property is called the settlor; and usually his wife and children, or his creditors, or his near relations, are the beneficiaries taking interests under the settlement. The settlement may be either a settlement of real estate or a settlement of personal estate.

SETTLEMENT OF PERSONAL ESTATE.

This is a settlement usually made upon marriage, either a marriage to follow, or one which has already taken place. It is a deed of trust; and usually the first trusts (after providing for the investment of the trust funds) relate to the destination of the income during the lives of husband and wife, and that of the survivor of them. When the property put into settlement is contributed by the husband, the first life interest is in general given to him; on the other hand, where the property is contributed by the wife, the first life interest is invariably given to her for her separate use with or without power of anticipation; but it is competent to the wife to allow the husband to receive the income without account. After the decease of both husband and wife, the ordinary trusts of the settlement are for the children or remoter issue of the marriage as the husband and wife or the survivor shall appoint; and in default of, or subject to, any such appointment, then in trust for the children equally, sons taking a vested, i.e., transmissible, share at twenty-one, daughters the like at twenty-one or marriage, whichever is the earlier event; and in case of a failure of children or remoter issue of the marriage living to attain a vested interest, the trust property is usually made to revert to the party who has contributed the same. The settlement usually contains special provisions regarding the maintenance, education, and advancement of the children of the marriage, and which provisions are usually applicable only when both parents are dead, while the children (or some of them) are still infants. Very generally, the settlement contains also a covenant to bring into settlement the after-acquired property of the wife (exceeding a certain value, which varies according to the wealth of the parties); and such a covenant is only operative during the coverture, and is on the wife's part only, being improper and suicidal on the part of the husband.

SETTLEMENT OF REAL ESTATE.

This is a deed of trust made in contemplation of marriage; but it differs from a settlement of personal estate in this respect, that the limitations of real estate may be made without the intervention of trustees, whereas trustees are indispensable in a settlement of personal estate.

A settlement of real estate may be either a strict settlement, as it is called, or one that is not strict. (1.) The settlement which is *not strict* is made where it is desired to settle the land in such a way as that the children shall take equally; and the proper mode of attaining that object is by conveying the land to trustees in trust

SETTLEMENT OF REAL ESTATE—continued.

for sale, such trust being made exerciseable during the lives of the tenants for life with their consent only, and afterwards at the sole discretion of the trustees, and the proceeds to arise from the sale are then settled as personal estate, with a proviso that until sale the rents and profits shall be paid and applied in the same manner as the income of the proceeds would be applicable if a sale had been already made. (2.) On the other hand, if the real estate (being an old family estate, or for any other reason) is to be settled *strictly*, the general form and contents of the settlement are as follows:—The first testatum contains a grant of the freehold property to the *general trustees* (grantees to uses) to the use of the settlor and his heirs until the marriage, and thereafter to the use of *pin-money trustees* for a term of ninety-nine years, and subject thereto to the use of the settlor for life, remainder to the use that the wife surviving her husband shall receive a jointure rent-charge during her life, and subject thereto to the use of *jointure trustees* for a term of 200 years, and subject thereto to the use of *portion trustees* for a term of 600 years, and subject thereto to the use of the first and other sons of the marriage successively in tail male, [with remainders to the use of the husband's younger brothers for life, and to their respective issues in tail male in succession, with remainder to the first and other sons of the intended husband in tail general, with the like remainder to his daughters in tail general, with remainder to the first and other sons of the husband's brother in tail general, with remainder to the first and other daughters of the same brothers in tail general], with remainder to the right heirs of the settlor. The limitations within the square brackets are often omitted, or are left to be subsequently settled by the remainderman in fee, or by the first tenant in tail. The settlement then goes on to declare the trusts of the several terms of ninety-nine years, 200 years, and 600 years being the terms created respectively to secure the wife's pin-money, the widow's jointure, and the younger children's portions. The settlement ought also to contain the following usual clauses;—

- (1.) Maintenance and education clause;
- (2.) Advancement clause;
- (3.) Provisions for the raising of portions;
- (4.) Provisions for the application of rents during minorities;
- (5.) Power for the husband to charge the premises with a gross sum, in general for his professional advancement;

SETTLEMENT OF REAL ESTATE—continued.

- (6.) Power for him to charge an additional rent-charge for his intended wife;
- (7.) Power for him to jointure any future wife, and to charge portions for his children by her;
- (8.) General powers of managing estate, according to its nature, by granting mining, agricultural, or other leases, subject to specified restrictions;
- (9.) Powers of sale and exchange;
- (10.) Powers of enfranchisement and partition;
- (11.) Provisions for the application of the moneys received upon any sale, exchange, enfranchisement, or partition;
- (12.) Power to general trustees to give receipts for such last-mentioned moneys; and
- (13.) Power of appointing new trustees;

Where the settled property comprises freeholds, copyholds, leaseholds, and heirlooms, or general personal estate, there is usually a separate testatum for each of these species of property; and the settlor gives the usual covenants on the part of a vendor, a settlement being in the nature of a purchase-deed.

See title *RE-SETTLEMENT*.

SETTLEMENT, POOR LAW. The right, depending on various circumstances, which entitles a pauper to be maintained by a particular locality, whether parish or union, is called his settlement. In the case of a married woman, her settlement follows that of her husband, assuming the marriage to have been legal (*Chinham v. Preston*, 1 W. Bl. 192); but if her husband has no settlement she retains her maiden settlement (*Rex v. St. Botolph*, Burr. S. C. 367). With reference to children (a), if legitimate, the place of their birth is *prima facie* the place of their settlement, such settlement continuing so long as the child remains a member of the family (*Rex v. Bleasby*, 3 B. & A. 377); and (b), if illegitimate, the mother's settlement is that of the child (4 & 5 Will. 4, c. 76, c. 71). Domestic servants used to acquire a settlement by one year's uninterrupted service in the same family, but such is not now the effect of service (4 & 5 Will. 4, c. 76, s. 64). Being an apprentice and inhabiting in any town or place makes that place the settlement of the child (3 W. & M. c. 11, s. 8; *St. Pancras v. Clapham*, 2 El. & El. 742). Also renting a tenement of the yearly value of £10 and paying poor rates for one year, confers a settlement, under 35 Geo. 3, c. 101, and 4 & 5 Will. 4, c. 76.

SETTLEMENT, POOR LAW—continued.

Also acquiring property at the purchase price of £30 or upwards, appears to confer a settlement in the place where the property is situated; but residence in the place seems to be also necessary.

See title *POOR*.

SEVEN BISHOPS, CASE OF: See title *BISHOPS, CASE OF THE SEVEN*.

SEVERAL COVENANT. A covenant by two or more persons severally, and not jointly, so that they are severally or separately bound by it. 5 Rep. 23.

See title *COVENANT*, sub-title *Joint and Several Covenants*.

SEVERAL DEMISES. Prior to the Common Law Procedure Acts, 1852–1860, it was necessary that the plaintiff in ejectment should make a demise, and that he should have the legal estate in him for that purpose. Wherefore in case of any doubt whether the legal estate was in A. or in B. or in C., it was usual in framing the declaration to insert a demise by each, and the declaration was then said to contain several demises. But now no demise at all is necessary to an action of ejectment.

See titles *EJECTMENT*; *SINGLE DEMISE IN EJECTMENT*.

SEVERAL FISHERY: See titles *FISHERY*; *RIVERS*.

SEVERAL INHERITANCE. An inheritance conveyed in such manner as to descend or come down to two or more persons severally, and not jointly, by moieties (*Cunningham*).

See title *CO-PARCEINERS*.

SEVERAL TAIL. An entail severally to two: as if land is given to two men and their wives and to the heirs of their bodies begotten; here the donees have a joint estate for their two lives, and yet they have a several inheritance, because the issue of the one shall have his moiety, and the issue of the other the other moiety (*Cowel*).

See title *ESTATE TAIL JOINT*.

SEVERALTY. A person is said to hold lands in severalty when he is the sole tenant thereof, and holds them in his own right only, without any other person being joined or connected with him in point of interest during his estate therein.

See title *JOINT TENANCY*.

SEVERANCE. Singling, dividing, disjoining. Thus, in pleading, when there are several defendants in an action they may either all plead jointly one and the same defence, or each defendant may plead a separate defence for himself if he thinks such a course preferable; in which

SEVERANCE—continued.

latter case he is said to "sever," and the subject generally is termed "severance in pleading." When, however, defendants have once united in the plea—that is, have pleaded a joint defence, they cannot afterwards sever at the rejoinder, or any other later stage of the pleadings. The word "severance" is also used to signify the cutting of the crops, such as corn, grass, &c. (F. N. B. 78; Steph. Pl. 285, 4th ed.; 4 B. & C. 764). And in connection with fixtures, being trade or tenant's fixtures, the tenant must have made a *severance* thereof from the land or house before the end of his term, if he means to remove them (Brown on Fixtures, 3rd ed.).

SEWERS, COMMISSIONERS OF. The Commissioners of Sewers were a temporary tribunal erected by virtue of a commission under the great seal. Their jurisdiction extended to overlooking the repairs of sea-banks and sea-walls, and the cleansing of rivers, public streams, ditches, and other conduits, whereby any waters are carried off; and it was confined to such county or particular district as the commission expressly named.

See title METROPOLITAN SEWERS.

SEXUAL RELATION. Being that of husband and wife, or of persons otherwise cohabiting together as such, is a relationship recognised in law,—as regards the liability of the male upon contracts, and as regards the probability of the female's testimony being more or less affected as regards its veracity (Best on Evidence).

SHACK: See title PASTURE, COMMON OF.

SHARE-CERTIFICATES. Upon an application for shares, stocks, or debentures, upon payment of the amount due on allotment, a provisional certificate is in general issued to the applicant-allottee, and this certificate (which is called a scrip certificate, and bears a penny stamp) is afterwards, upon completion of the payments, exchanged for a definitive certificate that the holder is the owner of the therein specified shares, stocks, or debentures. A scrip certificate is a negotiable instrument (*Rumball v. Metropolitan Bank*, 2 Q. B. Div. 194). A share certificate bears no stamp; it is transferred (or the share which it represents is transferred) by the prescribed instrument of transfer, which (except in public companies) is not necessarily a deed.

SHARE-WARRANTS. The Companies Act, 1867 (30 & 31 Vict. c. 131), ss. 27–33, provides, in the case of a company limited by shares, for the issue of share-warrants with respect to shares fully paid up, or with respect to stock; and these warrants entitle the bearer to the shares or stock

SHARE-WARRANTS—continued.

specified in them, and such shares or stock may be transferred by delivery of the share-warrant. The share-warrant must be under the seal of the company, and it bears a stamp duty equal to three times the *ad valorem* duty upon an ordinary transfer of shares. The holder of a share-warrant cannot usually vote, excepting upon compliance with certain regulations designed to exclude personation.

See titles SHARES; STOCKS.

SHARES. The shares in public and in joint-stock companies are (in effect) the capital of the company, and are almost invariably personal estate. Where they are not fully paid up, the liability for calls upon them remains until the full amount is paid up; and when they are fully paid up, that liability ceases, and they may be converted (in the case of joint-stock companies) under s. 12 of the Companies Act, 1862 (25 & 26 Vict. c. 89), into stock of the company. Such a company may also consolidate its capital into shares of larger amount than its existing shares (Companies Act, 1862), or may divide its capital or any part thereof into shares of smaller amount than the original amount thereof (Companies Act, 1867, s. 21). Under the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), public companies have the like power of converting paid up shares into stock of the company (s. 61). As regards the mode of transfer of shares and stocks, and the rights incidental to the ownership thereof respectively, there appears to be no material difference; but shares (unless fully paid up) carry a continuing liability with them.

SHARES, TRANSFER OF: See title SHARE-CERTIFICATES.

SHELLEY'S CASE, RULE IN. Is a rule of law which says—that when the ancestor by any deed or will takes an estate of freehold to begin with, and lower down in the same deed or will the same lands are limited to his heirs or to the heirs of his body, the words "heirs," or "heirs of the body," are words of limitation of the estate of the ancestor, and not words vesting any estate by purchase in the heirs or in the heirs of the body. For the application of this rule, both limitations must be of the same quality, i.e., either both legal or both equitable. A somewhat analogous rule applies in the case of personal property limited to A. B. for life, and after his death to his executors, administrators, and assigns, the rule giving to A. B. the whole and absolute interest.

SHERIFF. A sheriff is the principal officer in every county, and has the trans-

SHERIFF—continued.

acting of the public business of the county. He is an officer of great antiquity, and was also called the shire-reve, reve, or bailiff. He is called in Latin *vicecomes*, as being the deputy of the earl or comes. to whom the custody of the shire was committed at the first division of the kingdom into counties. But the earls in process of time, on account of their high employments and attendance on the king's person, not being able to transact the business of the county, were relieved of that burden, reserving to themselves the honour, but the labour was laid on the sheriff, who now, therefore, does all the king's business in the county. The office of sheriff lasts for one year, and his duties, which are very numerous and important, are commonly performed by his deputy, called an under-sheriff. The duties principally consist in executing writs, precepts, warrants from justices of the peace for the apprehension of offenders, &c. He also acted as judge in the County Court (or Sheriff's Court, as it was called), where actions were brought for the recovery of sums under £20; and to the present day the City of London Court, which is a County Court, is the same as the old Sheriff's Court. But by recent statutes a new organization of County Courts has been provided, which has little or no connection with the sheriff, a special officer (called the County Court Judge) presiding over each County Court.

Under the stat. 28 Edw. 1, st. 3, c. 8, the election of the sheriffs of the county belonged to the freeholders of the county assembled in the County Court; but by the subsequent statute, 9 Edw. 2, st. 2, the right of election was vested in (perhaps restored to) the Crown, who made the election through its chancellor, justices, &c. By the statute 14 Edw. 3, st. 1, c. 7, it was enacted that the sheriffs of every county should be annually re-elected at the Exchequer; and the practice at the present day is regulated by the last-mentioned Act, and by the stat. 3 & 4 Will. 4, c. 99, ss. 3-6.

See title PRICKING FOR SHERIFFS.

SHERIFF'S COURT. The Court held before the sheriff's deputy—that is, the under-sheriff, and wherein writs of inquiry as to damages are proceeded with, &c. The Sheriff's Court for the county of Middlesex is that in which damages are assessed upon interlocutory judgments given in trials at Westminster.

See title ENQUIRY, WRIT OF.

SHERIFF'S TOUR. This tourn, or rotation, was a Court of record, held twice every year before the sheriff in different parts of the county, being indeed only the

SHERIFF'S TOUR—continued.

turn of the sheriff to keep a Court Leet in each respective hundred (4 Inst. 259; 2 Hawk. P. C. 55).

See title COURT LEET.

SHEW CAUSE, RULE TO: See title RULE.

SHIFTING CLAUSE: See title NAME AND ARMS CLAUSE.

SHIFTING USE. Where lands are given to the use of A. until a certain event, and upon that event they are given to the use of B., if A.'s estate is regarded as shifting into B. upon the event happening, the use is called a *shifting* use; on the other hand, if the use to B. is regarded as arising and determining A.'s estate, it is called a *springing* use.

See title USES.

SHIPMASTER. The person in command of a merchant vessel, appointed by the ship-owner, and whose acts in the management of the vessel render both himself (usually) and also the shipowner liable to passengers and shippers of goods.

SHIP-MONEY. An ancient imposition, which, after having lain dormant for many years, was attempted to be revived by King Charles I., in 1635 and 1636, and his attempt to revive which was adjudged legal in the great *Case of Ship-money* (3 St. Tr. 825). It consisted of a tax levied on all the ports, towns, cities, boroughs, and counties of the realm for providing and fitting out ships of war for the king's service (Cowel; 17 Car. 1, c. 14). The tax was subsequently resolved in Parliament to be illegal, or, at all events, unconstitutional.

SHIP-MONEY, CASE OF: See title SHIP-MONEY.

SHIPOWNER. The owner of a merchant vessel, who usually appoints a master to navigate it. Regarding his liability,

See titles BOTTOMRY; CARGO; COLLISIONS; LIMITATION OF LIABILITY; PILOTAGE; SEAWORTHINESS, &c.

SHIPPING. In the Merchant Shipping Act. 1854 (17 & 18 Vict. c. 104), numerous provisions are contained regarding the entire subject of merchant shipping, including their registration, building, tonnage, ownership, and national character; also, regarding the seamen on board of them and their masters and commanders; also, regarding ship-brokers and ship-agents, pilots, &c.; also, regarding the sale or transfer and mortgage of merchant vessels, and regarding freight, charter-parties, demurrage, salvage, towage, collisions, &c. (See generally Kay on Shipmasters; also, the various titles above specified).

SHIPS, ENGLISH AND FOREIGN. No ship is a British ship unless she belongs wholly to natural born (or naturalised) British subjects (Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104); but corporations established under and subject to the laws of the United Kingdom and having their principal place of business therein, may be owners. All other vessels are deemed foreign.

SHIPS, OWNERSHIP OF. In English ships, this ownership is divided into sixty-four shares; and not more than thirty-two individuals may be the legal registered owners of any one ship; but any number of individuals, not exceeding five, may be registered as one joint-owner; no trusts are entered on the register (25 & 26 Vict. c. 63, s. 3).

SHIPS, SALE AND MORTGAGE OF. A registered ship or share therein is transferred by bill of sale duly registered, the transferee being qualified to become owner of a British ship. A registered ship may be mortgaged in the form (or in a form like to the form) in that behalf prescribed by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 66; and every mortgage is to be registered, and the registration imports a power of absolute sale; when the mortgage is paid off, a memorandum of satisfaction is entered in the register, and upon such entry the legal ownership reverts in the mortgagor.

SHIPS OF WAR: See title EXTRA-TERRITORIALITY.

SHIRE-MOTE. The assize of the shire, or the assembly of the people, was so called by the Saxons. It was nearly, if not exactly, the same as the *Scyr-gemote*, and in most respects corresponded with what were afterwards called the County Courts.

See title FOLK-MOTE.

SHIRLEY v. FAGG: See title HOUSE OF LORDS, JURISDICTION OF.

SHIRLEY'S CASE. A case in 1603, in which freedom from arrest as one of the privileges of parliament was asserted, with comparative success. The next year saw the legislative recognition of that privilege.

See titles ARREST, FREEDOM FROM; PRIVILEGE OF PARLIAMENT.

SHOOTING. Is a criminal offence. Shooting with intent to murder is a felony punishable like murder itself (24 & 25 Vict. c. 100, s. 14). Shooting with intent to maim, disfigure, &c., is also a felony punishable like murder (24 & 25 Vict. c. 100, s. 18). Shooting at revenue-vessels or at revenue-officers, &c., is a felony and

SHOOTING—continued.

punishable like murder (16 & 17 Vict. c. 107, s. 249).

SHOOTINGS. The right of shooting on or over lands, commonly called the shootings, is a hereditament which may be excepted (e.g., to the lord of the manor upon an inclosure of commons) (*Musgrave v. Forster*, L. R. 6 Q. B. 590); and may be demised apart from the land or from the copse or timber thereon (*Gearns v. Baker*, L. R. 10 Ch. App. 855).

See title GAME.

SHORT CAUSE. Is a cause which is not likely to occupy a great portion of the time of the Court, and which may be entered in the list of "short causes," set apart for the purpose, upon the application of one of the parties and a certificate of his counsel that the cause is a proper one to be heard as a "short cause." Such causes are very common in the Chancery Division. If both or all parties consent to the speedy decision of the suit, the cause is heard as a "consent cause;" but if one refuses to consent, and throws obstacles in the way of its speedy decision, it may nevertheless, if from its nature it is a proper case to be heard as a short cause, be so heard by its entry as a "short cause" (11 Sim. 51; 2 Keen, 671; 1 Keen, 464; 2 M. & C. 452; 1 Dan. Ch. Pr. 800).

SHORT-HAND WRITER'S NOTES. These notes of the evidence taken *vide voce* at the trial of an action, are usually looked at by the Court of Appeal upon the judgment or verdict coming before that Court upon appeal or upon motion for a new trial; and for facility of reference, these notes are usually printed from day to day. The cost of taking and of printing them may be allowed by the Court, but a special order for that purpose is required (4 Ch. Div. 24; 9 Ch. Div. 483; 10 Ch. Div. 307).

SI FECERIT TE SECURUM. Was an original writ (so called from the words of the writ), which directed the sheriff to cause the defendant to appear in Court without any option given him, "*provided the plaintiff gave the sheriff security*" effectually to prosecute his claim.

SIC UTERE TUO UT ALIENUM NE LÆDAS. Means literally, so use your own property, as not to injure another person's property; or more accurately, use and enjoy your own, provided that, or so long as that, or so far as you do not injure another's property. This maxim is the only limitation upon the enjoyment of a tenant in fee simple; but the limitation (e.g., in the case of mines), occasionally

**SIC UTERE TUO UT ALIENUM NE
LÆDAS**—*continued.*

amounts to an entire denial of the right of enjoyment.

See title MINES AND MINERALS.

SIDE-BAR RULE: *See title RULE.*

SIDESMEN. Were called also synodsmen, and were originally persons whom, in the ancient episcopal synods, the bishops summoned out of each parish to give information of the disorders of the clergy and people. These in the process of time became standing officers, under the title of sidesmen, synodsmen, or questmen. The whole of their duties seem now to have devolved by custom upon the churchwardens of a parish (Cripps' Laws of the Church and Clergy, 180).

See title CHURCHWARDENS.

SIGNATURE. Is the usual mode (or part of the usual mode) of signifying a party's being bound by a written instrument.

See title SEALS.

SIGNIFICAVIT. Was that clause in certain writs which stated that a certain judge or other competent person had "signified" to the king that he against whom the writ was issued was "manifestly contumacious," that is, was in flagrant disobedience to an order of the Court; wherefore the writs containing this clause were sometimes termed "*significavit*" (*Rex v. Ricketts*, 6 Ad. & E. 567).

See title EXCOMMUNICATO CAPIENDO, WRIT OF.

SIGNING JUDGMENT. Is the act of entering judgment in an action; or speaking more accurately, it is this,—when either party to the action is entitled by the rules of practice to sign judgment (*e.g.*, for default of appearance or of pleading in certain cases), he obtains the signature of the proper officer of the Court, expressing or acknowledging generally that judgment is given in his favour, and this is called signing judgment, and stands in the place of the actual delivery thereof by the judges themselves; and sometimes the officer only grants his permission to sign; for it has been stated that the signing of the judgment is but the leave of the master of the office for the solicitor to enter the judgment for his client (Style's Prac. Reg. title "Judgment;" Steph. Pl. 122, 5th ed.).

SIGN MANUAL. The signature or subscription of the sovereign is termed his sign manual. There is this difference between what the sovereign does under the sign manual and what he or she does under the great seal, viz., that the former is done as a personal act of the sovereign, the latter as an act of state.

See titles GREAT SEAL; PRIVY SEAL.

SILENCE: *See title QUI TACET, &c.*

SILK GOWN. Is the professional robe worn by those barristers who have been appointed of the number of Her Majesty's counsel, and is the distinctive badge of Queen's counsel, as the stuff gown is of the "juniors" who have not attained that dignity. Accordingly, when a barrister is raised to the degree of Queen's counsel, he is said to have "got a silk gown." The right to confer this dignity resides with the Lord Chancellor, who disposes of this branch of his patronage according to the talents, the practice, the seniority, and the general merits of the applicant.

See title STUFF GOWN.

SIMILITER. That set form of words used by the plaintiff or defendant in an action by which he signified his acceptance of the issue tendered by his opponent, was so called. When simply added to the adversary's pleading, containing the tender of issue, it was in the following form: "And the plaintiff [*or defendant, as the case might be*] doth the like." When instead of being simply added to the pleading as above explained, it was delivered to the opposite party as a separate instrument, it then ran in the following form: "And the plaintiff, as to the plea of the defendant by him above pleaded; and whereof he hath put himself upon the country, doth the like;" in which latter case it was called a "*special similiter*." The use of the *similiter* was only applicable to issues of fact which were triable by the country (*i.e.*, a jury). The resort to a jury in ancient times could in general be had only by the mutual consent of each party; and it appears to have been with the object of expressing such consent, that the *similiter* was in those times added in drawing up the record; and from the record it afterwards found its way into the written pleadings. Accordingly, no *similiter* or other acceptance of issue was ever necessary, when recourse was had to any of the other modes of trial (Steph. Pl. 265, 266, 4th ed.). By the C. L. P. Act, 1852, s. 79, the *similiter* ceased to be necessary.

SIMONY. The corrupt presentation of any one to an ecclesiastical benefice. It is said to be called "Simony" from the resemblance it bears to the sin of Simon Magus (3 Inst. 156). As to what amounts to a corrupt presentation within the intent of the Law, it must be made for money or for money's worth, directly or indirectly agreed to be paid (*Fox v. Bishop of Chester*, Tud. L. C. Conv. 190; and stats. 12 Anne, st. 2, c. 12, and 3 & 4 Vict. c. 113); also, generally, the living must be full at the time of the sale, in order that the sale of the presentation may be free from corrup-

SIMONY—*continued.*

tion; and bonds of resignation are subjected to restraint by the stat. 9 Geo. 4, c. 94, which requires them to be made only in favour of some one specified individual (being or not a stranger in blood to the patron), or either of two specified individuals (being each of them by blood or marriage an uncle, son, grandson, brother, nephew, or grandnephew, of the patron or of one of the patrons beneficially entitled to the living, or of his wife).

See titles **NEXT PRESENTATION**; **RESIGNATION BOND**.

SIMPLE CONTRACT. The word "simple," as applied to contracts, is used in contradistinction to contracts under seal. The former species of contract are called *simple*, because they subsist by reason simply of the agreement of the parties; and the latter species are called *special*, being in writing and sealed with the seal of the party in testimony of his solemn and special assent to the subject-matter of the contract.

See title **CONTRACT**.

SIMPLE HOMAGE : *See* title **HOMAGE**.

SIMPLE LARCENY : *See* title **LARCENY**.

SIMPLICITER. Simply, directly, immediately, absolutely, or without any circumstances of qualification.

SINECURE. When the rector of a parish neither resided nor performed duty at his benefice, but had a vicar under him endowed and charged with the cure thereof, this was termed a "sinecure." And when a church had fallen down, and the parish became destitute of parishioners, it was said to have become a sinecure (Wood's Inst. 153). But as regards sinecure rectories, it is now provided by the stat. 3 & 4 Vict. c. 113, that all such as have a vicar endowed or a perpetual curate shall upon the next vacancy be suppressed, and the tithes, &c., annexed to the vicarage which shall thereupon become a rectory with cure of souls. The Ecclesiastical Commissioners may or not intervene for the purchase of the patronage, as a step (when such step is necessary) to the suppression of the sinecure.

SINE DIE. When judgment was given for the defendant in an action, the phrase "*eat inde sine die*" (let him go thereof without day) meant that he was discharged or dismissed out of Court.

See title **EAT INDE SINE DIE**.

SINGLE BOND. A bond is called single when there is no condition added to it.

See title **BOND**.

SINGLE DEMISE IN EJECTMENT. A declaration in ejectment might have con-

SINGLE DEMISE IN EJECTMENT—*continued.*

tained either one or several demises; when it contained only one, it was said to be a declaration with a single demise.

See titles **EJECTMENT**; **SEPARATE DEMISE IN EJECTMENT**; **SEVERAL DEMISES**.

SITTINGS. The High Court of Justice and the Court of Appeal sit for the administration of justice during four periods in every year, that is to say, during the Michaelmas Sittings (2nd of November to 21st of December), the Hilary Sittings (11th of January to Wednesday before Easter), Easter Sittings (Tuesday after Easter week to Friday before Whitsunday), and Trinity Sittings (Tuesday after Whitsun week to 8th of August). And the division of the legal year into Terms has been abolished (Judicature Act, 1873, s. 26; Order LXI., 1).

See titles **BANC**, **SITTING IN**; **NISI PRIUS**; **TERMS**.

SITTINGS AT NISI PRIUS : *See* title **NISI PRIUS**.

SITTINGS IN BANC : *See* title **BANC**, **SITTINGS IN**.

SIX ACTS, THE. The Acts passed in 1819, for the pacification of the country, are so called. They in effect prohibited the training of persons to arms; authorized general searches and seizure of arms; prohibited meetings of more than fifty persons for the discussion of public grievances; repressed with heavy penalties and confiscation seditious and blasphemous libels; and checked pamphleteering by extending the newspaper stamp duty to political pamphlets.

See title **PRESS, LIBERTY OF**.

SIX CLERKS. Officers belonging to the old Court of Chancery, whose duties consisted in receiving and filing all bills, answers, replications, and other records in all causes on the Equity side of the Court of Chancery. They signed all copies of pleadings made by the *sworn clerks* and *waiting clerks*, after seeing that the originals were regularly filed. They examined and signed docquets of decrees and dismissals prepared for enrolment, and saw that the records and orders were duly filed and entered, &c. They had the care of all records in their office, which remained in their studies for six terms, for the sworn clerks and waiting clerks to resort to without fee, &c. (Smith, Ch. Pr. 25). They were abolished by the stat. 5 & 6 Vict. c. 103; and the clerks of records and writs now perform nearly all such duties as used to be performed by the six clerks, sworn clerks, or waiting clerks as officers of the

SIX CLERKS—continued.

Chancery Division in relation to the filing, copying, and amending of all writs and records; and in relation to the entrance of appearances, consents, &c.; the certifying of appearances, the custody of exhibits, the enrolment of decrees, and other such like proceedings. And the taxing-masters of the Chancery Division now perform the remainder of such duties.

See titles RECORDS AND WRITS CLERKS; TAXING-MASTERS.

SIX CONVEYANCING COUNSEL: See title CONVEYANCING COUNSEL.

SKINNER v. EAST INDIA COMPANY: See title HOUSE OF LORDS, JURISDICTION OF.

SLANDER. The malicious defamation of a man with respect to his character, or his trade, profession, or occupation, by word of mouth; the same as a libel is by writing or other significant characters (3 Chitty's Bl. 123, and Starkie on Libel and Slander). Unless where the words (1) are spoken of a person in respect of his trade, profession, or occupation, or (2) impute to him the commission of an indictable offence, or (3) charge him with having a contagious disease (e.g., itch) likely to exclude him from society, it is necessary to prove special damage, and also to allege the same in the statement of claim. Thus, it is not actionable *per se* to impute unchastity to a virtuous married woman, but special damage must be shewn; and yet to say of a whore, within the City of London, that she is a whore, is *per se* actionable; only in that case, *semble*, as certainly in all other cases, the truth of the slander would be a defence to the action (Addison on Torts, 3rd ed., by Wolferstan, 808).

See titles LIBEL; PRIVILEGED COMMUNICATION.

SLANDER OF TITLE. This is a statement of something tending to cut down the extent of title to some estate vested in the plaintiff. Such statement, in order to be actionable, must be false and malicious, i.e., both untrue and done on purpose to injure the plaintiff (*Pater v. Baker*, 3 C. B. 831, 868, 869, *per* Maule, J.; *Steward v. Young*, L. R. 5 C. P. 122, *per* Byles, J.; and *Brook v. Rawl*, 4 Exch. 521). Further, damage, *semble*, must also have resulted from the statement according to the general rule in cases of Slander.

SLAUGHTER-HOUSES. These, so far as regards the metropolis, are now principally regulated by the stat. 25 & 26 Vict. c. 102 (ss. 93, 94), and 37 & 38 Vict. c. 67, the latter statute also preventing the establishment of new slaughter-houses within the area of the metropolis (as defined by the Metropolis Management Act, 1855), with-

SLAUGHTER-HOUSES—continued.

out the sanction of the Local Authority. Outside of the metropolis the regulation of slaughter-houses seems to be within the general provisions of the Sanitary Acts or Public Health Acts; but there is also the stat. 12 & 13 Vict. c. 92, which aims at preventing unnecessary cruelty towards cattle to be slaughtered or being slaughtered.

See titles HEALTH, PUBLIC; SANITARY LAWS.

SLAVERY: See title SOMERSETT'S CASE.

SLAVE-TRADE. Is a piracy as between such nations (and their subjects) as by their laws prohibit it; but it is not piracy in the case of the subjects of a nation whose laws do not prohibit it (*The Amedie*, 1 Acton, 240; *The Louis*, 2 Doda. 210). The English Law (by stat. 5 Geo. 4, c. 113) made the slave-trade piracy in 1825.

SLEEPING RENT. An expression frequently used in coal mine leases and agreements for same. It signifies a fixed or dead, i.e., certain, rent as distinguished from a rent or royalty varying with the amount of coals gotten (*Jones v. Shears*, 6 M. & W. 429), and is payable although the mine should not be worked at all, but should be sleeping or dead; whence the rent is called a sleeping or dead or certain rent.

See titles DEAD RENT; ROYALTIES.

SLIP. Is that part of a police-court which is divided off from the other parts of the court for the prisoner, or party charged with any offence, to stand in. It is also called the dock.

SMALL DEBTS COURTS. Are such Courts as the various County Courts, and (for the City of London) the Sheriff's Court.

See titles CITY OF LONDON; COUNTY COURTS.

SMUGGLING. Importing goods which are liable to duty and evading payment of the duty, or trying to. Such goods may be seized, and the vessel forfeited; and every person on board such vessel is liable to a penalty of £100. The price of smuggled goods cannot be recovered in an action (*Thomson v. Thomson*, 7 Ves. 493).

See titles CUSTOMS; EXCISE.

SOC. Power or liberty of jurisdiction, whence the word *soca*, signifying a seigniorie enfranchised by the king with liberty of holding a court of sokmen or socagers, i.e., tenants, whose tenure is said by some to have been thence called socage (*Bract. lib. 3, tract 2*; Cowel).

See title SERVITUM REGALE.

SOCAGE. Socage tenure is the holding of lands in consideration of certain services of husbandry to be performed by the tenant to the lord of the fee. Socage in its most general and extensive signification denotes a tenure by any *certain and determinate* service; and in this sense it is constantly put in opposition to tenure by chivalry or knight service, where the render was precarious and uncertain. Socage is of two sorts—*free socage*, where the services are not only certain but honourable; and *villein socage*, where the services, though certain, are of a baser nature. Such as hold by the former tenure are also called in Glanvil and other authors by the names of *liberi sokemanni*, or tenants in free socage (Cowel; Bract. lib. 2, c. 35). By the stat. 12 Car. 2, c. 24, all the tenures by knight service were, with one or two immaterial exceptions, converted into free and common socage.

See title FEUDAL SYSTEM.

SOCAGERS. These, who were called also *Socmans*, *Sokemans*, or *Socmen*, were tenants who held their lands by socage tenure. The *ceorles*, or husbandmen, among our Saxon ancestors were of two sorts, one that hired at a rent the lord's out-land or tenementary land like farmers, and the other that tilled or manured his in-land or demesnes (yielding work, not rent), and were, therefore, called *soc-men* or *ploughmen*. But after the Conquest, the proper *sokemanni*, or *sokemanni*, were those tenants who held by no servile tenure, but commonly paid their rent as a *soke*, or sign of freedom, to the lord, though they were sometimes obliged to perform customary duties for the service and honour of their lord (Cowel; *Les Termes de la Ley*).

See title SOCAGE.

SOCIETAS. In Roman Law is the partnership of English Law, and admitted of as many (and even more) varieties of internal arrangement. One species, called the *Leonina Societas*, alone was illegal. Each partner was required to shew only reasonable diligence, and was therefore not liable to his co-partners excepting for *crassa negligentia*.

SOCIÉTÉ. In French Law is the *societas* of Roman Law and the *partnership* of English Law. Every *société* is either

- (1.) *Universelle*, being either
 - (a.) Of all present property; or,
 - (b.) Of all future gains; or,
- (2.) *Particulière*, being a particular contract for one definite enterprise.

A *société en commandite* appears to be one in which some of the partners are the sole acting partners, and others are dormant partners, the former being liable to an unlimited extent like partners generally, and the latter being liable to the extent

SOCIÉTÉ—continued.

only of their share in the capital, and being, therefore, rather like people lending money to the firm, upon an agreement to receive a share of the profits as and for interest on the capital lent.

See title BOVILL'S ACT.

Generally, the modes and consequences of a dissolution of a *société* are the same as for that of a partnership in English Law.

See titles PARTNERSHIP; SOCIETAS.

SODOMY. The crime of having unnatural intercourse with a male human being, or, *semble*, a female person; or with a brute animal. In his 3rd Institute, Lord Coke describes this offence as high treason (*crime de majesté*) against the King of Heaven (*vers le Roy Celeste*).

See title BUGGERY.

SOIL. Soil in law denotes the land, together with whatever is in it, under it, or upon or above it. In a narrower sense, the soil is the land without the minerals. And again, the soil is sometimes distinguished from the herbage or vesture of the land. Soil is the *solum* referred to in the maxim *cujus est solum, ejus est usque ad cælum et deinde usque ad centrum*.

See title SUPERFICIES.

SOLATIUM: See title SEDUCTION.

SOLE CORPORATION: See title CORPORATION, SOLE.

SOLE TENANT. He who holds lands in his own right without any other being joined (Kitchin, 134; Cowel).

SOLEMN AFFIRMATION: See title DECLARATIONS, STATUTORY.

SOLICITOR. The words "solicitor" and "attorney" are commonly used indiscriminately, although they used not to be precisely the same, an attorney being a practitioner in the Courts of Common Law, a solicitor a practitioner in the Courts of Equity. Most attorneys, however, used to take out a certificate to practise in the Courts of Chancery, and therefore became solicitors also; and, on the other hand, most, if not all, solicitors used to take out a certificate to practise in the Courts of Common Law, and therefore became attorneys also; and hence it was that the two words were commonly used as synonyms. And now, under the Judicature Act, 1873, the common appellation or description of "Solicitor to the Supreme Court" applies both to solicitors and to attorneys.

SOLICITOR AND CLIENT. This relation is fiduciary on the part of the solicitor, who cannot, therefore (pending the relation), accept any gift whatsoever from his client, and cannot usually purchase from him (*Tomson v. Judge*, 3 Drew.

SOLICITOR AND CLIENT—*continued.*

306); but the solicitor is of course entitled to charge fairly for his professional services, and may (subject to taxation) enter into an agreement to receive a lump sum for his future costs (33 & 34 Vict. c. 28), and may also agree his past costs subject or not to taxation. The Common Law gives him a lien on the papers of his client being in his possession; and upon delivering a signed bill (*i.e.*, statement) of his costs, he is entitled after one month, failing sooner payment thereof, to commence an action for the recovery thereof. The statute Law (23 & 24 Vict. c. 127, s. 28) also gives him a lien for his costs of action upon any property recovered or preserved in such action by his instrumentality.

SOLICITOR-GENERAL. Is a legal officer of the Government, and takes rank next after the Attorney-General, and during the illness or absence of the latter supplies his place in all *ex officio*—legal matters.

See title ATTORNEY-GENERAL.

SOLICITORS, ACTS CONCERNING. The principal statutes concerning solicitors are the following:—

6 & 7 Vict. c. 73 (the General Act), relating to the entry into, and conduct and rights and liabilities in, the profession;

23 & 24 Vict. c. 127 (Solicitors Act, 1860);

33 & 34 Vict. c. 28 (Solicitors Act, 1870); and

38 & 39 Vict. c. 79 (Solicitors Act, 1875).

All these last-mentioned Acts containing special provisions as to costs.

See titles COSTS; SOLICITORS ACT, 1843; SOLICITOR'S LIEN.

SOLICITOR'S BILL OF COSTS: See title COSTS, SOLICITORS ACT, 1843.

SOLICITOR'S COSTS ACT: See title COSTS, SOLICITORS ACT, 1843.

SOLICITOR'S LIEN. Is either at Common Law upon the papers and documents of the client which are in the possession of the solicitor, and in that case is a passive lien only; or is by stat. (23 & 24 Vict. c. 127) upon a fund or other property recovered through his instrumentality in an action, and in that case is an active lien; but the last-mentioned lien arises only upon the Court declaring same, which declaration is to be applied for by petition. The lien of the solicitor in either case is commensurate with the client's interests; and just as the solicitor's lien will not prejudice any prior existing equity, so it will not be prejudiced by any equity arising subsequently to the inchoation of the lien (*Ex parte Cleland*, L. R. 2 Ch. App. 808;

SOLICITOR'S LIEN—*continued.*

but see *Pringle v. Gloag*, 10 Ch. Div. 676).

See title LIEN.

SOLUM ITALICUM: See title SOLUM PROVINCIALE.

SOLUM PROVINCIALE. In Roman Law, the *solum italicum* (an extension of the old *Ager Romanus*) admitted full ownership, and of the application to it of *usucapio*; whereas the *solum provinciale* (an extension of the old *Ager Publicus*) admitted of a possessory title only, and of *longi temporis possessio* only. Justinian abolished all distinctions between the two, sinking the *italicum* to the level of the *provinciale*.

SOLUS DEUS HEREDEM. In English Law, it is a common maxim that only God can make the heir-at-law of a deceased person, and that man can make the devisee only. The maxim means, that circumstances not entirely within the control of a person concur in constituting his heir-at-law at the date of his death.

SOLVIT AD DIEM, PLEA OF. A plea pleaded by a defendant in an action of debt, or bond, &c., to the effect that the money was paid at the day limited or appointed.

See title TIME OF THE ESSENCE OF CONTRACTS.

SOMERSETT'S CASE. Was a celebrated case decided in 1771–72, by the Court of King's Bench, and affirming the extinction of villenage slavery in England, and that no new slavery had been, or could be, introduced into England; and that a slave touching English soil cannot afterwards be sent out of the country against his will, or otherwise than (like freeborn persons) by due course of law.

See titles HABEAS CORPUS; VILLENAGE.

SON ASSAULT DEMESNE, PLEA OF. A plea which occurs in the actions of trespass and trespass on the case, by which the defendant alleges that it was the plaintiff's own original assault that occasioned the trespass for which he has brought the action, and that what the defendant did was merely in his own defence (*Steph. Pl.* 186, 187).

See title SE DEFENDENDO, PLEA OF.

SOUGH. A drain or watercourse. The channels or watercourses used for the purpose of draining mines are so termed; and those mines which are near to and lie within the same level, and are benefited by any given sough, are technically said to lie within the title of that sough (*Arkwright v. Gell*, 5 M. & W. 228, *per Abinger*, L.C.B.).

SOUND IN DAMAGES. An action is technically said to sound in damages when it is brought, not for the specific recovery of lands or goods but for the recovery of damages only, as in actions of covenant, trespass, &c. (Steph. Pl. 116).

SOVEREIGN STATES. Are states whose subjects are in the habit of obedience to them and which are not themselves subject to any other (or paramount) state in any respect. The state is said to be semi-sovereign only, and not sovereign, when in any respect or respects it is liable to be controlled (like certain of the states in India) by a paramount government (e.g., by the British Empire).

SPEAKER OF THE COMMONS. The term "Speaker," as used in reference to either of the Houses of Parliament, signifies the functionary acting as chairman. In the Commons, his duties are to put questions, to preserve order, and to see that the privileges of the House are not infringed; and in the event of the numbers being even on a division, he has the privilege of giving the casting vote. He is elected by the Commons themselves, but their election is subject to the approval of the sovereign. As regards any attempted invasions by the Crown, the Speaker is only the "mouth-piece" and servant of the House; but as regards the members *inter se* and the conduct of business, he is the governor and controller of the House.

SPEAKER OF THE LORDS. The Speaker of the Lords is the Lord Chancellor or the Lord Keeper of the Great Seal of England, or if he be absent the Lords may choose their own Speaker. "It is singular," says Mr. May in his Treatise on the Privileges, &c., of Parliament, "that the president of this deliberative body is not necessarily a member. It has frequently happened that the Lord Keeper has officiated for years as Speaker without having been raised to the peerage; and on the 22nd of November, 1830, Mr. Brougham sat on the woolsack as Speaker, being at that time Lord Chancellor, although his patent of creation as a peer had not yet been made out." The duties of the Speaker of the Lords are principally confined to putting questions, and the Lord Chancellor has no more to do with preserving order than any other peer.

SPECIAL ACCEPTANCE OF A BILL OF EXCHANGE. Where the acceptor makes the bill payable at a particular place, "*and not elsewhere*," it is so termed. This is also sometimes termed a restrictive special acceptance as distinguished from one payable generally or at a particular place only,

SPECIAL ACCEPTANCE OF A BILL OF EXCHANGE—continued.

without the addition of the words "and not elsewhere."

See titles ACCEPTANCE OF BILL; BILL OF EXCHANGE.

SPECIAL ALLOWANCES. Under the order of August, 1875, such allowances are permitted for expert evidence &c. (2 C. P. Div. 273; 3 C. P. Div. 264).

See titles COSTS; HIGHER AND LOWER SCALE, COSTS.

SPECIAL BAIL: See title BAIL.

SPECIAL CASE. When on a trial a difficulty in point of law arises, the jury may, instead of finding a special verdict, find a general verdict for the plaintiff, subject to the opinion of the Court on what is termed a special case, that is, a statement of all the facts of the case drawn up for the opinion of the Court in banc by the counsel and attorneys on either side, formerly under correction of the judge at *nisi prius*. The party for whom the general verdict is so given is in such a case not entitled to judgment till the Court in banc has decided on the special case; and according to the result of that decision the verdict is ultimately entered either for him or for his adversary. It was also provided by 3 & 4 Will. 4, c. 42, s. 25, that where the parties in an action or issue joined could agree on a statement of facts, they might, by order of a judge, draw up such statement in the form of a special case for the judgment of the Court without proceeding to trial (Steph. Pl. 102; 1 Arch. Pract. 452). And now after writ issued, the parties (if so disposed) may concur in stating any special case, raising all or any questions of law involved in the action (Ord. xxxiv. 1); also, at any time before or at the trial, if it appear to the Court that there is a preliminary question of law to be decided, and that the proof of facts is a matter subordinate thereto, the Court may order the question of law to be decided on a special case or other form sufficiently raising it, and in the meantime the proof of facts is stayed (Ord. xxxiv. 2). Every special case is to be printed by the plaintiff, signed by all the parties (or their solicitors), and filed by the plaintiff (Ord. xxxiv. 3); either party may enter it (i.e., set it down) for argument, first obtaining, where married women, infants, or lunatics are concerned, an order giving leave to set it down. The order is obtained upon an affidavit or affidavits of the truth of the statements contained in the special case (Ord. xxxiv. 4, 5).

SPECIAL CONTRACT: See titles SIMPLE CONTRACT; SPECIALTY CONTRACT.

SPECIAL DAMAGE. The damages which a plaintiff seeks to recover are either general or special. *General damages* are such as the law implies or presumes to have resulted from the wrong complained of. *Special damages* are such as really and in fact resulted, but are not implied by law, and are either superadded to general damages arising from an act injurious in itself, as, where some particular loss arises from the uttering of slanderous words actionable in themselves; or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of some special or actual damage having resulted from the uttering of them. Whenever the damages sustained by a party have not necessarily resulted from the act complained of, and consequently are not implied by law, the plaintiff must, in order to prevent surprise on the defendant which otherwise might ensue on the trial, state with particularity in his declaration the actual or special damage which he has sustained, and such special damage is in fact in these cases portion of the very ground of action (8 T. R. 133; 1 Ch. Pl. 395, 396, 6th ed.)

See title DAMAGES.

SPECIAL DEMURRER. This has been abolished by the C. L. P. Act, 1852.

See title DEMURRER.

SPECIAL EXAMINER: See title EXAMINER.

SPECIAL INDORSEMENT OF BILL. When a bill of exchange is indorsed with the name of the indorsee as well as of the indorser, *e.g.*, thus, "Pay C. D. or order, A. B.," that indorsement is called a special indorsement; and C. D. can transfer the bill only by delivery with a fresh further indorsement either in blank or special.

SPECIAL INDORSEMENT OF WRIT. The writ of summons in an action may under Order III. 6, be indorsed with the particulars of the amount sought to be recovered in the action, after giving credit for any payment or set-off; and this special indorsement (as it is called) of the writ is applicable in all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt, or on a guaranty, whether under seal or not.

SPECIAL ISSUES. The issues produced upon special pleas, as being usually more specific and particular than those of *not guilty, never indebted, &c.*, were sometimes described as special issues by way of distinction from the others, which were called general issues, the latter term being also applied not only to the issues themselves, but to the pleas which tendered and produced them (Steph. Pl. 109, 5th ed.; Co. Litt. 126a; Heath's Maxims, 53; Com. Dig. "Pleader," (R. 2).

See titles GENERAL ISSUE, &c., PLEA OF; ISSUE; ISSUES, PREPARATION OF.

SPECIAL JURY is a jury composed of individuals above the rank of ordinary freeholders, and is usually summoned to try questions of greater importance than those usually submitted to common juries.

See title JURY.

SPECIAL OCCUPANT: See title ESTATE PUR AUTRE VIE.

SPECIAL PAPER. A Court paper containing a list of special cases and demurrers set down therein for argument.

SPECIAL PLEADER: See title SPECIAL PLEADING.

SPECIAL PLEADING. When the allegations (or pleadings, as they are called) of the contending parties in an action are not of the general or ordinary form, but are of a more complex or special character, they are denominated special pleadings; and when a defendant pleads a plea of this description (*i.e.*, a special plea) he is said to plead specially, in opposition to pleading the general issue. These terms have given rise to the popular denomination of that science which, though properly called pleading, is generally known by the name of special pleading. Hence, also, the denomination of "*special pleader*" as applied to those learned persons who are employed in drawing and framing special pleadings. These, it may be as well to observe, are mostly gentlemen who have studied for more than three years at one of the Inns of Court, and who may or may not intend, at some future period, to engage in the more complicated and important avocations of a barrister (Steph. Pl. 31, 186). Under the present system of pleading (as introduced by the Judicature Acts, 1873-5), the business of special pleaders as such has almost ceased; but they often attend in Chambers (although not in Court), and are largely employed in giving opinions, for which their great special knowledge peculiarly fits them.

SPECIAL REFEREE: See title REFEREES.

SPECIAL RESOLUTION: See title RESOLUTIONS, VARIETIES OF.

SPECIAL RULES. The grounds upon which certain rules are granted are subject to so little variation, and are so well understood, that in practice they are obtained from the proper officer of the Court upon application by the party or his solicitor, and without any motion, actual or supposed. In other cases, the motion need not be actually made in Court, but it is supposed to be made, and the proper officer draws up the rule on the production of a brief or motion paper signed by counsel; the rules granted without any motion in Court, or when the motion is only assumed to have been, and is not actually made, are called *common rules*, while the rules granted upon motion actually made to the Court are termed *special rules* (Bagl. Prac. 279; 2 Arch. Pr. 1708).

See titles INTERLOCUTORY JUDGMENTS AND ORDERS; RULE.

SPECIAL TRAVERSE. Was that peculiar form of traverse or denial in pleading by which the party traversing explained or qualified his denial instead of putting it, as by a common traverse he would, in a direct and absolute form. He first alleged new affirmative matter, which was called the inducement, and then added a distinct and formal denial of such portions of the adverse pleading as supported the adversary's case. This negative part was termed the *absque hoc*, those being the words with which this portion of the plea commenced, and the whole was finished by a conclusion to the country. The inducement or introduction of new affirmative matter, was usually employed for the purpose of avoiding some rule of law prohibiting a plain and simple denial of the adversary's allegation; and was sometimes employed for the purpose of raising a question of law at once upon the pleadings (Steph. Pl. 193-218, 5th ed.; 3 Chit. 908, 6th ed.; *Brudnell v. Roberts*, 2 Wils. 143; *Palmer v. Ekyns*, Lord Raym. 1550).

See title ABSQUE HOC.

SPECIAL SESSIONS. These, which are called also Special Petty Sessions, are meetings of the justices holden specially after proper and reasonable notice duly given to all the magistrates of the sessional division for which they are holden. Such special sessions are required by various statutes and for various purposes, e.g., by 43 Eliz. c. 2, for appointing overseers of the poor; by 9 Geo. 4, c. 61, and the more recent Licensing Acts of Queen Victoria, for licensing ale-houses, beer-houses, &c., and for transferring such licences; by 4 & 5 Will. 4, c. 50, and 25 & 26 Vict. c. 61, for executing the Highway Acts; by 6 & 7

SPECIAL SESSIONS—continued.

Will. 4, c. 96, for appealing against parochial rates; by 6 & 7 Vict. c. 68, for licensing theatres; by 5 & 6 Vict. c. 109, for appointing parochial constables; by 5 & 6 Will. 4, c. 76, for appointing special constables; and by 7 & 8 Vict. c. 33, for appointing high constables.

SPECIAL SIMILITER: See title SIMILITER.

SPECIAL VERDICT: See title VERDICT.

SPECIALTY CONTRACT: See title SIMPLE CONTRACT.

SPECIE. As applied to contracts, signifies specifically, strictly, or according to the specific terms; and, as applied to things, individuality or identity. Whether a thing is due *in genere* or *in specie* depends in each case on the will of the parties. If a thing be designated only by its kind, as, e.g., any house whatever, or any of my houses, any cask of wine, or any cask of the vintage of 1834 in my cellar, it may be furnished *in genere*. But if the thing be designated individually, e.g., my house, No. 2, Belgrave Square, or my five-year old bay saddle horse, it is not then generic, but must be furnished or returned *in individuo*. The practical distinction between the two is, that he who is under an obligation with respect to a thing specifically designated cannot furnish any other than the very thing itself; whereas, in the case of a thing which is designated generically, the party obliged has the choice of giving which of the species he will, as the other party has no right to any one thing in particular (Brown's Sav. 70).

See title FUNGIBLES.

SPECIFIC DELIVERY OF CHATTELS: See titles DELIVERY, WRIT OF; SPECIFIC PERFORMANCE.

SPECIFIC DEVISES. Are devises of lands particularly specified in the terms of the devise,—as opposed to general and residuary devises of lands, in which the local or other particular descriptions are not expressed. For example, I devise my Hendon Hall estate is a specific devise; but I devise all my lands or all other my lands is a *general* devise or a *residuary* devise. But all devises are (in effect) specific, even residuary devises being so (*Hensman v. Fryer*, L. R. 3 Ch. App. 420; *Lancefield v. Iggulden*, 10 Ch. App. 136).

SPECIFIC LEGACIES: See title LEGACIES.

SPECIFIC PERFORMANCE. When a party has sustained damage or injury from the breach or non-performance of, or from delay in performing, any contract, &c., he

SPECIFIC PERFORMANCE—continued.

may either have recourse to a Court of Common Law to obtain recompense in damages, or he may resort to a Court of Equity, which will compel the party to repair the injury by performing the terms of the contract *in specie*, as it is termed, i.e., specifically, or according to the specifications it contains; and this performing the terms of a contract *in specie* is called "specific performance."

The requisites which the Court of Chancery requires in order to its decreeing specific performance are the following:—

- (1.) That the act be both legal and moral;
- (2.) That it be for value;
- (3.) That it be within the power of the Court to enforce, and so there is no specific performance of,—
 - (a.) Contracts requiring personal skill (*Lumley v. Wagner*, 5 De G. & Sm. 485);
 - (b.) Contracts for transfer of goodwill apart from lease of premises (*Baxter v. Conolly*, 1 Jac. & W. 576);
 - (c.) Contracts to build or repair (*Moseley v. Virgin*, 3 Ves. 184); and
 - (d.) Contracts revocable in their nature (*Hercy v. Birch*, 9 Ves. 357);
- (4.) That the contract be mutual (*Adderley v. Dixon*, 1 S. & S. 607); and
- (5.) That damages at Law for breach of contract are an inadequate compensation.

Generally, therefore, the Court decrees specific performance of contracts regarding *land*, and not of contracts regarding *personal estate*. Yet in respect of personal estate, where the species of estate contracted for is (like land) limited in purchaseability, the Court decrees a specific performance of the contract,—e.g., regarding shares in a railway company (*Duncuft v. Albrecht*, 12 Sim. 199); debts proveable under a bankruptcy (*Adderley v. Dixon*, 1 S. & S. 607); articles of *vertu* (*Fulke v. Gray*, 4 Drew. 658); heir-looms (*Somerset v. Cookson*, 1 Wh. & Tud. L. O. Eq. 736); and such like. There appears to be no exception to the general rule that the Court will decree specific performance regarding land; indeed, the Court carries its principles so far in this respect that it will, in avoidance of the Statute of Frauds, decree specific performance of an unwritten contract in special cases, being chiefly cases of part performance of the contract (*Surcombe v. Pinniger*, 3 De G. M. & G. 571), or of fraud (*Foxcroft v. Lester*, 1 Wh. & Tud. L. O. 693).

Also, in the case of a contract regarding

SPECIFIC PERFORMANCE—continued.

lands which is put into writing, but which the defendant alleges was afterwards varied by parol, although such parol variation would be worthless at Law, yet in Equity the plaintiff shall only have specific performance upon condition of accepting the defendant's terms (*Townshend v. Stangroom*, 6 Ves. 328). Sometimes, also, specific performance is decreed with a compensation for any misdescription or deficiency of the land or estate contracted for, but the misdescription or deficiency must (where the vendor asks specific performance) be of a compensable character (*M'Queen v. Farquhar*, 11 Ves. 467); although that is not a requisite where the purchaser asks specific performance (*Hill v. Buckley*, 17 Ves. 401; and, *quære*, *Thomas v. Dering*, 1 Keen, 729).

See title INJUNCTION.

SPECIFICATIO. In Roman Law, was one of the modes of acquisition of property by the *jus gentium* or *jus naturale*. The act of making a new thing (or something of a new and distinct species) out of material, that is to say, *specificatio* (*speciem facio*) gave a title in certain cases to the maker, i.e., generally, in all cases when the material could not be restored to its condition as such, by undoing the article or species made.

SPECIFICATION. As used in patents and in building contracts is (what the name denotes) a particular or detailed statement of the various elements involved. In patent law, the specification is either provisional or complete,—a provisional specification being that which accompanies the petition for the grant of the letters patent, and the complete specification being that which is filed in the Patent Office upon the grant of the letters patent (*Johnson's Patentees' Manual*).

SPEECH, FREEDOM OF: See titles FREEDOM OF SPEECH; PRIVILEGE OF PARLIAMENT.

SPEEDY EXECUTION. Was an execution which, by the direction of the judge at *nisi prius*, issued forthwith, or on some early day fixed upon by the judge for that purpose after the trial of the action. By stat. 1 Will. 4, c. 7, s. 2, in all actions brought in the Courts of Law at Westminster, it was made lawful for the judge to certify under his hand on the back of the record, at any time before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith, or at any day named in the certificate. And if the plaintiff waived his costs he might also have speedy execution as a matter of course (1 Arch. Pract. 525).

SPEEDY EXECUTION—*continued.*

Under the present practice, the general rule is, that immediately upon entry of judgment for any sum of money, or for any costs (being first taxed), either *fi. fa.* or *elegit* may issue, unless payment of either is by the judgment deferred beyond the date of such entry (Order XLII. 15). But in such cases, by special order, execution may issue sooner than entry (Order XLII. 15), or may be stayed until any time (Order XLII. 15). In judgments of other sorts, the time for doing the act is, in general, expressed in the judgment. And see Order XLII. 15a, April, 1880.

SPENCER'S CASE: See titles RUNNING WITH THE LAND; RUNNING WITH THE REVERSION.

SPIRITUAL CORPORATIONS: See titles ARCHBISHOP; BISHOP; DEAN; DEAN AND CHAPTER; PARSON.

SPIRITUAL COURTS: See title COURTS ECCLESIASTICAL.

SPIRITUALITIES OF A BISHOP. Those profits which a bishop receives in his ecclesiastical character, as the dues arising from his ordaining and instituting priests, and such like, in contradistinction to those profits which he acquires in his temporal capacity as a baron and lord of parliament, and which are termed his temporalities, consisting of certain lands, revenues, and lay fees, &c. (Staund. Pl. Cor. 132; Cowel).

See title TEMPORALITIES OF A BISHOP.

SPIRITUOUS LIQUORS. These are inflammable liquids produced by distillation, and forming an article of commerce (*Att.-Gen. v Bailey*, 1 Ex. 281). Excise duties are payable by distillers; and by the stat. 9 & 10 Vict. c. 90, the use of stills by unlicensed persons was prohibited. Retailers of spirits have to pay licence duty.

See titles CUSTOMS; EXCISE; LICENSING ACTS.

SPLITTING DEMANDS. The County Court jurisdiction in matters of contract being limited to £50, a plaintiff whose claim on contract exceeds that amount cannot split or divide his claim into fractions not exceeding the prescribed limit; he may, however, abandon the excess over £50.

See titles ABANDONMENT; COUNTY COURTS.

SPOLIATION. Generally, was any damage or injury; but in particular it was an injury done by one clerk or incumbent to another, in taking the fruits of his benefice under a pretended title; e.g., if a patron first presented A. to a benefice, who was instituted and inducted thereto, and then, upon pretence of a vacancy, the same

SPOLIATION—*continued.*

patron presented B. to the same living, and he also obtained institution and induction, then the one clerk might sue the other in the Spiritual Court for spoliation, or for taking the profits of his benefice; and the question tried was whether the living was or was not vacant, and upon that question the validity of the second clerk's pretensions depended (*Les Termes de la Ley*; F. N. B. 36).

SPOLIATOR. It is a maxim of law, bearing chiefly on evidence, but also upon the value generally of the thing destroyed, that everything most to his disadvantage is to be presumed against the destroyer (*spoliator*), *contra spoliatorem omnia presumuntur* (*Armory v. Delamirie*, 1 Sm. L. C. 315).

SPONSOR: See title FIDEJUSSOR.

SPRINGING USE: See titles SHIFTING USE; USES.

STAKEHOLDER. Is the person with whom money is deposited upon a bet or wager to abide the event. Such money may be recovered before the event, but not afterwards (*Manning v. Purcell*, 7 De G. M. & G. 55).

See title WAGERING.

STALLAGE. A toll, or duty, payable for the liberty of erecting a stall in a fair or market (Palm. Rep. 77; Com. Dig. tit. "Market" (F. 2); Brady Bor. App. p. 12). See titles FAIRS; MARKET.

STAMP DUTIES. A branch of the royal revenue, consisting of a tax imposed on all parchment and paper, whereon any legal proceedings, or private instruments of almost any nature whatsoever, are written. These duties are at present regulated by the Stamp Act, 1870 (33 & 34 Vict. c. 97), and Appendix thereto; and by that Act and the Appendix thereto, progressive duties are abolished: one uniform *ad valorem* duty is made payable, and in lieu of the 35s. duty by way of deed stamp, a duty of 10s. is imposed, and that only in the cases in which no *ad valorem* is chargeable. If more than one instrument be written upon the same piece of material, every one of such instruments is to be separately and distinctly stamped with the duty with which it is chargeable (sect. 7); and when one of several instruments is the principal one, and the other or others is or are merely accessory to it, the duty is differenced accordingly (sect. 76). With regard to conveyances on sale the stamp is 5s. for every £50 or fraction thereof in the case of ordinary considerations; and with regard to considerations possessing some peculiarity, it is enacted that where the consi-

STAMP DUTIES—continued.

deration consists of any stock or marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the value of such stock or security; and where the consideration consists of any security not marketable the conveyance is to be charged with *ad valorem* duty in respect of the amount due on the day of the date thereof for principal and interest upon such security; and where the consideration consists of money payable periodically for a definite period, so that the total amount to be paid can be previously ascertained, the conveyance is to be charged with *ad valorem* duty on such total amount; but when the consideration consists of money payable periodically in perpetuity, or for any indefinite period, the conveyance is to be charged with *ad valorem* duty on the total amount which will or may be payable (if the period is not terminable with a life or lives) during the period of TWENTY YEARS; and (if the period is so terminable) then during the period of TWELVE YEARS next after the day of the date of such instrument. With regard to leases, licences, &c., it is enacted that an agreement for a lease of any lands for any term not exceeding thirty-five years, is to be charged with the same duty as if it were an actual lease; but a lease made subsequently to, and in conformity with, such agreement is to be charged with the duty of sixpence only (sect. 96). And there is a graduated scale of *ad valorem* stamps upon leases, according as the term is definite, and does not exceed thirty-five years, or is indefinite; or the term being definite exceeds thirty-five years, but does not exceed 100 years; and so on. Counterparts and duplicates of leases which are charged with a duty not exceeding 5s., are liable to the same duty as the originals, and counterparts of all other leases are liable to the duty of 5s. (sect. 93). Assignments and surrenders of leases on any other occasion than a sale or mortgage are charged with a duty of 10s. Mortgages are charged with an *ad valorem* duty of 2s. 6d. for every £100 or fraction thereof; and re-conveyances and transfers thereof with an *ad valorem* duty of 6d. for every £100, of the money lent or paid off or paid over, as the case may be.

See titles TAXATION, HISTORY OF;
TAXATION, VARIETIES OF.

STANDING ARMY: See title ARMY.

STANDING ORDERS. The rules adopted by the Houses of Parliament for the permanent guidance and order of their proceedings are called "Standing Orders," and are contradistinguished from the sessional orders by the fact, that the former, unless rescinded by a special vote of the

STANDING ORDERS—continued.

House, continue in force, not only from one session to another, but from one parliament to another; while the latter are intended to last only during the session in which they are made. In the House of Lords every new standing order is added to "The Roll of Standing Orders," carefully preserved and published from time to time. In the Commons, there is no authorized collection of standing orders except in relation to private bills (May's Treatise on Parliament).

See title SESSIONAL ORDERS.

STANNARY COURTS. Courts in Devonshire and Cornwall for the administration of justice among the miners and tinners. These Courts are held before the Lord Warden and his deputies by virtue of a privilege granted to the workers of the tin mines there, to sue and be sued in their own Courts only, in order that they might not be drawn away from their business by having to attend law suits in the ordinary Courts (Bac. Abr. tit. "Courts of the Stannaries"). The jurisdiction of these Courts is confined to matters arising within the stannaries; and the suit may be either between tinner and tinner, or between stranger and tinner upon the principle of the *forum rei*. The jurisdiction of the Courts was defined by the stat. 16 Car. 1, c. 15; and the legal and equitable jurisdictions of the stannaries of Cornwall were consolidated in one Court by the stat. 6 & 7 Will. 4, c. 106; and by s. 32 of the stat. 18 Vict. c. 32, the stannaries of Devon and Cornwall were made one judicial district. By the Judicature Acts, 1873-75, the Appellate Jurisdiction Act, 1876, and the Stannary Procedure New Rules and Orders, 1876, the procedure in the Court of the Vice-Warden, and, on appeal therefrom, has been amended and simplified, and has, in fact, been brought almost into entire conformity with the procedure in Her Majesty's High Court of Justice.

See titles COURTS OF JUSTICE; TINNER.

STAR-CHAMBER. The Court called by this name is commonly regarded as being the *Aula Regis* sitting in the Star Chamber, a room at Westminster. The jurisdiction of the Court would, therefore, be all or some part of that residuary jurisdiction which remained after the severance of the Courts of Exchequer, Common Pleas, Queen's Bench, and Chancery.

By the stat. 3 Hen. 7, c. 1, the Court was remodelled, and its jurisdiction placed upon a lawful and permanent basis. That Act empowered the Chancellor, Treasurer, and Keeper of the Privy Seal, or any two of them, with one spiritual and one temporal peer, and the Chief Justices of the

STAR-CHAMBER—continued.

Courts of Queen's Bench and Common Pleas, or in their absence, two other justices, to call before them and to punish the following offenders and classes of offences:—

- (1.) Combinations of the nobility and gentry, supported by liveries, &c.;
- (2.) Partiality on the part of sheriffs in making up the panels of jurors, or in making untrue returns of members;
- (3.) Bribery in jurors; and
- (4.) Riots and unlawful assemblies.

By a later stat. 21 Hen. 8, c. 20, the President of the King's Council was added to the list of judges; and by the stat. 31 Hen. 8, c. 8, which gave to the king's proclamations in ecclesiastical matters the force of law, all persons offending against such proclamations were to be tried before the Star-Chamber, and punished with fine and imprisonment.

The jurisdiction of the Court is defined by Lord Bacon as extending to "forces, frauds, crimes, various of stellionate, and the inchoations or middle acts towards crimes capital or heinous not actually committed or perpetrated."

The utility of the Star-Chamber, in the reigns of Henry VII. and subsequent monarchs consisted in two principal functions, viz.:

- (1.) In its repression of the turbulence of the nobility and gentry in the provinces; and
- (2.) In its supplying a Court of jurisdiction for matters which, as being of novel origin, were unprovided for by the existing tribunals, e.g., in the case of offences against proclamations in ecclesiastical matters.

The effect of the Court was to enhance the royal authority, which it did by supplying the executive with a speedy and effective machinery. Cardinal Wolsey has the credit of having improved and extended the jurisdiction of the tribunal.

But the very nature of the jurisdiction of the Court of Star-Chamber rendered its process liable to great abuses; and Wolsey's connection with it was one of the principal causes of his unpopularity. The increase of those abuses was the ultimate cause of its abolition by the Long Parliament in 1640.

STATE, ACT OF. Is the act of the sovereign, or of the sovereign body; and for which act, or for its consequences, the sovereign or sovereign body is not legally liable to its own subjects, however much affected thereby; but to the subjects of other countries, the sovereign or sovereign body may be liable, in case the sovereign

STATE, ACT OF—continued.

or sovereign body of such other countries should choose to intervene for the prosecution of its own subjects (*Buron v. Denman*, 2 Exch. 167).

STATE OF FACTS. Formerly, when a Master in Chancery was directed by the Court of Chancery to make an inquiry or investigation into any matter arising out of a suit, and which could not conveniently be brought before the Court itself, each party in the suit carried in before the Master a statement shewing how the party bringing it in represented the matter in question to be; and this statement was technically termed a state of facts, and formed the ground upon which the evidence was received; the evidence being, in fact, brought by one party or the other to prove his own or disprove his opponent's state of facts (*Gray's Ch. Prac.* 109, 110). And so now, a state of facts means the statement made by either party of his version of the facts.

See title **SPECIAL CASE**.

STATED ACCOUNT: See title **ACCOUNT STATED**.

STATEMENT OF CLAIM. This is the first pleading (properly so called) in an action in the High Court of Justice. The plaintiff may unite in one statement of claim several causes of action subject to the Court or a judge, on the application of the defendant, directing them to be separately disposed of (*Order xvii., 1, 8, 9*), e.g., claims by or against husband and wife, with claims by or against either of them separately (*Order xvii., 4*); claims by or against an executor or administrator, as such, with claims (connected with the estate) by or against him personally (*Order xvii., 5*); and joint claims with separate claims, by all, or some, or one of several co-plaintiffs against the same defendant (*Order xvii., 6*), excepting, nevertheless, the two following cases, viz.: (1.) The plaintiff may not (unless by leave of the Court or a judge) join with an action for the recovery of land any second cause of action other than a claim or claims in respect of arrears of rent or mesne profits, or damages for breach of covenant relating to the same land or some part thereof (*Order xvii., 2*); and (2.) The plaintiff may not (unless by leave as aforesaid) join claims by him as a trustee in bankruptcy, with claims by him in any other capacity (*Order xvii., 3*).

STATEMENT OF DEBTS. Upon a liquidation under the Bankruptcy Act, 1869, at the meeting of creditors at which the special resolution to liquidate by arrangement and not in bankruptcy is passed, the debtor produces to the meeting a statement

STATEMENT OF DEBTS—*continued.*

showing the whole of his assets and debts, and such statement of debts (and of assets) together with the special resolution are thereafter registered with the Registrar in Bankruptcy. Similarly, upon a composition under the same Act, at the two meetings of creditors at which the extraordinary resolution to accept a composition in satisfaction of their debts is passed, the debtor produces a like statement of debts (and of assets), and such statement together with the extraordinary resolution are thereafter registered with the Registrar in Bankruptcy. In each case, the registration brings the matter under the control of the Court, which may thereafter interfere in a summary way on motion.

STATEMENT OF DEFENCE. Where the defendant neither demurs nor defends by stating one simple fact (*e.g.*, a release), he may defend by stating a succession of circumstances with or without (at the same time) denying or expressing that he does not admit the whole [or certain specified parts] of the statement of claim, in which case he is said properly to defend; and this statement of his in defence is properly called his statement of defence; and this statement of defence may be either with or without any counter-claim.

STATES, VARIETIES OF: See title SOVEREIGN STATES.

STATING PART OF A BILL. Was that part of a bill in Chancery in which the plaintiff stated simply the facts of his case; and it was distinguished from the charging part of the bill and from the prayer.

See titles BILL IN CHANCERY; CHARGING PART OF A BILL.

STATUS. According to Heineccius, *status est qualitas cujus ratione homines diverso jure utuntur*, *i.e.*, status is a quality or aspect by reason of which individuals enjoy a diversity of rights; and this opinion is that of lawyers generally, almost all rights and liabilities incident to men as to property being so incident by relation only, or with reference to, some particular quality or character of the person or property. According to Mr. Austin, who ridicules the "occult" quality of Heineccius, status is a mere bundle or collection of rights and duties.

See title CAPUT AND STATUS.

STATUTE OF ALLEGIANCE DE FACTO. An Act of 11 Hen. 7, c. 1, requiring subjects to give their allegiance to the actual king for the time being, and protecting them in so doing.

See title ALLEGIANCE.

STATUTE OF FRAUDS: See title FRAUDS, STATUTE OF.

STATUTE-MERCHANT. A writing in the nature of a bond which was introduced in the reign of Edward I., for the purpose of allowing lands to be charged, contrary to all feudal principles, with the payment of debts contracted in trade between merchants. It is somewhat in the nature of what is termed a *vincum vadium*, or living pledge, by which a man borrows a sum of money of another, and grants him an estate to hold till the rents and profits shall repay the sum so borrowed. A statute-merchant may, therefore, be said to be a security for a debt acknowledged to be due, and by which not only his goods may be seized in satisfaction of the debt, but also his lands may be delivered to the creditor till out of the rents and profits of them the debt is satisfied; and during such time as the creditor so holds the lands he is called a tenant by statute-merchant, and such creditor's estate or interest in the lands during that period is termed an estate by statute-merchant.

See title STATUTE-STAPLE.

STATUTE OF PRÆMUNIRE: See title PRÆMUNIRE.

STATUTE OF PROVISOIRS: See title PROVISIONS.

STATUTE-STAPLE. A security for a debt acknowledged to be due before the mayor of the staple, that is, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by Act of Parliament in certain trading towns. It is called a "statute-staple," because entered into before the mayor of such staple. It is in the nature of a bond given by the debtor to the creditor, and is very similar to a statute-merchant, and was originally permitted only among traders for the benefit of commerce. By it, not only the goods of the debtor may be seized in satisfaction of his debt, but also his lands may be delivered to the creditor till out of the profits and rents of them the debts are satisfied; and during such time as the creditor so holds the lands he is called a "tenant by statute-staple," and his estate or interest in the lands during that period is called "an estate by statute-staple."

See title STATUTE-MERCHANT.

STATUTES. The statutes are the written laws of the kingdom, made by the king's majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in Parliament assembled. They are either general or special, public or private. *General or*

STATUTES—continued.

public Acts are universal rules that regard the whole community; and of these the Courts of Law are bound to take notice judicially and *ex officio*, without the statutes being specially pleaded or formally set forth by the party who claims the advantage of them. *Special or private Acts* are those which only operate upon particular persons and private concerns: such as the Romans entitled *privilegia* (in the favourable sense of that word), in contradistinction to the *senatus consulta*, which regarded the whole community; and of these (which are not promulgated with the same notoriety as the former) the judges are not bound to take notice, unless they be formally shewn and pleaded.

STATUTES OF DISTRIBUTIONS: See title NEXT OF KIN.

STATUTES, INTERPRETATION OF. Various rules have been made regarding the construction or interpretation of statutes; the short substance of which is as follows:—

I. Where the words of the statute are unambiguous, then by the words alone it is proper to abide, unless, perhaps, in the case only of manifest absurdity (*Dr. Bonham's Case*, 8 Rep. 118 a):

II. Where the words of the statute are ambiguous, then the following subsidiary rules are to be applied:—

- (1.) Inquire the Common Law before the making of the statute;
- (2.) The mischief against which it did not provide;
- (3.) The remedy which Parliament thought to apply; and
- (4.) The true reason (i.e., true essence, or gist) of the remedy (*Heydon's Case*, 3 Rep. 7).

It used also to be a general rule, that penal statutes were to be construed restrictively, and beneficial statutes liberally; but as to the propriety of such a rule, there may well be considerable doubt (See Austin's Lectures on Jurisprudence).

STATUTES OF JEOPAILS: See titles AMENDMENT; JEOPAIL.

STATUTES AT LARGE. Are an authentic collection of the various statutes which have been passed by the British Parliament from very early times up to the present day. The oldest one of those now extant, and printed in our statute book, is Magna Charta, as confirmed in Parliament 9 Hen. 3, though doubtless there were many Acts before that time, the records of which are now lost, and whose provisions are perhaps in the present day currently received for the maxims of the old Com-

STATUTES AT LARGE—continued.

mon Law, or customs of the realm. The statutes from Magna Charta down to the end of the reign of Edward II. (including also some supposed to have been passed in one or other of the three reigns of Henry III., Edward I., or Edward II., and termed *incerti temporis*), compose what have been called the *vetera statuta*; on the other hand, those from the beginning of the reign of Edward III. are contradistinguished by the appellation of the *nova statuta* (Dwarris on Stat. 626).

STATUTES, PRINCIPAL EARLY. An enumeration of the important early statutes of a more general character, which have produced a great effect in the history of English Law, both public and private, is here given,—

I. OTHER THAN ECCLESIASTICAL:—

- 1087: *The 52nd Law of William I.*, making feudalism general.
- 1164: *Constitutions of Clarendon*, regulating the civil and ecclesiastical jurisdictions and the matters which were the proper subjects of such jurisdictions.
- 20 Hen. 3 (*Statute of Merton*).
- 52 Hen. 3 (*Statute of Marlbridge*).
- 3 Edw. 1 (*Statute of Westminster the First*).
- 6 Edw. 1 (*Statute of Gloucester*).
- 7 Edw. 1 (*Statute de Religiosis Viris*).
- 11 Edw. 1 (*Statute of Accon-Burnell*).
- 13 Edw. 1 (*Statute of Westminster the Second*).
- 13 Edw. 1 (*Statute of Merchants*).
- 13 Edw. 1 (*Statute of Circumspectè agatis*).
- 18 Edw. 1 (*Statute of Westminster the Third*).
- 25 Edw. 1 (*Statute of Confirmatio Chartarum*).
- 25 Edw. 1 (*Statute de Tallagio non Concedendo*).
- 28 Edw. 1 (*Statute of Articuli super Chartas*).
- 9 Edw. 2 (*Statute of Articuli Cleri*).
- 17 Edw. 2 (*Statute de Prærogativâ Regis*).
- 25 Edw. 3, st. 4 (*Statute of Provisors*).
- 25 Edw. 3, st. 5, c. 4 (*Statute of Treasons*).
- 15 Rich. 2, c. 5 (*Statute of Mortmain*).
- 16 Rich. 2, c. 5 (*Statute of Præmunire*).
- 2 Hen. 4, c. 15 (*Statute de Hæretico Comburendo*).
- 4 Hen. 7, c. 24 (*Statute of Fines*).
- 11 Hen. 7, c. 1 (*Statute concerning Allegiance to a Sovereign de facto*).

II. ECCLESIASTICAL:—

- 10 Hen. 2 (*Constitutions of Clarendon*).
- 7 Edw. 1 (*Statutum de Religiosis Viris*).
- 9 Edw. 2, st. 1 (*Articuli Cleri*).
- 25 Edw. 3, st. 6 } (*Statutes of Provisors*).
- 27 Edw. 3, st. 1 }

STATUTES, PRINCIPAL EARLY—continued.

- 15 Rich. 2, c. 5 (*Statute of Præmunire*).
 24 & 25 Hen. 8 (*Appeals to Rome taken away*).
 25 & 26 Hen. 8 (*The King declared Supreme Head of the Church of England, and the Archbishop of Canterbury empowered to grant licences and dispensations in lieu of the Pope*).
 1 Eliz. c. 1 (*Act of Supremacy*).
 2 Eliz. c. 2 (*Act of Uniformity*).
 16 Car. 1 (*Abolition of Court of High Commission*).
 6 Car. 2 (*Establishment of Presbyterianism in England*).
 12 Car. 2 (*Restoration of Episcopalianism in England*).
 13 Car. 2 (*Corporation Act*).
 13 Car. 2 (*Act of Uniformity*).
 16 Car. 2 (*Act against Conventicles*).
 17 Car. 2, c. 2 (*Five Mile Act*).
 25 Car. 2, c. 2 (*Test Act*).
 1 W. & M. c. 8 (*Toleration Act*); and
 11 & 12 Will. 3, c. 4 (*Act of Settlement*).

STATUTES REVISED. A compilation and re-issue of the statutes, in a form more or less approaching to a consolidation thereof, has been recently made at the expense and under the authority of the Government; and such consolidated statutes as so re-issued are called the Statutes Revised.

STATUTORY CONVEYANCES: See title CONVEYANCES.

STATUTORY DECLARATIONS: See title DECLARATIONS, STATUTORY.

STATUTORY OBLIGATION. Is an obligation arising under statute, and may be either to pay money or to perform certain acts, e.g., maintain fences, erect accommodation works, and the like. The obligation does not usually attach until the happening of some event or the doing of some act by the party obliged.

See title OBLIGATION.

STATUTORY REFERENCES. Arbitrations are not uncommonly directed by statute; and all such arbitrations, if the statute so express or necessarily imply, are exclusive of the ordinary jurisdictions (L. R. 2 H. L. Sc. 347). Also, the general Acts, Common Law Procedure Act, 1854, and Judicature Acts, 1873-75, enable the Courts to compulsorily refer various matters in an action.

See title REFEREES.

STAY OF PROCEEDINGS. An appeal from a master's decision operates no stay of proceedings unless and so far as the master (or a judge) otherwise orders

STAY OF PROCEEDINGS—continued.

(Order LIV., 5). An appeal from a district registrar's decision operates no stay of proceedings unless and so far as the district registrar (or a judge) otherwise orders (Order XXXV. 8). An appeal to the Court of Appeal operates no stay of execution or of proceedings under the decision appealed from (Order LVIII., 16), all intermediate acts and proceedings holding good, unless otherwise ordered by the Court of Appeal, or by the Court appealed from, or any judge thereof (Order LVIII., 16): the application to stay is to be first made in the Court appealed from (Order LVIII., 17). But an order to shew cause (upon a motion *ex parte* for a new trial) operates a stay of proceedings in the action,—unless (and excepting so far as) the Court upon granting the rule shall otherwise order (Order XXXIX., 5).

STEALING: See title LARCENY.

STEALING AN HEIRESS: See title ABDUCTION.

STELLIONATUS. Was an offence or group of offences, of too subtle a character to be reached by the ordinary tribunals, and which was therefore assigned to the Court of Star-Chamber, and afterwards to the Court of Chancery, and now to the Chancery Division of the High Court.

See title STAR-CHAMBER, COURT OF.

STET PROCESSUS. Was an entry on the roll in the nature of a judgment, of a direction that all further proceedings should be stayed (i.e., that the process might stop or stand), and it was one of the ways by which a suit might be ended by the act of the party, as distinguished from a termination of it by judgment, which was the act of the Court.

See title JUDGMENTS, VARIETIES OF.

STEVEDORE. A person skilful in loading and unloading cargo on board ships. He is not an ordinary servant of the ship-owner, but is rather an agent of the latter; he has entire control of the labourers who assist him.

See titles STOWAGE; CARGO.

STEWARD. This word signifies a man appointed in the place or stead of another, and generally denotes a principal officer within his jurisdiction. The greatest, however, of these was the Lord High Steward of England, whose functions were of a very important nature, he having had, next under the king, the supervision and regulating of the administration of justice, and of most other affairs of the realm, both of a civil and of a military nature; and there are still many officers called stewards that are connected with the king's house-

STEWARD—*continued*.

hold, and with his administration of justice throughout the realm; and in manors, there is an important officer called "steward of the manor," who has the general management of all forensic matters connected with the manor of which he is the steward (Cowel).

STEWARTRY. In the Scotch Law was synonymous with the English word "county." Thus, "any shire or stewartry in Scotland," is used in the 12th section of 5 & 6 Vict. c. 35 (the Income and Property Tax Act); and by 1 Vict. c. 39, it is enacted that the word "county" occurring in any future or existing Act shall comprehend and apply "to any stewartry in Scotland, excepting where otherwise specially provided, or where there is anything in the subject or context repugnant to such meaning or application."

See title COUNTRY.

STINT, COMMON WITHOUT. Common without stint is the right of commoning or feeding an unlimited number of cattle on the common, and that throughout the year, without limitation of time. The notion, however, of this species of common, so far as it is absolute, is said to be exploded, as a right of common absolutely without stint cannot exist in law (2 Chit. Bl. 34, n (32)); but if the phrase is taken to mean common without stint (not absolutely but only) for all cattle levant and couchant (see title LEVANT AND COUCHANT), there seems nothing objectionable in it, or nothing impossible in Law.

See titles COMMON, RIGHT OF; LEVANT AND COUCHANT.

STIPULATIO. In Roman Law, was the verbal contract (*verbis obligatio*)—and was the most solemn and formal of all the contracts in that system of jurisprudence. It was entered into by question and corresponding answer thereto, by the parties both being present at the same time, and usually by such words as "*spondes? spondeo*," "*promittis? promitto*," and the like.

STIPULATIO AQUILIANA. In Roman Law, was a particular application of the *stipulatio*, and was used to collect together into one verbal contract all the liabilities of every kind and quality of the debtor, with a view to their being released or discharged by an *acceptilatio*, that mode of discharge being applicable only to the verbal contract.

STIRPES. Taking property by representation is called "succession *per stirpes*," in opposition to taking in one's own right, or as a principal, which is termed succession *per capita*. It is called succession *per stirpes*, because it is according to the roots;

STIRPES—*continued*.

that is, all the branches inherit the same share that their root, whom they represent, would have done.

See titles CAPITA, DISTRIBUTION PER; NEXT OF KIN.

STOCK. This is the general name for the public funds, but is applicable generally to the like funds of corporate bodies. It is a chose in action, and cannot be sued for as money (*Nightingale v. Devisme*, 2 W. Bl. 684). It carries interest, which has been defined in the case of stocks to be a right to receive a perpetual annuity subject to redemption (*Wildman v. Wildman*, 9 Ves. 177). The Bank of England is the depositary of the public funds, and liable only as a depositary (*Humberstone v. Chase*, 2 Y. & C. 209). The interest or dividends have by a recent Act (32 & 33 Vict. c. 104, the Dividends and Stock Act, 1869), been made payable upon warrants sent through the post.

See titles SHARES; SHARE-WARRANT.

STOCK-BROKERS: See titles BROKERS; JOBBERS; FACTORS.

STOCK EXCHANGE. This is a society or club, prescribing rules which bind its members, and its customs bind all persons, whether members or not, having dealings upon it or with it. The persons transacting business professionally on the Exchange are either brokers or jobbers; the former being agents merely for their customers, the latter (especially since the stat. 23 Vict. c. 28, repealing Sir John Barnard's Act, 7 Geo. 2, c. 8) dealing for themselves while at the same time making purchases and sales for their customers, chiefly by means of what are called "time-bargains" (*Coles v. Bristowe*, L. R. 4 Ch. Ap. 3; *Grissell v. Bristowe*, L. R. 4 C. P. (Ex. Ch.) 36; and *Maxted v. Paine*, L. R. 4 Ex. 81). So far as the rules of the Stock Exchange would, if unchecked, operate beyond the club itself and the members thereof, they are subject to the general law of the land; e.g., to the Bankruptcy Act, 1869 (*Ex parte Saffery, In re Cooke*, 4 Ch. Div. 555; 3 App. Ca. 213). But "time-bargains" are unlawful (*Thacker v. Hardy*, 4 Q. B. Div. 685).

See titles BROKERS; JOBBERS; SHARES; STOCKS, &c.

STOCK JOBBER: See title JOBBERS.

STOCKDALE v. HANSARD. An action of libel (1836) by a medical gentleman against Hansard (Parliament publisher), for publishing by order of Parliament reports of Prison Inspectors, in which reports it was stated that the plaintiff had published improper and indecent physiological plates. The defendant was condemned in the Courts of Law, but Parliament interfered

STOCKDALE v. HANSARD—continued.

to protect their own publisher; and a deadlock followed, the recurrence of which for the future is obviated by the stat. 3 & 4 Vict. c. 9, which makes it a sufficient defence to say that the report is published by order of either House of Parliament.

STOLEN GOODS, POSSESSION OF : See title POSSESSION OF STOLEN GOODS.

STOLEN GOODS, RECEIVER OF : See title RECEIVING STOLEN GOODS.

STOP-ORDER. When a fund is in the Court of Chancery, a person interested or claiming to be interested in it, may sometimes obtain a stop-order on it, such stop-order (like notice to an individual) arresting the fund so long as the stop-order remains undischarged. The application is made by summons usually, but may (in a proper case) be made by petition; and the order, if made, may or may not be in aid of a charging order: the application must be supported by affidavits shewing the title of the applicant.

See title CHARGING ORDER.

STOPPAGE IN TRANSITU. This is the right of the unpaid vendor of goods to stop them in certain cases before they have reached the actual or constructive possession of the vendee, and to resume the possession, so as to put himself in the same position as if he had not parted with it. The first case in which the principle was acted on was *Wiseman v. Vandepuut* (2 Vern. 203; Tudor's Merc. C. 631). The right arises properly only in cases in which the vendee or consignee has become bankrupt or insolvent; but a general inability to pay, evidenced by stoppage of payment is sufficient to satisfy the rule (Sm. M. L., 8th ed., p. 544). Moreover, the right, or an analogous one, may exist by special contract (*Wilmshurst v. Bowker*, 2 Man. & G. 792), upon the happening of the event specified in the contract.

The right determines when the goods have reached their destination, whether or not they are in the actual possession of the vendee. Usually, the carrier of the goods is a mere neutral agent between the vendor and the vendee; and in ordinary cases, therefore, the transit is regarded as continuing as long as the goods are in the carrier's possession (*Ex parte Rosevear Clay Co., In re Cock*, 11 Ch. D. 560). But if the carrier enters into any new relation with the vendee, becoming, e.g., custodian as well as carrier, that determines the transit, although the goods may not yet have reached their destination (*Whitehead v. Anderson*, 9 M. & W. 534; *Ex parte Cooper, In re McLaren*, 11 Ch. D. 68). So, also, the exercise by the vendee of acts of

STOPPAGE IN TRANSITU—continued.

ownership over the goods, will in general determine the transit; for example, if the vendee takes samples of the goods with the intention of taking a constructive possession, and the carrier retaining possession of the goods has expressly or impliedly assented to keep the goods as agent for the vendee (*Whitehead v. Anderson, supra*). And if the goods are delivered on board the vendee's own ship, that determines the transit (*Schotmans v. Lancashire and Yorkshire Ry. Co.*, L. R. 2 Ch. App. 332), unless, indeed, the vendors in such a case procure (as they ought to procure) the master's bill of lading, making them deliverable to their order or assigns, for in that way they reserve to themselves the *jus disponendi* (*Turner v. Trustees of Liverpool Docks*, 6 Ex. 543) and may re-take possession, or may transfer the property by indorsement and delivery of the bill of lading (*Shepherd v. Harrison*, L. R. 4 Q. B. 196, 493). But where goods sold in London *fres on board* (f. o. b.), to be paid for on delivery on board by bill or cash at a certain discount, were shipped on a vessel selected by the vendee, and the vendor elected to take a bill, and it appeared that by the custom of the port the expression "f. o. b." indicated that the vendee was considered as the shipper, although the vendor was to pay the expenses of shipment, it was held that the transit was determined by the delivery on board, and the receipt of the bill (*Cowasjee v. Thompson*, 5 Moo. P. C. C. 165).

Where goods are in a warehouse and not on carriage, it is a general rule that the right of stoppage *in transitu* determines so soon as a delivery order is given by the vendor to the vendee, and the warehouseman assents thereto; but this is only so where no act remains to be done, such as weighing, measuring, or separating, to ascertain the quantity, value, or identity of the goods (*Hanson v. Meyer*, 6 East, 614; Tud. M. C. 600). The mere giving of a delivery order used not to operate as a constructive delivery of the goods (*M'Ecan v. Smith*, 2 H. L. C. 209); and the transfer of a delivery order had no such effect as the indorsement and delivery of a bill of lading (*Akerman v. Humphrey*, 4 Bing. 516); but now under the Factors Act, 1877 (40 & 41 Vict. c. 39), when any document of title to goods has been lawfully indorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indorsement, or (when that is sufficient by custom or according to the terms of the delivery order) by delivery to a person who takes the same *bonâ fide* and for valuable consideration, the last men-

STOPPAGE IN TRANSITU—continued.

tioned transfer has the same effect as the like transfer of a bill of lading towards defeating the right of stoppage *in transitu*. Moreover, the warehouseman's assent to hold the goods for the vendees may, in certain cases, estop him personally from denying their right to the possession of the goods, while it leaves the right of the vendors to stop *in transitu* unaffected (*Stonard v. Dunkin*, 2 Camp. 314).

Where there would be a right to stop if the *transitus* had begun, there is, *à fortiori*, a right to refuse to allow the transit even to begin (*Dixon v. Yates*, 5 B. & Ad. 313).

The right of stoppage is not determined by part payment or part delivery, unless in the latter case the vendee takes possession of the part in name of the whole; although even then the vendor is entitled under certain circumstances to hold the remainder of the goods until the price for the whole is paid (*Wentworth v. Outhwaite*, 10 M. & W. 436). Neither is the right of stoppage determined by a resale of the goods by the vendee, in the absence of course of a previous delivery thereof to him (*Craven v. Ryder*, 6 Taunt. 433).

The right to stop *in transitu* is personal to the vendor or consignor; it does not belong to a surety for the price of the goods (*Siffken v. Wray*, 6 East, 371). The vendor or consignor may, however, at any time before the transit is ended, ratify and thereby make good the act of a stranger who stops the goods (*Bird v. Brown*, 4 Ex. 786).

The following is a summary of the rules regarding stoppage *in transitu* :—

(1.) The right of stoppage *in transitu* is not a rescission of the contract, but at the most a re-vesting of the possession in the vendor (*Wentworth v. Outhwaite*, 10 M. & W. 451; *Ex parte Stapleton*, *In re Nathan*, 10 Ch. Div. 586).

(2.) The right is personal to the consignor, and does not extend, *e.g.*, to a surety for the price of the goods (*Siffken v. Wray*, 6 East, 371);

(3.) The right only endures during the transit, and the transit is taken to have ended so soon as the goods come into the actual or constructive possession of the vendee (*Edwards v. Brewer*, 2 M. & W. 375);

(4.) The termination of the transit as to part is not the termination of it as to the rest (*Tanner v. Scovell*, 14 M. & W. 28); unless the contract was entire (*Hammond v. Anderson*, 1 N. R. 69);

(5.) The termination of the transit may be accelerated by the vendee (*Whitehead v. Anderson*, 9 M. & W. 518); but may not be prolonged by the carrier (*Bird v. Brown*, 4 Ex. 786);

STOPPAGE IN TRANSITU—continued.

(6.) The right to stop *in transitu* is defeated by the consignee's negotiating the bill of lading or document of title to a *bond fide* transferee for value (*Lickbarrow v. Mason*, 1 Sm. L. C. 699); *secus*, if to a *malâ fide* transferee (*Cumming v. Brown*, 9 East, 514); but

(7.) The indorsee, even since 18 & 19 Vict. c. 111, takes subject to the equities attaching upon his indorser (*Gurney v. Behrend*, 2 E. & B. 622).

STOWAGE. Lading cargo. It is the master's duty to safely place the cargo, so as not to be damaged either in the act of lading or afterwards from leakage or the motion of the vessel. Stowage on deck is improper, if that endangers either the vessel or the cargo itself; but it may be justified by the usage of trade. Stowage on deck gives no claim (unless by custom) to general average. Usually, cargo is stowed by means of "stevedores" (*see* title STEVEDORE); but the master is required to be himself a competent stevedore. Where a stevedore is employed, and damage results to the cargo in the process of stowage, the shipowner or master is generally liable, but sometimes the shipper; and the question seems to depend on who is the principal employing the stevedore as his agent (*See Sandemann v. Scurr*, L. R. 2 Q. B. 86; *Kay's Shipmasters*, 273-275).

STRANGERS. These are third persons generally. Thus, the persons bound by a fine are parties, privies, and strangers,—the parties being either the cognizors and cognizees, the privies being such as are in any way related to those who levy the fine, and as claim under them by any right of blood, or other right of representation, and the *strangers* being all other persons in the world, except only the parties and privies. Again, those who are in no way parties to a covenant, nor bound by it, are also said to be *strangers* to the covenant.

See titles PARTIES OR PRIVIES.

STREAMING FOR TIN. The process of working tin in Cornwall and Devon. The right to stream must not be exercised so as to interfere with the rights of other private individuals, *e.g.*, either by withdrawing or by polluting or choking up the water-courses or waters of others; and the statutes 23 Hen. 8, c. 8, and 27 Hen. 8, c. 23, impose a penalty of £20 for the offence.

STREAMS: *See* title RIVERS.

STREETS: *See* titles HEALTH, PUBLIC; SANITARY LAWS; VAGABONDS.

STRIKING A JURY. Is the act of selecting or nominating a jury of twelve men out of the whole number returned as jurors on the panel. This, in common jury cases, is usually done by the associate of the Court at the trial putting the names in a box, and then drawing out twelve promiscuously. With regard to a special jury, the proper officer of the Court appoints a time and place for "striking the special jury," and the under-sheriff, or his agent, and the parties attend, and the numbers from the jurors' list are then put into a box, and the forty-eight names corresponding with the forty-eight numbers are drawn by each party alternately, and this number is afterwards reduced, and constitutes the special jury (*Lush's Pr.* 471, 477; *stat. 6 Geo. 4, c. 50, ss. 30, 32, 34, 37*; *Juries Act, 1870 (33 & 34 Vict. c. 77)*).

See titles JURY; PANEL.

STRIKING OUT PLEADINGS. Either party to an action may, upon motion, obtain an adverse order against the other party to strike out or amend anything in the adverse pleading that ought to be amended or struck out, either as being scandalous, embarrassing, dilatory, or otherwise prejudicing the fair and speedy trial of the action (*Order xxvii.*); e.g., vague allegations of title put forward by a plaintiff, who has never been in possession of the land claimed (*Phillips v. Phillips, 4 Q. B. Div. 127*).

STRODE'S CASE: See title FREEDOM OF SPEECH.

STRONG HAND. The words "with strong hand" imply a degree of criminal force, whereas the words "with force and arms" (*vi et armis*) are mere formal words in the action of trespass, and the plaintiff is not bound to prove any force. The statutes relating to forcible entries use these words, "with a strong hand," as describing that degree of force which makes an entry or detainer of lands criminal (*Rex v. Wilson, 8 T. R. 362, 363*; per *Lawrence, J., Lowe v. King, 1 Saund. 81*; *Harvey v. Brydges, 14 M. & W. 440, per Parke, B.*).

See title FORCIBLE ENTRY.

STUFF GOWN. Is the professional robe worn by barristers of the outer bar, viz., those who have not been admitted to the rank of Queen's counsel.

See title SILK GOWN.

SUB-AGENT. The relation of a sub-agent towards the agent, is that of an ordinary agent to his principal, excepting that the agent regarded as a principal has of necessity powers limited by his agency,

SUB-AGENT—continued.

and cannot confer upon the sub-agent other or larger powers.

SUB-CONTRACTOR. Usually the contractor is liable in exemption of the principal for whom he contracts, in respect of all injuries occasioned to third persons by the contractor or his servants in the execution of the contract (*Burgess v. Gray, 1 C. B. 578*); but there is no such exemption if the contract or anything to be done under it is beyond the power of the superior to authorize (*Ellis v. Sheffield Gas Co., 2 El. & Bl. 767*), or is such that the injurious consequences flow naturally from the act (*Bower v. Peate, L. R. 1 Q. B. Div. 321*), or if the superior (i.e., principal) is directly involved or personally at fault (*Tarry v. Ashton, L. R. 1 Q. B. Div. 314*). The like rules apply as between a principal contractor and his sub-contractor; and the latter has no privity of contract with the primary individual who engages the principal contractor (*Venables v. Smith, 2 Q. B. Div. 279*; *Pearson v. Cox, 2 C. P. D. 369*; *Bridges v. North London Railway, L. R. 7 H. L. 213*).

SUBINFEUDATION. The system which the feudal tenants introduced of granting smaller estates out of those which they held of their lord, to be held of themselves as inferior lords; and as the system was proceeding downwards *ad infinitum*, and deprived the lords of their feudal profits of wardships, marriages, and escheats, which fell into the hands of these mesne, or middle, lords, who were the immediate superiors of those who occupied the land, a provision was made in the thirty-second chapter of Magna Charta, 9 Hen. 3, prohibiting any man either to give or sell his land without reserving sufficient to answer the demand of his lord, and ultimately, by the *stat. Quia Emptores, 18 Edw. 1* (*Statute of Westminster the Third*), c. 1, subinfeudation was entirely suppressed, and instead of it alienation in the modern sense was introduced, so that thenceforth the alienee held of the same chief lord and by the same services that his alienor before him held.

See title ALIENATION.

SUBJACENT SUPPORT: See title SUPPORT, RIGHT OF.

SUBMISSION: See next title.

SUBMISSION TO ARBITRATION. The submitting matters in difference between parties to the award or decision of an arbitrator, and also the bond by which the parties bind themselves to abide by the award of the arbitrator, are commonly called the submission or submission bond. A submission to arbitration may (when in writing) be and commonly is made a rule

SUBMISSION TO ARBITRATION—*continued.*

of one of the superior Courts; and thereby the award may (if necessary) be enforced in a summary manner, or such other application as the circumstances require may be made to the Court regarding it.

SUB-MORTGAGES. When a mortgagee borrows money upon the security (or any part of the security) held by himself to secure the loan made by himself, he effects what is called a sub-mortgage. For example, an equitable mortgagee by deposit may deposit with any third person by way of securing an advance made by the latter to himself all or any of the title deeds deposited with him by the original mortgagor.

SUBORNATION OF PERJURY. The offence of procuring another to take such a false oath as would constitute perjury in the principal. To render the offence of subornation of perjury complete, either at Common Law or on the statute, the false oath must be actually taken, and no abortive attempt to solicit the party to take it will bring the offender within its penalties (3 Mod. 122). The punishment is the same as for perjury, viz., fine or penal servitude for not more than seven nor less than five years (3 Geo. 4, c. 114; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47).

See title PERJURY.

SUB-PLEDGES: *See title PLEDGE.*

SUBPOENA AD TESTIFICANDUM: *See title SUBPOENA, WRIT OF.*

SUBPOENA DUCES TECUM: *See title SUBPOENA, WRIT OF.*

SUBPOENA, WRIT OF. A writ by which persons are commanded to appear at a certain place, at a certain time, under a penalty of £100. This writ is used both in the Courts of Chancery and in the Courts of Common Law, and is applied to various purposes. The subpoena most frequently in use in Chancery proceedings was that by which parties were commanded to appear in Court, and answer the plaintiff's bill, and which was thence called a *subpoena to appear and answer*. This subpoena was, however, abolished by the Jurisdiction Act, 1852. There are, however, other subpoenas still in use, those of most frequent occurrence being two, viz. (1.) Those used for the purpose of compelling witnesses to attend in Court to give their testimony on a trial, and which are thence called *subpoenas ad testificandum*; (2.) Those used for the purpose not only of compelling witnesses to attend in Court, but also requiring them to bring with them books or documents which may be in

SUBPOENA, WRIT OF—*continued.*

their possession, and which may tend to elucidate the subject-matter of the trial, and which are thence called *subpoenas duces tecum*.

SUBROGATION. In French Law denotes the putting a third person who has paid a debt in the place of the creditor to whom he has paid it, so as that he may exercise against the debtor all the rights which the creditor if unpaid might have done. It is of two kinds,—either (1.) Conventional, or (2.) Legal, the former being where the subrogation is *express* by the acts of the creditor and the third person, the latter being (as in the case of sureties) where the subrogation is *implied* by the law.

See title SURETYSHIP.

SUBSCRIBING WITNESS. He who witnesses or attests the signature of a party to an instrument, and in testimony thereof subscribes his own name to the document.

SUBSEQUENS MATRIMONIUM TOLLIT PECCATUM PRÆCEDENS. Means literally that a legal marriage contracted subsequently to sexual intercourse between the parties thereto removes the previous legal blemish in the status of the offspring conceived of such intercourse, and born prior to the marriage. This maxim held good in Roman Law, holds good in Scotch Law, but is bad in English Law.

See title LEGITIMATION.

SUBSEQUENT CONDITIONS: *See title CONDITIONS, PRECEDENT AND SUBSEQUENT.*

SUBSIDY. An extraordinary grant in the nature of a tax, aid, or tribute granted by Parliament to the King to meet the exigencies of the state.

See title TAXATION, HISTORY OF.

SUB-SOIL: *See titles EASEMENTS, subtitle SUPPORT; MINES AND MINERALS.*

SUBSTITUTED SERVICE. Where personal service of the writ of summons for commencing an action in the High Court can be effected, but for some reason or other cannot be promptly effected (W. N. 1875, p. 202), the plaintiff must obtain from the Court or a judge (*i.e.*, by motion in Court or by summons at chambers) an order for substituted or other service, or for the substitution of notice for service (Order ix., 2). Such order is to be obtained upon an affidavit, or affidavits, shewing sufficient grounds for it (Order x.), and in particular that the defendant is in present communication with the proposed substitute, or (as the case may be) that the notice proposed to be given will come under his observation.

SUBSTITUTIO HÆREDIS. In Roman Law, it was competent for a testator after instituting a *Hæres* (called the *Hæres Institutus*) to substitute another (called the *Hæres Substitutus*) in his place in a certain event; if the event upon which the substitution was to take effect was the refusal of the instituted heir to accept the inheritance at all, then the substitution was called *vulgaris* (or common); but if the event was the death of the infant (*pupillus*) after acceptance and before attaining his majority (of fourteen years if a male, and of twelve years if a female), then the substitution was called *pupillaris* (or for minors).

SUBSTITUTIONAL OR ORIGINAL. In the construction of wills, it is frequently matter of difficulty to decide whether a legacy or devise is substitutional or is original,—the importance of the question consisting sometimes in the avoidance of a lapse of the gift, sometimes in the determination of the proportions of benefit to be taken by the beneficiaries, and the like (5 Ch. Div. 494; 7 Ch. Div. 665).

See titles LAPSE; WILLS.

SUBTRACTION. Is the offence of withholding (or withdrawing) from another man what by law he is entitled to. There are various descriptions of this offence, of which the principal are the following:—

(1.) *Subtraction of suit and service*,—is a species of injury affecting a man's real property, and consists of a withdrawal of (or a neglect to perform or pay) the fealty, suit of court, rent, or customary services, reserved by the owner of the land to himself when he lets or leases it to another. For this neglect of duty on the part of the tenant the law gives the landlord the peculiar remedy of distress; but the real remedies formerly in use for rent in arrear, and for subtraction of suit and service, were abolished by the stat. 3 & 4 Will. 4, c. 27, and the only actions which now lie are personal actions. For the neglect to perform any customary service, such as the refusal to grind corn at the landlord's mill, an action on the case will lie to compensate the party injured in damages (2 B. & C. 827).

(2.) *Subtraction of tithes*,—is the withholding from the parson, whether he be a clergyman or a lay impropriator, or from the vicar, the tithes to which he is entitled, and this was an offence cognizable in the Ecclesiastical Courts; for though those Courts had no jurisdiction to try the right of tithes (unless between spiritual persons), yet where only the fact, whether or not the tithes allowed to be due were really subtracted or withdrawn, was in dispute, this was a personal transient injury, for which

SUBTRACTION—continued.

the remedy (*viz.*, the recovery of the tithes or their equivalent) might properly be had in the Ecclesiastical Court. But any dispute as to tithes in their original form is now rare, that species of property having been in the great majority of parishes already commuted into a corn rent-charge, under the provisions of the Tithe Commutation Act (6 & 7 Will. 4, c. 71) (2 Roll. Abr. 309).

(3.) *Subtraction of conjugal rights*,—is the withdrawing or withholding by a husband or wife of those rights and privileges which the law allows to either party, in respect of the personal society of the other. This is an offence peculiarly within the cognizance formerly of the Ecclesiastical Courts, and now of the Court for Matrimonial Causes, and the party injured seeks redress by bringing a suit to recover those rights of which he or she has been deprived, called a suit for the restitution of conjugal rights. Thus, where the husband leaves his wife, and lives separate from her, without any sufficient reason, the Court in question will compel him to return to cohabitation.

(4.) *Subtraction of legacies*,—is the withholding or detaining of legacies by an executor; and as such act deprives the legatees of the benefit which the law gives them, and which the testator intended them to have, it is an offence of which the Courts of Equity take notice.

(5.) *Subtraction of church-rates*,—consists in the refusal to pay the amount of rate at which any individual parishioner has been assessed for the necessary repairs of the parish church; and this is cognizable by the Courts Ecclesiastical (Roger's Ecc. Law, 988-999; 1 Curt. 375; 4 Ad. & E. 423; 1 Curt. 345; 12 Ad. & E. 233, 265; 1 Atk. 516; 2 Mad. 251).

SUBTRACTION OF CHURCH RATES:

See titles CHURCH RATES; SUBTRACTION.

SUBTRACTION OF CONJUGAL RIGHTS:

See titles CONJUGAL RIGHTS, RESTITUTION OF; SUBTRACTION.

SUBTRACTION OF LEGACIES: See

title SUBTRACTION.

SUBTRACTION OF SUIT OR SERVICE:

See titles SERVICES; SUBTRACTION; SUIT OF COURT.

SUBTRACTION OF TITHES: See titles

SUBTRACTION; TITHES.

SUCCESSION. The act of succeeding to the Crown or to property is occasionally so called; and a succession may be either a universal one (*e.g.*, to an entire inheritance) or a particular one (*e.g.*, to any particular

SUCCESSION—continued.

gift, office, or the like). The person succeeding is called the successor.

SUCCESSION DUTY. This is a duty varying from one to ten per cent., payable under the stat. 16 & 17 Vict. c. 51, in respect chiefly of real estate and leaseholds, but generally in respect of all property (not already chargeable with legacy duty) devolving upon any one in consequence of any death, where such devolution takes place after the nineteenth (19th) day of May, 1853, and where the person becoming entitled under it is not a purchaser for value (16 & 17 Vict. c. 51, s. 2, as modified by ss. 7 and 17). The duty is to be paid at the time the successor comes into possession or into the receipt of the rents or income of the property (*Re Hillas*, 2 Ir. Jur. 36), and, therefore, in the case of reversionary property, not until the same falls into possession by natural causes only. In case the reversionary property should devolve under several wills or intestacies before it falls into possession, a single duty only is payable, but that duty is to be at the highest rate of the several successions (16 & 17 Vict. c. 51, s. 14). (Contrast LEGACY DUTY.) If any succession is not wholly obtained by the successor in the first instance, the duty may be paid on the value of the part from time to time obtained, such value to be estimated as the property exists at the time it is obtained, and not at the time of the death (*Att.-Gen. v. Cavendish*, Wigh. 82). (Compare LEGACY DUTY.) If the succession is a gross sum (not being real or leasehold estate) vesting at once in the legatee, then, whether the same be or not given over on a contingency, duty on the whole amount is payable all at once, with a right to be recouped any over-payment in case the gift over takes effect, in which case the successor-over becomes chargeable with the same, or at a higher rate, if his rate should be higher than that of the first legatee (16 & 17 Vict. c. 51, s. 36) (compare LEGACY DUTY); but if the succession is not a gross sum, but an annuity for life or for years, then, whether the same be or not charged upon some other succession, and whether the same be or not given over on a contingency, duty is payable on the value only of the annuitant's interest calculated according to the tables of the Act 16 & 17 Vict. c. 51, and is to be paid by *four* successive annual instalments, such instalments being payable with the four first successive payments of the annuity itself, with a right to be recouped any over payment in case the gift over takes effect; but in the case of a direction to purchase an annuity, or of a perpetual annuity, the

SUCCESSION DUTY—continued.

duty is to be paid all at once on the value of the annuitant's interest calculated as aforesaid (16 & 17 Vict. c. 51, s. 32). (Compare LEGACY DUTY.) In the case of a gift of personal property producing income to several persons in succession,—(a.) If all the successors are chargeable with the same rate of duty, the whole duty is payable at once for the capital of the fund; and (b.) If the successors are chargeable with different rates of duty, the duty is to be calculated and paid upon each successive partial interest in the same manner as if the same were an annuity, and last of all upon the ultimate interest (being the absolute interest), in the same manner as if the same were an immediate gift of the capital (16 & 17 Vict. c. 51, s. 32). (Compare LEGACY DUTY.) In the case of successors in joint tenancy, each is chargeable at his own rate of duty, in the first instance, upon his then share, and afterwards (if it should happen) upon his accrued share. (Compare LEGACY DUTY.) In the case of money directed to be laid out in the purchase of lands, *see* LEGACY DUTY under that head. In the case of successors to real property, each successor, whether for life or in fee, is chargeable at his own rate of duty upon the value of his life interest, as if the same were an annuity for his life, and such duty is payable by eight half-yearly instalments,—the first thereof at the end of one year; but a successor for life only, if he should die before all these instalments are due, pays no more, while on the other hand a successor in fee, if he should die in like manner, remains chargeable with the unpaid instalments. But corporations stand upon a different footing in this respect (16 & 17 Vict. c. 51, ss. 16–17). No succession duty is payable upon a fund which is specially provided for the payment of duty—"no duty upon duty"—(16 & 17 Vict. c. 51, s. 32). (Compare LEGACY DUTY.) In the case of legacies which are subject to powers of appointment, it is provided by 36 Geo. 3, c. 52, s. 18, as follows: (1.) Where the power is limited, both the appointees and the persons taking interests, either prior or subject to such power, are chargeable; and (a.) If the rate of each legatee is the same, the duty is payable at once upon the capital of the fund; but (b.) If the rates of the several parties are different the duty payable by each is calculated as for an annuity. (2.) Where the power is general—(a.) If the appointor is entitled in default of appointment, the appointor pays the duty, as upon an absolute gift to him; and (b.) If the appointor is not entitled in default, the rule is the same, whether he takes or not any interest prior to the power, but the

SUCCESSION DUTY—continued.

appointor in this case only pays in case he should appoint, and only at the time he does appoint (16 & 17 Vict. c. 51, s. 4).

SUCCESSION TO CROWN, LAW OF.

The law of succession in Anglo-Saxon times was a mixture of the hereditary with the elective principle, the Crown descending within the royal family, but not invariably to the individual pointed out by the strict rules of descent; for in very many instances the Wittenagemote seems to have approved as a successor an able uncle in preference to the infant son of his brother, *e.g.*, Alfred excluded the son of his brother Ethelred, and Athelstan (although illegitimate) excluded the sons of his brother Edward the elder; and again, the sons of Edmund I. were postponed to their uncle Edred, and in their turn they excluded the sons of Edred. The frequency of these instances proves that the principle of election was as strong as that of hereditary descent, if, in fact, the elective principle was not the stronger of the two.

This mode of succession survived into the Anglo-Norman times, although the elective principle was then much impaired. Thus, upon the death of William I., his second son William succeeded in exclusion of the first son Robert; and again, upon the death of William II., his brother Henry I. succeeded, in exclusion also of Robert. Subsequently, however, the rules of descent became fixed and strictly hereditary. It is true that John, who was the fifth son of Henry II., excluded his elder brother Geoffrey's son Arthur, but John appears to have done so with difficulty, and by means of artifice, for he claimed under a devise of the Crown from Richard I., who was elder than Geoffrey, it being probably at that epoch a moot point whether the Crown was or not devisable. However, upon the death of John the Crown descended upon Henry III., although he was a minor of nine years or so, and the subsidiary principle of a regency (under the Earl of Pembroke) was resorted to; so that the law of hereditary succession to the Crown appears by a somewhat natural coincidence to have become established at the same time and in the same reign that the principles of primogeniture and representation were established in the matter of the succession to real property.

The Crown of England has since descended according to the strictest rules of primogeniture and representation. However, the doctrine of the king's capacity to devise the Crown was revived in the reign of Henry VIII., that monarch having attempted to devise the Crown, and having

SUCCESSION TO CROWN, LAW OF—continued.

also made various purported devises thereof in the 28th, 32nd, and 35th years of his reign, under enabling statutes passed in those years, in such manner as that the same should descend upon his decease otherwise than the law of inheritance pointed out, that is to say, to the issue of Anne Boleyn (*i.e.*, Elizabeth) in exclusion of the issue of Queen Catharine (*i.e.*, Mary), and subsequently to his son by Jane Seymour (*i.e.*, Edward VI.), with remainder to the issue of the younger daughter of Henry VII. (*i.e.*, Mary of Suffolk, his sister) in exclusion of the issue of the elder daughter of Henry VII. (*i.e.*, Margaret of Scotland, his sister). It is noteworthy, however, that all those attempts to alter the hereditary line of descent proved ineffectual, and that upon the death of Henry VIII. the Crown descended successively to Edward VI., Mary, and Elizabeth, and afterwards to James I., who was the great-grandson of Margaret, according to the strict principles of primogeniture and representation, and notwithstanding that there were at the time of each descent persons in existence who might have claimed under the various capricious devises before mentioned.

However, although the principle of hereditary succession to the Crown is now, and has long been, well established, still that principle is, or appears at any rate to be, subject to the constitutional maxim established at the Revolution of 1688, namely, that the two Houses of Parliament may, with the consent of the people, but only for reasons of overwhelming sufficiency, set aside or pass over the strict heir, and resort to the old principle of election within the royal family, and may even settle the descent of the Crown by Act of Parliament, as was done, for example, in the Bill of Rights, 1689, and again in the Act of Settlement, 1701, the present Brunswick dynasty holding, and claiming to hold, only under the last-mentioned Act.

See titles **BILL OF RIGHTS; REGENCIES; SETTLEMENT, ACT OF.**

SUCCESSORS: See titles **PREDECESSOR; SUCCESSION; SUCCESSION DUTY.**

SUE. To prosecute by law; to commence legal proceedings against a party. It is applied almost exclusively to prosecuting a civil action against one. He who has process issued against him is said to be sued.

SUFFERANCE, TENANT AT. A tenant at sufferance is he who holds lands or tenements by the implied permission of the owner. Thus, if a man takes a lease

SUFFERANCE, TENANT AT—*contd.*

for a year, and after the year is expired continues to hold the premises without any fresh leave of the owner, he is called a tenant at sufferance, and the estate which he so continues to hold is then called an estate at sufferance. And generally, a tenant at sufferance is one who comes in by right and holds over by wrong, *i.e.*, without right (*Rouse's Case*, Tud. Conv. 1).

SUFFERING A RECOVERY. A recovery was effected by the party wishing to convey the land *suffering* a fictitious action to be brought against him by the party to whom the land was to be conveyed (the demandant), and allowing the demandant to recover a judgment against him for the land in question. The vendor, or conveying party, in thus assisting or permitting the demandant so to recover a judgment against him was thence technically said to "suffer a recovery."

See title RECOVERY, COMMON.

SUFFRAGAN. Bishops who in former times were appointed to supply the place of others during their absence on embassies or other business were so termed, because they were said to help or assist (*suffragari*) the bishop when incapacitated by his other duties. They were consecrated as other bishops were, and were anciently called "*chorepiscopi*, or bishops of the county," in contradistinction to the regular bishops of the city or see. The practice of creating suffragan bishops after having long been discontinued was recently revived; and such bishops are now permanently "*assistant*" to the bishops.

SUGGESTIO FALSI: See title MISREPRESENTATION.

SUGGESTIONS, ENTRY OF, ON THE ROLL. In actions at law, whenever under any Act of Parliament or otherwise, a person not a party to the record was to be affected by a judgment, or where the judgment upon the record was to be such as would not be ordinarily warranted by the previous proceedings on the record, the proper course was to enter a suggestion on the roll, so that the party to be affected by it might demur if he thought the facts suggested insufficient in point of law, or plead, if he meant to deny them. Under the C. L. P. Act, 1852, and the Jurisdiction in Chancery Act, 1852, this entry of suggestions was made by order of the Court to be obtained upon motion supported by an affidavit of the circumstances occasioning the necessity for the suggestion; the entry was made with the record and writ clerks in Chancery matters in the Book of Causes; and in Common Law matters it was made with the associates of the then superior

SUGGESTIONS, ENTRY OF, ON THE ROLL—*continued.*

Courts at Westminster; and this practice remains practically unaffected by the Judicature Acts, 1873-5.

SUICIDE: See titles Felo de se; HOMICIDE.

SUI JURIS. Means, of full legal capacity; and is used in English Law in contradistinction to persons under any of the various disabilities of infancy, coverture, lunacy, or the like. As used in Roman Law, it was opposed to the phrase *alieni juris*, and meant persons out of the potestas (of a father or master) as opposed to persons subject to such potestas (*alieni juris*).

SUIT. This word originally signified the number of persons or witnesses which a plaintiff produced to establish the truth of the allegations made in his declaration; and this practice of producing a suit gave rise to the ancient formula once almost invariably used at the conclusion of a declaration, *et inde producit sectam* (and therefore he brings his suit) (Steph. Pl. 461). Its more modern meanings are principally the two following: (1.) Suit of Court, *i.e.*, service to the lord; and (2.) Suit, *i.e.*, action at law, or in Equity.

SUIT OF COURT. This phrase denoted the duty of attending the Lord's Court, and, in common with fealty, was and is one of the incidents of a feudal holding.

SUIT IN EQUITY: See title BILL IN CHANCERY.

SUIT OF THE KING'S PEACE. The pursuing a man for breach of the king's peace by treasons, insurrections, or trespasses (Cowel).

See titles HUE AND CRY; WATCH AND WARD.

SUIT AT LAW: See title ACTION AND SUIT.

SUITORS' DEPOSIT ACCOUNT. Moneys in the Chancery Division of the High Court paid in by suitors either before or after the 7th of January, 1873, are placed on deposit; and all moneys paid in after the last-mentioned date are placed on such deposit without any application or request for that purpose, and when so placed on deposit bear interest at the rate of £2 per cent. per annum, together with income tax (if any) chargeable thereon (35 & 36 Vict. c. 44, s. 14), unless such moneys are otherwise invested under any general or particular order of the Court.

See title SUITORS' FUND IN CHANCERY.

SUITORS' FEE FUND. Is or was only a receipt and expenditure fund in the

SUITORS' FEE FUND—continued.

Court of Chancery, arising partly from the surplus interest accruing on either head of the Suitors' Fund in Chancery (*see* that title), and partly from other moneys of the Court, and partly from the fees and other current revenue of the Court, and from the brokerage paid by the broker of the Court. By the stat. 32 & 33 Vict. c. 91, it has been transferred (together with all like growing moneys) to the Treasury on the indemnity of the public; but the Court still has on hand at all times for the purposes of the Court a sum not exceeding but averaging £500,000.

SUITORS' FUND IN CHANCERY was a fund standing in the name of the Accountant-General of the Court of Chancery, and arising partly from the investment by the Court at its own risk of the moneys (or a large part of the moneys) paid into the name of the Accountant-General by the suitors of that Court, and partly from the investment of the surplus interest (after payment of expenses) upon such moneys. There were two principal accounts kept at the Bank of England by the Accountant-General of Chancery with regard to the Suitors' Fund, one intituled "Account of the moneys placed out for the benefit and better security of the suitors of the High Court of Chancery," and the other, "Account of securities purchased with surplus interest arising from securities carried to an account of moneys placed out for the benefit and better security of the suitors of the High Court of Chancery." Now, however, under the stat. 32 & 33 Vict. c. 91 (Courts of Justice Salaries and Funds Act, 1869), the entirety of the moneys standing to either of such accounts has been transferred to the Treasury in trust for the public and on their indemnity. The moneys paid into Court, and which remain the property of the suitors (as opposed to those funds which are or were the property of the Court itself) have not been so transferred, but are payable (with the dividends thereon) to the parties upon certificate and by order of the Paymaster-General by the stat. 35 & 36 Vict. c. 44, substituted for the old Accountant-General.

SUMMARY CONVICTIONS. Under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), children charged with any indictable offence (other than homicide) may, unless the parent or guardian objects, be summarily tried, and convicted or discharged; but the imprisonment is not to exceed one month, and the fine is not to exceed forty shillings. Also, juvenile offenders (*i.e.*, persons appearing to be between twelve and sixteen years of age) charged with larceny, embezzlement, and

SUMMARY CONVICTIONS—continued.

the like, may be summarily dealt with, if the magistrates think fit; and so likewise adults, but with their consent only. The imprisonment for juvenile offenders is not to exceed three months, and for adults is not to exceed six months. And the Act empowers the magistrate to discharge the accused, where the offence (although technically proved) is of a trivial character, such discharge being usually upon terms (s. 16). Appeal from any such summary conviction lies to the general or quarter sessions (s. 19). The Summary Jurisdiction Act, 1879, appears to be in aid of the stat. 11 & 12 Vict. c. 43 (relating to summary convictions before justices and their orders), and to be in partial substitution for the stat. 18 & 19 Vict. c. 126 (also relating to the like summary convictions and orders); and it wholly repeals the last-mentioned Act, except ss. 18, 20, 22, 23, and 24 thereof, none of which are material to the present title.

See title **SUMMARY JURISDICTIONS.**

SUMMARY JURISDICTIONS. These jurisdictions are usually the justices or magistrates. The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), enlarges the powers and discretions of magistrates exercising summary jurisdiction, and generally amends the procedure before them. Frequently penalties imposed by such Acts as the Public Health Act for infringements of their provisions are made recoverable before a summary jurisdiction; and the Act of 1879 makes all such penalties civil debts merely.

See title **SUMMARY CONVICTIONS.**

SUMMARY PROCEDURE, BILLS AND NOTES: *See* title **BILL OF EXCHANGE, ACTION ON.**

SUMMARY PROCEEDINGS IN AN ACTION. The formal procedure is the regular *de cursu* procedure in an action properly so called. It rarely happens, however, that the formal procedure alone is used in an action; more often, and, in fact, almost always, many incidental proceedings intervene in the progress of every action from its commencement to its conclusion, such incidental proceedings being necessitated by various occasions arising in the action, and being disposed of in an expeditious and less formal or informal manner, whence these latter proceedings are commonly designated and classified together as the summary procedure in the action. Each of the Divisions of the High Court exercises also a large summary jurisdiction, upon petition, motion, and summons, independently of the pendency of any action, and solely by virtue of certain statutory provisions in that behalf.

SUMMONS. The process used for bringing a party before a justice of the peace on summary conviction is termed a summons. It is to be distinguished from a *warrant*, the latter instrument authorizing the apprehension of the accused, which a summons does not do.

See title **WARRANT**.

SUMMONS AND ORDER. In the progress of an action, it frequently becomes necessary to obtain the order of the Court upon some matter of minor importance; and as such matters are of very frequent occurrence, it would be inconvenient in many respects to permit the party seeking such an order to make an application for the same in open Court; in consequence of which, one or more of the judges usually sit at chambers daily or on particular days, for the purpose of hearing and disposing of such minor matters. The party who wishes to obtain a judge's order at chambers must usually summon the attorney or agent of the opposite party before the judge, which he does by obtaining a judge's summons, and serving it on such opposite party, which summons requires him to attend before the judge at a specified time, to shew cause why the party applying for the order should not have it granted him (2 Arch. Pract. 1598).

See title **CHAMBERS**.

SUMMONS TO PARLIAMENT: See titles **BARONY**; **NEW WRIT**; **PEERAGE**.

SUMMONS, or MOTION, or PETITION. These are the three modes of obtaining interlocutory orders or judgments,—the summons being at chambers, the motion being (usually) in Court, and the petition also being (usually) in Court.

See titles **MOTIONS**, **VARIETIES OF**; **PETITIONS IN CHANCERY**; **SUMMONS AND ORDER**.

SUMMONS, WRIT OF. The writ or process used for the commencement of an action. It is a judicial writ (i.e., a writ issuing out of the Court in which the defendant is to be sued), and is witnessed in the name of the Lord Chancellor, and is directed to the defendant, whom it commands to appear in Court at the suit of the plaintiff. By the O. L. P. Acts, 1852 and 1854, six general forms of this writ were provided; but now, under the Judicature Acts, 1873-5, and the orders and rules thereunder, the following are the varieties of writs of summons that are available for the commencement of an action:—

(1.) A writ specially indorsed under Order III., 6, with the particulars of a debt or liquidated damages;

(2.) A writ indorsed with any other

SUMMONS, WRIT OF—continued.

claim, either for unliquidated damages or for any declaration of rights or other general remedy, or expressly for an account or other matter incidental or ancillary to the more substantive relief claimed.

See titles **INDORSEMENTS UPON WRIT**; **ISSUE OF WRIT**; **NOTICE IN LIEU OF SERVICE**; **SUBSTITUTED SERVICE, &c.**

SUMMUM JUS SUMMA INJURIA. Means literally that the strictest exaction of one's legal rights is the supremest infliction of injury upon others,—a maxim which had some application perhaps before the fusion of Law and Equity, but which has none since then. Probably, the maxim was one of the reasons which assisted in the original development of Equity as a substantive separate jurisdiction.

SUMPTUARY LAWS. Laws made for restraining excess of expenditure in clothes and apparel, &c. (Cowel).

SUNDAY. Is a *dies non juridicus*. Also, contracts made on Sundays by persons in their usual trades are invalid under the stat. 29 Car. 2, c. 7 (*Bloxsome v. Williams*, 3 B. & C. 232). The statute applies to "tradesmen, artificers, workmen, labourers, and other persons whatsoever"; but it does not extend to people not falling within these categories, e.g., to a stage-coach owner (*Sandiman v. Brench*, 7 B. & C. 96); and works of necessity are expressly excepted from the statute. Also, under the stat. 21 Geo. 3, c. 49, penalties are imposed for the breach of Sunday observance, but same may be remitted under the stat. 38 & 39 Vict. c. 80 (*Girdlestone v. Brighton Aquarium Co.*, 3 Exch. Div. 137).

SUNDAY OBSERVANCE: See titles **QUI TAM ACTIONS**; **SUNDAY**.

SUPERFICIES. In Roman Law was a right to the perpetual enjoyment of anything built upon land, on payment of an annual rent (*pensio*). The *Superficiarius* had (subject to such payment) the enjoyment and use of the subject-matter (*utendi fruendi*); also the right of alienating, pledging, or burdening it with servitudes.

See titles **CONDOMINIA**; **EMPHYTEUSIS**.

SUPERFLUOUS LANDS. When lands have been taken by compulsion by a public company under the Lands Clauses Act, 1845, or the company's special Act, or under both Acts, and any portions thereof prove to be or become superfluous, i.e., not required for the purposes of the company's undertaking, the company is required to dispose of such superfluous lands within the period prescribed for that purpose, or else within ten years after the time prescribed for the completion of the works;

SUPERFLUOUS LANDS—continued.

and failing such disposition thereof, the lands are made to vest in the adjoining owners in proportion to their respective adjoining lands. The person who was owner prior to the company's compulsory taking of the lands has, however, a right and the first right of pre-emption, and after him the adjoining owners; and the offer of the right of pre-emption must be accepted within six weeks after it is made. But these provisions do not extend to lauds (otherwise superfluous) situate within a town, or used for building purposes (*Carington v. Wycombe Ry. Co.*, L. R. 2 Eq. 825; 3 Ch. App. 377).

SUPERIOR COURTS. The Courts of the highest and most extensive jurisdiction, viz., the Court of Chancery and the three Courts of Common Law, i.e., the Queen's Bench, the Common Pleas, and the Exchequer, which sit in Westminster Hall, were commonly so termed (4 Steph. Pl. 368, 869, 5th ed.; *Peacock v. Bell*, 1 Saund. 73; 12 Ad. & E. 256; 4 Ad. & E. 438, 446).

See titles COURTS OF JUSTICE; INFERIOR COURTS.

SUPERIOR AND VASSAL: See title LORD AND VASSAL.

SUPERSEDE. To stay, stop, interfere with, or annul; e.g., to supersede the proceedings in outlawry, or in bankruptcy, or in lunacy, &c.

See title SUPERSEDEAS, WRIT OF.

SUPERSEDEAS, WRIT OF. A writ which lies in various cases to supersede some legal process, e.g., to supersede an inquisition (or the order made upon an inquisition) of lunacy (*Elmer's Lunacy Practice*, 5th ed., 81, 82); also, e.g., to supersede an execution or a judgment of outlawry (2 Chitty's Arch. 1317, 1340, &c.).

SUPERSTITIOUS USES. What these are depends partly on the Common Law, which renders it incumbent on the Crown to prevent the propagation of a false religion, and partly upon particular statutes, being principally the following:—

- (1.) 23 Hen. 8, c. 10, assurances of lands to uses to have *obits perpetual*, or a continual service of a priest for ever;
- (2.) 1 Edw. 6, c. 14, lands given to the finding or maintenance of any anniversary or obit, or other like thing, intent, or purpose; and,
- (3.) 1 Geo. 1, c. 50, a statute appointing a commission to inquire into and confiscate to the king lands held on superstitious uses.

At one time the doctrines of Protestant

SUPERSTITIOUS USES—continued.

Dissenters, of Roman Catholics, and of Jews were all deemed contrary to the national worship more or less; but Dissenters were relieved of this interpretation by the Toleration Act, 1689, Roman Catholics by the stat. 2 & 3 Will. 4, c. 115, and Jews by the stat. 9 & 10 Vict. c. 59; nevertheless, the relief afforded by these statutes does not extend to authorize gifts for superstitious uses, such as for saying masses for the dead (*In re Blundell*, 30 Beav. 360),—an egregiously inconsistent condition of the law.

See title CHARITABLE USES; also, titles DISSENTERS; JEWS; NON-CONFORMISTS; and ROMAN CATHOLICS.

SUPERVISION, WINDING-UP UNDER.

As regards companies registered under the Companies Act, 1862, when a resolution has been passed by a company to wind up voluntarily, the Court may, on petition, make an order directing that the voluntary winding-up should continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others, to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just; and wherever an order is made for a winding-up subject to the supervision of the Court, the liquidators appointed to conduct such winding-up may, subject to any restrictions imposed by the Court, exercise all their powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily.

See title WINDING-UP ORDER.

SUPPLEMENTAL BILL. In a suit in Chancery, it frequently happened that new matter arose or was discovered after the filing of the original bill in the suit, or that some of the parties acquired a new interest, or that new parties acquired an interest in the matter in question; all which matters had to be brought to the knowledge of the Court upon the proceedings. Now it occasionally happened that some of these objects might be accomplished by amending the bill; but after the parties were at issue, and witnesses had been examined in the suit, the bill could not usually be amended, and therefore the defect was in such a case supplied by means of what was termed a supplemental bill (*Gray's Ch. Pr.* 86). However, under the modern practice, the necessity for such a bill has now ceased, and the old effect thereof may now in general be produced by amendments and an order of revivor; occasionally, however, it may happen that a supplemental statement (or statement of claim) would have to be

SUPPLEMENTAL BILL—continued.

delivered or filed, or else a petition presented in the action.

See titles REVIVOR, BILL OF; REVIVOR, ORDER OF.

SUPPLETORY OATH. In the modern practice of the Civil Law, a less number than two witnesses falls short of *plena probatio* (full proof); the testimony of one witness is *semi-plena probatio* only, on which no sentence can be founded; in order to supply the other half of proof, the party himself (plaintiff or defendant) is examined on his own behalf, and the oath administered to him for that purpose is called the *suppletory oath*, because it supplies the necessary *quantum* of proof on which to found the sentence.

See titles DECISORY OATH; OATHS.

SUPPLICAVIT, WRIT OF. A mandatory writ issuing out of the Court of King's Bench or Chancery to compel a justice to give security of peace to a party who is in bodily danger.

See title PEACE, ARTICLES OF THE.

SUPPLIES. The "supplies," in parliamentary proceedings signify the sums of money which are annually voted by the House of Commons for the maintenance of the Crown and the various public services.

See titles COMMITTEE OF SUPPLY; COMMITTEE OF WAYS AND MEANS.

SUPPLIES, APPROPRIATION OF: See title APPROPRIATION OF SUPPLIES.

SUPPORT, RIGHT OF: See title EASEMENTS, sub-title *Support*.

SUPPRESSIO VERI: See title CONCEALMENT IN EQUITY.

SUPREMACY, ACT OF. Is the statute 1 Eliz. c. 1, whereby all foreign jurisdictions, whether spiritual or temporal, within the realm were excluded, and all spiritual jurisdiction was annexed to the Crown, which might exercise the jurisdiction by commissioners.

See title HIGH COMMISSION.

SURCHARGE. This word signifies overcharge. Thus, *surcharge of the forest* or of common signifies the putting in the forest or on the common more beasts than one has a right to put; and if, after admeasurement of common, upon a writ of admeasurement of pasture, the same defendant surcharges the common again, the plaintiff may have a writ of second surcharge (*de secundâ superatione pasturæ*), by which the sheriff is directed to inquire by a jury whether the defendant has in fact again surcharged the common contrary to the tenor of the last admeasurement, and if he has, he shall then forfeit to the king

SURCHARGE—continued.

the supernumerary cattle put in, and shall also pay damages to the plaintiff.

See title ADMEASUREMENT, WRIT OF.

SURCHARGE AND FALSIFY. This phrase, as used in the Courts of Chancery, denotes the liberty which these Courts will occasionally grant to a plaintiff who disputes an account, which the defendant alleges is settled, to scrutinize particular items therein without opening the entire account. The shewing an item for which credit ought to have (but has not) been given is to *surcharge* the account; the proving an item to have been inserted wrongly is to *falsify* the account.

See title SETTLED ACCOUNT.

SUR CUI IN VITÂ. A writ that lay for the heir of a woman whose husband had aliened her land in fee, and she had omitted to bring the writ of *cui in vitâ* for the recovery thereof; in which case, her heir might have this writ against the tenant after her decease (Cowel).

SURETY: See title SURETYSHIP.

SURETY OF THE PEACE. This security consists in being bound with one or more securities in a recognizance or obligation to the king entered on record, and taken in some Court, or by some judicial officer; whereby the parties acknowledge themselves to be indebted to the Crown in the sum required (for instance, £100), with condition to be void and of none effect if the party shall appear in Court on such a day, and in the meantime shall keep the peace, either generally towards the king and all his liege people, or particularly also with regard to the person who seeks such security. Or if the security be for the good behaviour of the party, then on condition that he shall demean and behave himself well (or be of good behaviour) either generally or specially, for the time therein limited.

See title PEACE, ARTICLES OF THE.

SURETYSHIP. This word denotes the relation in which one person who is not primarily indebted stands towards two other persons, viz., the primary creditor whom he further assures in his debt, and the primary debtor whom he assists in obtaining credit. The relation is contractual in these respects, viz., the surety agrees with the creditor to pay him, failing the debtor; and the debtor agrees to repay the surety the amount which he may have paid on his account to the creditor.

The utmost good faith is required from all parties to this contract, any concealment or misrepresentation of material facts on the part of the creditor releasing the surety (*Pidcock v. Bishop*, 3 B. & C. 605;

SURETYSHIP—continued.

Hamilton v. Watson, 12 Cl. & F. 109). Whence the surety will be discharged if the creditor varies the contract with his debtor without the surety's privity; or if without the surety's consent, he give time to the debtor, or release or covenant not to sue the debtor; but where he merely covenants not to sue the debtor, or merely gives time, in either of these cases (but not also in case he release the debtor) he may reserve his rights against the surety; and in that case, the surety will remain bound.

It seems that the surety cannot compel the creditor (as in Roman Law, *beneficium excussionis vel ordinis*) to obtain payment of his debt from the debtor, or even to try to obtain such payment in the first instance; but he can compel the debtor to pay the debt when due (*Padwick v. Stanley*, 9 Hare, 627). And in case the surety has been called upon to pay, and has paid, the debt, then he is entitled to be re-imbursed the amount by the debtor, a right which is commonly called his right of *recoupment*. He has also under such circumstances a right to have all securities held by the creditor delivered up to him, whether or not the same securities, or any of them, are satisfied by his own payment of the debt (*Hodgson v. Shaw*, 3 My. & K. 190, and M. L. A. Act, 1856); and whether or not he knew at the time of becoming surety that the creditor held such securities, a right which was called in Latin the *beneficium cedendarum actionum*.

Where there are two or more sureties for one and the same debt, they have in English Law no right (as they had in Roman Law under the *Epistula Hadriani*) to require the creditor to split his demand equally between or amongst all the solvent co-sureties (*beneficium divisionis*), but in lieu thereof they have what is called the right of *contribution* as against each other, where one or more have paid the entire debt. At Law this right of contribution used to be regulated by the original number of co-sureties (*Batard v. Hawes*, 2 El. & Bl. 287), but in Equity by the number of those who were solvent at the time of payment (*Peter v. Rich*, 1 Ch. Rep. 19); and for this purpose it did not matter whether all the co-sureties were by one instrument or by several instruments (*Dering v. Earl of Winchelsea*, 1 W. & T. L. C. 89), provided they were equally upon a line as sureties for one common debt, and not one for one part only and the others for the other part of the debt (*Coope v. Twyman*, 1 T. & R. 426), or some as being only collaterally liable in *subsidiu*m of the others (*Swain v. Wall*, 1 Ch. Rep. 149); and of course, the rule of Equity now prevails in all these respects at Law also.

SURFACE: see title SUPERFICIES.

SURMISE. This word commonly denotes to suspect, conjecture, or suggest. In former times, where a defendant in an action pleaded a local custom—as, e.g., a custom of the City of London—it was necessary for him “to surmise,” that is, to suggest, that such custom should be certified to the Court by the mouth of the Recorder, and without such a “surmise” the issue was to be tried by the country, as other issues of fact are (1 Burr. 251; Vin. Abr. 246 (G.)).

SURPLUS IN BANKRUPTCY. The bankrupt has not such an interest in a prospective surplus coming from his estate as to maintain an action respecting it (*Rochfort v. Battersby*, 2 H. L. C. 388); neither is the trustee in bankruptcy a trustee for him (*Re Leadbitter*, 10 Ch. Div. 388), but only for the creditors.

SURPLUS LANDS: See title SUPERFLUOUS LANDS.

SURPLUS MONEYS, IN MORTGAGES. These moneys are (or may be) directed by the clause in that behalf incidental to the power of sale contained in the mortgage deed to be paid to the executors, administrators, or assigns of the mortgagor, if the sale takes place in his lifetime, and to his heirs or assigns, if it takes place after his death,—that being, in fact, the devolution of these moneys, which in either event the law would of itself prescribe. (See also *Dawson v. Bank of Whitehaven*, 6 Ch. Div. 218).

SURPRISE: See titles ACCIDENT; MISTAKE; FRAUD.

SURREBUTTER. } See title REBUTTER.
SURREJOINDER. }

SURRENDER. A surrender is of a nature directly the reverse of a release; for as the latter operates by the greater estate descending upon the less, so a surrender operates by the falling of a less estate into a greater, the two estates being in privity in each case. It is defined by Lord Coke to be the yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them. The person who so surrenders is termed the surrenderor, and the person to whom he surrenders is termed the surrenderee. Sometimes a surrender takes place by operation of law, and in that case it is called an *implied* surrender, as opposed to the *express* surrender described above. An implied surrender is where the lessee either himself takes a new lease in possession from

SURRENDER—continued.

his reversioner or landlord before the expiration of his subsisting lease, or is party or privy to the grant of such new lease to any third person; for in either of these cases the subsisting lease is deemed in law to have been surrendered to the landlord immediately before the grant of such new lease.

See title **SURRENDER OF COPYHOLDS**.

SURRENDER OF COPYHOLDS. The mode of conveying or transferring copyhold property from one person to another is by means of a *surrender* and an *admittance*; the surrender consists in the yielding up of the estate by the tenant into the hands of the lord (who is in a manner the reversioner or landlord) for such purposes as are expressed in the surrender. The process in most manors is for the tenant to come to the steward either in Court or out of Court, or else to two customary tenants of the same manor, provided there be a custom to warrant it, and there by delivering up a rod, a glove, or other symbol, or by mere word of mouth, as the custom directs, to resign into the hands of the lord, by the hands and acceptance of his steward, or of the said two tenants, all his interest and title to the estate, in trust to be again granted out by the lord to such persons and for such uses as are named upon the surrender, and as the custom of the manor will warrant. Formerly, such a surrender was wanted in order to devise copyholds; but it was rendered unnecessary by Preston's Act, 1815 (55 Geo. 3, c. 192). A surrender in the case of legal estates tail in copyholds is at the present day the only mode of barring same (3 & 4 Will. 4, c. 74); but in the case of equitable estates tail in copyholds, either a surrender or a disentailing deed may be used for that purpose (3 & 4 Will. 4, c. 74).

See title **ADMITTANCE**.

SURROGATE. One who is appointed or substituted in the place of another, most commonly in the place of a bishop, or a bishop's chancellor. He usually presided in the bishop's diocesan court, and as the representative of the ordinary granted letters of administration where the spiritual court was not presided over by a judge.

See title **COURTS, ECCLESIASTICAL**.

SURVIVORSHIP. One of the incidents of joint estates is what is termed the doctrine of survivorship, by which when two or more persons are seized of a joint estate, or are jointly possessed of a chattel interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor. This incident does not attach to

SURVIVORSHIP—continued.

estates held by tenancy in common; but in the case of these latter tenancies it is not unusual to insert an express clause of survivorship or accrual, as it is called. There is this difference between the accrual in joint tenancies which is implied by law, and the accrual in common tenancies which is expressed in the words of the deed, that whereas the former takes place repeatedly, as often as the event arises, the latter is confined to the original shares only of the tenants, and does not extend also, unless particularly so expressed, to the shares accrued by the accrual, it being a maxim of law as to the express clause that (in the absence of express words) there is "no survivorship upon survivorship" (*Pain v. Benson*, 3 Atk. 80). Usually, also, there is no survivorship implied at law as between partners; moreover, the Court of Chancery will defeat survivorship upon very slight distinctions.

See titles **JOINT TENANCY**; **SURVIVORSHIP**, **WIFE'S RIGHT OF**.

SURVIVORSHIP, PROOF OF. There is no presumption recognised by the English Law regarding which of two or more persons who have perished in one common calamity was or were the survivor or survivors, but the person alleging the survivorship of one or other must prove same (*Underwood v. Wing*, *Wing v. Angrave*, 19 Beav. 459; 4 De G. M. & G. 633; 8 H. L. C. 183).

SURVIVORSHIP, WIFE'S RIGHT OF. A wife surviving her husband takes back to herself absolutely all her leasehold property (whether in possession or in reversion) not disposed of by him by act *inter vivos*; and also all her freehold fee-tail and fee-simple estates; and also all her choses in action which have not been reduced by her husband into possession; and also all her pure personal estates in reversion which have not fallen into possession during the coverture (Snell's Equity, 5th ed. 374-398).

See title **EQUITY TO A SETTLEMENT**.

SUSPENDING POWER: See title **DISPENSING POWER**.

SUSPENSION. A temporary stop or suspension of a man's rights; e.g., the depriving of an ecclesiastic of the profits and privileges of his benefice for a time. Also, easements may be suspended for a time by unity of ownership of the dominant and servient tenements, and may revive again upon the subsequent separation again of the tenements; also, rent-charges may be suspended by reason of the like unity of ownership; also, powers are sometimes said to be suspended, as opposed to being

SUSPENSION—continued.

extinguished, but the word *suspended* is not very properly used in that case.

See titles **EASEMENTS; POWERS, &c.**

SWEARING: See titles **BLASPHEMY; OATHS.**

SWORN CLERKS: See title **SIX CLERKS.**

SYNDICS. As applied to foreign bankrupts, is the term corresponding to assignees of the bankrupt (now trustee for the creditors of the bankrupt) in English Law. But the term is also capable of expressing other bodies invested with a legal status.

SYNGRAPHÆ. Were later forms of the literal contract (*litteris obligatio*) in Roman Law, and are stated to have been bilateral, as against *chirographæ* which are said to have been unilateral.

T.

TACKING. This word denotes annexing, and as applied to mortgages it signifies the annexation of a subsequent to some prior charge, so as to squeeze out a mesne charge. This is its chief application in law; but under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 7, the doctrine of tacking was abolished as from the 7th of August, 1874. However, by the Land Transfer Act, 1875, the doctrine of tacking has been restored in its entirety as from the 7th of August, 1874, excepting as to anything done in the interval between the 7th of August, 1874 (inclusive), and the 1st of January, 1876 (exclusive). The law is expressed in the following rules, which are principally taken from the celebrated case of *Brace v. Marlborough (Duchess)*, 2 P. Wms. 491:—

(1.) A third mortgagee buying in a first mortgage, *being a legal mortgage*, may annex his third mortgage to the first, so as to squeeze out, *i.e.*, get paid before, the second or mesne mortgage;

(2.) One who is a legal mortgagee to begin with, and who afterwards advances a further sum upon a judgment, may in like manner annex his judgment to his mortgage; but one who is a judgment creditor to begin with cannot annex his judgment to a first legal mortgage which he may afterwards obtain a transfer of, *scil.*, so as to squeeze out a mesne mortgage, because otherwise he may (after actual delivery in execution under the judgment) tack the judgment to the mortgage (*Ex parte Evans, In re Watkins*, 11 Ch. Div. 691).

(3.) Tacking is excluded when all the mortgages are equitable; also, where the

TACKING—continued.

third mortgage or the subsequent judgment is made or obtained with notice of the second or mesne mortgage.

See titles **CONSOLIDATION OF MORTGAGES; NOTICE.**

TAIL. This word, used in conjunction with the word "estate" or the word "fee," signifies an estate of inheritance, descendible to some particular heirs only of the person to whom it is granted, in contradistinction to an estate in fee simple, which is an estate descendible to the heirs general (without distinction) of the person to whom it is granted. An estate tail is of two kinds, general and special. When lands are given to a man and the heirs of his body without any further restriction, this is called an *estate tail general*; because how often soever such donee in tail be married, his issue by every such marriage is capable of inheriting the estate tail. But if the gift is restrained or limited to certain heirs of the donee's body, exclusively of others, as in the case of lands being given to a man and the heirs of his body on Mary his present wife to be begotten, this is an *estate tail special*, because the issue of the donee by any other wife is excluded.

Estates tail are also distinguished into estates tail male and estates tail female. When lands are given to a person and the heirs male of his or her body, this is called an *estate tail male*, and to which the female heirs are not capable of inheriting. On the other hand, when lands are given to a person and the heirs female of his or her body, this is called an *estate tail female*, and to which the male heirs are not capable of inheriting. The person who holds an estate tail is termed a tenant in tail. And when a person grants land to a man and his particular heirs in the manner above described (*i.e.*, when he creates an estate tail), such person is said to entail his lands (1 Cruise, 78, 79; *Les Termes de la Ley*).

Estates tail exist chiefly in lands of freehold tenure, the statute *De Donis Conditionalibus* (13 Edw. 1, c. 1) upon which they depend speaking only of "tenements of inheritance." However, certain manors having, in imitation of the Courts at Westminster, introduced into their Courts the analogy of the statute, while other manors have persistently excluded it, it follows that in manors of the former class an estate tail in copyhold lands may and does exist, and arises in virtue of the same words as the like estate in freehold lands; whereas in manors of the latter class an estate tail does not exist, but a *donum conditionale* only, *i.e.*, a fee simple conditional at Common Law, as was the case with all like gifts of freehold lands before the stat. *De Donis*.

TAIL—continued.

Personal estate cannot be entailed; and words of limitation which would confer an estate tail in freehold lands give a fee simple absolute in leasehold lands (*Leventhorpe v. Ashbie*, Tud. Conv. 763), and a fee simple conditional in the case of grants of personal annuities (*Earl of Stafford v. Buckley*, 2 Ves. Sen. 170).

See title ESTATE TAIL.

TAKING, FELONIOUS: See title LARCENY.

TALES DE CIRCUMSTANTIBUS: See title TALES, PRAYING A.

TALES, PRAYING A. When by means of challenges, a sufficient number of unexceptional jurors does not appear at the trial, either party may pray a *tales* as it is termed; that is, a supply of such men as are summoned on the first panel in order to make up the deficiency. For this purpose a writ of *decem tales*, *octo tales*, and the like, used to be issued to the sheriff at Common Law, and that must still be done at a trial at bar, if the jurors make default. But at the assizes or *nisi prius*, by virtue of the stat. 35 Hen. 8, c. 6, and other subsequent statutes, the judge is empowered at the prayer of either party to award a *tales de circumstantibus*, i.e., of the bystanders or of persons present in the Court, to be joined to the other jurors to try the cause, who, however, are liable to the same challenges as the principal jurors. This is usually done *toties quoties* till the legal number of twelve is completed (1 Inst. 155).

TALIS NON EST EADEM. What is similar is not identical. Therefore, there is no estoppel by contrary judgment in cases exactly similar, but the matter is said to be concluded by authority.

See title ESTOPPEL.

TALITER PROCESSUM EST. Upon pleading the judgment of an inferior Court, the proceedings preliminary to such judgment, and on which the same was founded, must, to some extent, appear in the pleading, but the rule is that they may be alleged with a general allegation that "such proceedings were had," instead of a detailed account of the proceedings themselves, and this general allegation is called the *Taliter processum est* (1 Wms. Saund. 112, 113; Steph. Pl. 369, 5th ed.). A like concise mode of stating former proceedings in a suit is adopted at the present day in Chancery proceedings upon Petitions and in actions in the nature of Bills of Revivor and Supplement.

TALLAGE. This word means the share of a man's substance paid by way of toll, or tax, and is derived from the French

TALLAGE—continued.

tailleur, which signifies a share cut out of the whole (Cowel.)

See title TAXATION, HISTORY OF.

TALTARUM'S CASE: See title ESTATE TAIL.

TAXATION, HISTORY OF. In early Anglo-Norman times, taxation was twofold:—

- (1.) Taxes upon land, and being either
 - (a.) On military tenants; or
 - (b.) On socage tenants; and
- (2.) Taxes upon persons other than landowners, being the taxes commonly called *tallages*.

The taxes of the first class were nothing more than the incidents of tenure, viz., aids, reliefs, wardships, marriages, escheats, and the like, the amounts of which were regulated by Magna Charta, 1215. The taxes of the second class were granted by the Commons in Parliament; and it is regarding these latter taxes that most of the statutes protecting the subjects' property against illegal taxation have been made, chief amongst which is the *Statutum de Tallagio non Concedendo* (25 Edw. 1). But the king also derived a large revenue from his hereditary domains, e.g., the demesne lands and forests of the Crown.

In later times fresh sources of revenue were opened up, namely:—

- (1.) The *custuma antiqua sive magna*, being customs granted for the first time in 25 Edw. 1, and falling upon wool, woolfels, and leather, exported and imported;
- (2.) The *custuma nova sive parva*, being customs granted for the first time in 31 Edw. 1, and falling upon merchant strangers exclusively, and being in addition to their assessment under the *custuma antiqua sive magna*;
- (3.) Butlerage, being a charge of 2s. on every *tun* of wine imported by merchant strangers; and
- (4.) Priage, being a charge of 20s. for one *ton* before and another behind the mast, and falling upon English merchants having 20 tons of wine or more on board.

Two other modes of raising a revenue were given to the sovereign by special Acts of Parliament, passed usually at the commencement of each reign, viz.:—

- (1.) Tonnage and Poundage, the former on wine and the latter on dry goods; and
- (2.) Aids, being chiefly tenths and fifteenths of moveable goods.

The king also, in virtue of his prerogative, or of an assumed prerogative, exercised other modes of raising a revenue, viz.:—

TAXATION, HISTORY OF—continued.

- (1.) Purveyance ;
- (2.) Benevolences ;
- (3.) Forced loans ; and
- (4.) Fines, forfeitures, and penalties.

The king also derived an occasional but not inconsiderable revenue from his custody of the temporalities of bishoprics upon a vacancy thereof and from first-fruits and tenths upon ordinary church livings ; also, from his right to royal fish, wrecks, treasure-trove, waifs, and estrays ; and from royal mines ; and from his right to the custody of the estates of idiots and lunatics.

In 12 Car. 2, when the feudal tenures were commuted into socage tenures, the revenue from the feudal dues was taken away, and in lieu thereof the excise duties were given to the king ; but afterwards, in 1692, an equivalent for the feudal dues was re-imposed on land in the shape of the *land-tax*, which in 38 Geo. 3, was fixed at 4s. in the pound, and made perpetual. A tax on income (and which is diversely called the income or property tax) was imposed for the first time in 1798 (38 Geo. 3) ; and this after being abolished in 1802 was revived in 1803 ; and being again abolished in 1816, it was revived in 1842 by the stat. 5 & 6 Vict. c. 35, and since then it has continued to exist, varying only in its amount.

See title **TAXATION, VARIETIES OF.**

TAXATION, VARIETIES OF. The principal varieties of taxation at the present day are the following :—

- (I.) *Local Taxes*, commonly called Rates, and comprising the following :—

- (1.) Borough Rates ;
- (2.) County Rates ;
- (3.) General Improvement Rates ;
- (4.) Poor Rates ;
- (5.) District Rates ;
- (6.) Water Rates ;
- (7.) Lighting Rates ;
- (8.) Highway Rates ;
- (9.) Church Rates, &c., &c.

- (II.) *Imperial Taxes*, being taxes properly so called, and comprising the following :—

- (1.) Land Tax ;
- (2.) Customs ;
- (3.) Excise ;
- (4.) Post Office Revenue ;
- (5.) Stamps on legal documents, including Legacy Duty, Succession Duty, &c. ;
- (6.) Queen's Taxes, otherwise called Assessed Taxes ;
- (7.) Offices and Pensions Duty ; and
- (8.) Income or Property Tax.

See titles **RATING ; TAXATION, HISTORY OF.**

TAXATION OF COSTS. There are certain officers in the Courts who are appointed to examine the items in solicitors' bills, and to make such deductions as they think proper to be made ; this process of examining the bills, and making the proper deductions, is technically termed *taxing costs*. The officers who perform this duty are the masters or taxing masters of the respective Courts : and when a master, or taxing master, has so examined a bill (or taxed the costs, as it is termed), and has deducted the items which he has thought proper to disallow from the gross amount, he marks down the remaining sum which is to be allowed, and this remaining sum is thence called the master's *allocatur*, or certificate.

The taxation of costs may be made on either of two scales, that is to say, either (1.) As between solicitor and client, which is the more liberal ; or (2.) As between party and party, which is the less liberal scale.

At any time before the taxing master or master's certificate or *allocatur* is signed, any party dissatisfied therewith may apply by summons at Chambers for an order to review the taxation, such review extending only to matters objected to before the master, and of which objected matters with the grounds of objection thereto, a written statement must be furnished.

See titles **COSTS ; COSTS OF THE DAY ; COSTS, SOLICITORS ACT, 1843 ; HIGHER AND LOWER SCALE, COSTS.**

TAXES, COVENANT TO PAY. This covenant throws upon the lessee the payment of taxes which would otherwise have to be borne by the lessor. These taxes are land tax, sewers rates, and tithe rent-charge, and also all assessments made or to be made in respect of permanent improvements done by order of a local authority. The words of the covenant should include "taxes, assessments, and outgoings" (*Palmer v. Earith*, 14 Mee. & Wel. 428 ; *Jeffery v. Neale*, L. R. 6 C. P. 240) ; and should also include the words, "burdens, duties, and services" (*Tidswell v. Whitworth*, L. R. 2 C. P. 326).

TAXING MASTERS : See title **TAXATION OF COSTS.**

TELEGRAPHS. Under the stat. 31 & 32 Vict. c. 110, and the Amendment Act, 32 & 33 Vict. c. 73, the Government, in its Postmaster-General, was authorized to acquire, work, and maintain electric telegraphs, for the use of the public, having previously only had the use thereof in common with the public. The telegraph company (and now, *semble*, the Govern-

TELEGRAPHS—continued.

ment) is not answerable for the consequences of a mistake in transmitting the message on the wires (*McAndrew v. Electric Telegraph Company*, 17 Q. B. 3), nor for delivery of a telegram at the wrong address (*Dickson v. Reuter's Telegraph Company*, 2 C. P. Div. 62). Telegraph messages are not privileged from production for purposes of evidence in Courts of Justice (*In re Waddell*, 8 Jur. (N.S.) 181).

TELLERS. Four officers in the Exchequer were so called, whose duty it was to receive all moneys due to the king. They also paid all persons any money payable by the king, by warrant from the auditor of the receipt, and made weekly and yearly books of their receipts and payments, which they delivered to the Lord Treasurer (Cowel).

TELLERS IN PARLIAMENT. In the language of Parliament, the "tellers" are the members of the House selected to count the members when a division takes place. In the House of Lords a division is effected by the "non-contents" remaining within the bar, and the "contents," going below it; a teller being appointed for each party. In the Commons the "ayes" go into the lobby at one end of the House, and the "noes" into the lobby at the other end, the House itself being perfectly empty, and two tellers being appointed for each party (May's Treatise on Parliament).

TEMPORALITIES OF A BISHOP: See title SPIRITUALITIES OF A BISHOP.

TENANCY: See title TENANT.

TENANT. In the language of the law, every possessor of landed property is called a *tenant*, with reference to such property, almost all the real property of this kingdom being by the policy of the law supposed to be granted by, dependent upon, and holden of, some superior lord, in consideration of some service to be rendered to the lord by the tenant or possessor of the property. Tenants are distinguished, according to the nature of the estate which they hold, a person who holds an estate in fee simple being called, with reference to such estate, a tenant in fee simple; and a tenant who holds an estate tail is called, with reference to such estate, a tenant in tail; and if it is an estate for years, he is then called a tenant for years, and so on.

See titles ESTATE; TENURE, &c.

TENANT IN COMMON. Tenants in common are generally defined to be such as hold by several and distinct titles, but

TENANT IN COMMON—continued.

by unity of possession, because none knows his own severalty, and therefore they all occupy promiscuously, and (excepting by express words) there is no survivorship between them, as there is in the case of joint tenants.

See titles ESTATE; JOINT TENANTS.

TENANT BY THE CURTESY: See title CURTESY.

TENANT IN FEE SIMPLE: See titles ESTATE; FEE SIMPLE.

TENANT FOR LIFE: See title ESTATE.

TENANT TO THE PRÆCIPE: See title RECOVERY, COMMON.

TENANT AT SUFFERANCE: See title SUFFERANCE, TENANT AT.

TENANT IN TAIL: See titles ESTATE TAIL; TAIL.

TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINCT. The meaning of this title may be thus explained. Supposing lands to be given to a man and the heirs of his body on Matilda his present wife to be begotten, the donee with reference to the lands so given is called a tenant in tail. Now, if his wife Matilda should happen to die without leaving issue, or having left issue, such issue should die before the donee, he would then be called a tenant in tail after possibility of issue extinct; that is, the possibility of his having issue inheritable to the lands would be extinct, because Matilda his wife was the only source of issue capable of inheriting according to the terms of the gift. Such a tenant cannot bar the estate tail; but in consideration of the eminency of his estate, which is greater than that of an estate for life, he is dispunishable for waste, not being wilful or humoursome.

See titles TENANT; WASTE.

TENANT IN TAIL EX PROVISIONE VIRI. Where an owner of lands upon or previously to marrying a wife, settled lands upon himself and his wife, and the heirs of their two bodies begotten, and then died, the wife being the survivor became tenant in tail of the husband's lands "*in consequence of the husband's provision*" (*ex provisione viri*). Originally, she could bar the estate tail like any other tenant in tail; but the husband's intention having been merely to provide for her during her widowhood, and not to enable her to bar his children of their inheritance, she was restrained (*respectu fragilitatis sue*) by the stat. 32 Hen. 8, c. 36, from barring the tail.

TENANT AT WILL. Is a tenancy determinable at any time at the will of either the landlord or the tenant. It may be created by express demise to hold at will, but that is not often the case; the tenancy at will more often arises when a landlord leases lands to a tenant for a period of more than three years (or at a rent less than two-thirds of a rack rent) by word of mouth or writing under hand only, and not under seal, the effect of the want of a deed in such cases being under the Statute of Frauds (29 Car. 2, c. 3), and the 8 & 9 Vict. c. 106, to render the lease an estate at will only. But, *nota bene*, after possession taken and payment of rent by the quarter or half-year, such a tenancy becomes transmuted in law into a tenancy from year to year, and not determinable otherwise than a tenancy from year to year would be. A tenant at will properly so called is entitled to emblements when his tenancy is determined by the landlord's act.

See titles EMBLEMENTS; TENANT; YEAR TO YEAR TENANCY.

TENANT FOR YEARS: See titles LEASE; LANDLORD AND TENANT.

TENANT FROM YEAR TO YEAR: See title YEAR TO YEAR TENANCIES.

TENDER. In order to a valid *tender* the money tendered must be actually produced, unless the creditor dispenses with the production of it at the time (*Thomas v. Evans*, 10 East, 101). The tender must also be unconditional; and for this purpose, in case a receipt is wanted, the debtor should bring a stamped receipt with him, and require the creditor to sign it, and to pay the amount of the stamp (*Laing v. Meader*, 1 C. & P. 257).

TENDER, PLEA OF. Signifies a plea by which the defendant alleges that he has been always ready to pay the debt demanded, and *before the commencement of the action* tendered it to the plaintiff, and now brings it into Court ready to be paid to him, &c. (Steph. Pl. 247; Bull. & L. Prec. in Pl. 693). The plea of tender must be accompanied by an actual payment of the amount into Court, such payment being in fact stated in the plea. The plea therefore amounts to an admission of the cause of action.

See title PAYMENT OF MONEY INTO COURT.

TENDERING ISSUE. If in the pleadings in an action the defendant traversed or denied some allegation of fact put forward by the plaintiff in his declaration or other pleading, a question was at once raised between the parties as to the exist-

TENDERING ISSUE—continued.

ence or non-existence, truth or falsehood, of the fact to which the traverse was directed. A question being thus raised, or, in other words, the parties having arrived at a specific point, or matter affirmed on the one side and denied on the other, the defendant (as the party traversing) was obliged to offer to refer this question to the proper mode of trial, which he did by annexing to the traverse an appropriate formula indicative of such offer, and in so doing he was said to "tender issue." Where the question for trial was one of fact, the formula was simply as follows: "and of this the defendant puts himself upon the country," &c., meaning that, with regard to the question in issue, he threw himself upon a jury of his countrymen. However, other issues besides those of fact were frequently tendered (Steph. Pl. 59, 60, 5th ed.).

See title ISSUE.

TENEMENT. This word includes within its compass every species of real property which may be held, or in respect of which a person may be a tenant, all the real property of this kingdom being supposed to be granted by, dependent upon, and *holden of*, some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of his property. The thing holden is, therefore, styled a *tenement*, the possessor thereof a tenant, and the manner of his possession a tenure. As thus used, the word "*tenement*" extendeth to land and messuages of all varieties, whether freehold, copyhold, or leasehold, and is equally applicable to incorporeal as to corporeal hereditaments.

See titles TENANT; TENURE.

TENENDUM. That formal part of a deed which is characterised by the words "to hold." It was formerly used to express the tenure by which the estate granted was to be held; but since all freehold tenures have been converted into socage, the *tenendum* is of no further use, and is therefore joined in the *habendum* (4 Cruise, 26).

See title HABENDUM.

TENOR, EXECUTOR ACCORDING TO: See title EXECUTOR, ACCORDING TO THE TENOR.

TENTERDEN'S ACT (LORD). The 9 Geo. 4, c. 14, is so called, which is declared to be "An Act for rendering a written memorandum necessary to the validity of certain promises and engagements."

These are four in number, that is to say:—

TENTERDEN'S ACT (LORD)—*contd.*

- (1.) A promise to bar the Statute of Limitations (s. 1);
- (2.) A promise by an adult to pay a debt contracted by him during infancy (s. 5);*
- (3.) Representations of ability in trade, upon the strength of which credit is intended to be given (s. 6); and
- (4.) Contracts for the sale of goods amounting in price to £10 or upwards, notwithstanding such goods have yet to be made or finished (s. 7).

See titles FRAUDS, STATUTE OF; INFANTS RELIEF ACT, 1874.

TENTHS. Tenths and fifteenths were temporary aids issuing out of personal property, and granted to the king by Parliament. They were formerly the actual tenth or fifteenth part of all the moveables belonging to the subject; but ecclesiastical tenths were the tenth part of the annual profits only of each living.

See title TAXATION, HISTORY OF.

TENURE. Tenure signifies the system of holding lands or tenements in subordination to some superior, and which in the feudal ages was the leading characteristic of real property. The king, who was at once the source of property and the fountain of justice and honour, had bestowed large territories on the great barons who immediately surrounded the throne, and these again had distributed his bounty through the channels of their numerous dependants. In legal contemplation, all the landowners of the kingdom thus derived their estates. On this hypothesis, the system of tenure was built, a system which linked every feudatory, by a chain more or less extended, to the Crown, and rendered his fief eventually liable to resumption by the sovereign power from which it had, or was assumed to have, originally emanated. The nature of the tenure, or, in other words, the manner in which lands were held, was characterised by appropriate terms; thus, lands held by the honourable tenure of military service, that is, in consideration of attending or assisting the lord in his wars, &c., were distinguished by the term knight service, &c. Out of this system arose the relation of lord and vassal, corresponding to a certain extent with the landlord and tenant of the present age. To this system we may also refer the origin of the present legal assumption, that every possessor of real property is a tenant in respect of that

TENURE—*continued.*

property; that he is still considered as holding it of some superior lord, and therefore is a tenant in reference to such lord. To this system may also be referred the origin of the present freehold and copyhold tenures, into the one or the other of which nearly all the various tenures which existed during the period of feudal rigour have merged. Such is a general idea of the nature of tenure; the different kinds of tenure will be found under their respective titles.

See titles ESTATE; FEUDAL SYSTEM.

TENURE OF LAND, HISTORY OF. It is a disputed question whether tenure existed in Anglo-Saxon times. It is the opinion of Spelman, Madox, Wright, Blackstone, and Williams, that no tenure existed till 1066. On the other hand, Hallam mentions that writers of equal authority (whose names, however, he significantly does not give) have held a different theory; and he himself is of opinion, that if actual tenure did not exist, at least something very closely analogous to it did exist in Anglo-Saxon times.

It is true that in Anglo-Saxon times all lands were subject to services or burdens; namely,—

- (1.) Military services in defensive warfare;
- (2.) The repair of roads and bridges; and
- (3.) The maintenance of royal fortresses; these being the three burdens comprised in the *trinoda necessitas*. But it appears that for the neglect to render these services the Anglo-Saxon owner did not forfeit his lands, but at the most was liable in damages only; whereas in Anglo-Norman times the holder in case he neglected the services that were due and owing from him forfeited the lands, and was not liable in damages merely, these services having become the condition of his holding the lands. In brief, the Anglo-Norman services were annexed to the *tenure* of the lands, whereas the Anglo-Saxon services were annexed to the lands themselves; and therein precisely consists the distinction between feudal estates and allodial ownerships.

It is true that the lands of England, being subject in Anglo-Saxon times to the services of the *trinoda necessitas*, were fitted to receive readily and naturally the peculiar impress of feudalism; the difference between annexing the services to the tenure and annexing them to the lands was very slight. That, however, is no reason for confounding two distinct things, or for saying that things which were analogous merely are identical; and the

* By Infants Relief Act, 1874 (37 & 38 Vict. c. 62), this section of Lord Tenterden's Act is in effect repealed.

TENURE OF LAND, HISTORY OF—
continued.

English lawyer knows, therefore, of no tenure prior to 1066.

See titles **ALLODIAL LAND; FEUDAL SYSTEM.**

TERM FEE. A small fee or allowance which an attorney in a cause was entitled to for every term in which any step was taken in the cause, from the time of the delivery of the declaration until final judgment. The term for this purpose was considered as including the following vacation, so that if any step in the cause was taken between one term and another, as, for instance, between Michaelmas and Hilary Terms, i.e., in Michaelmas vacation, the attorney would be entitled to his fee for Michaelmas Term the same as if the step had been actually taken in the term itself. The amount of the fee varied from 13s. to 20s.

TERMS. Were those four periods of the year during which the Courts at Westminster used to sit to hear and determine points of law, and transact other legal business of importance, and which were and are called respectively Hilary, Easter, Trinity and Michaelmas Terms. By the Judicature Act, 1873, the distinction of terms from sittings after term was abolished; but the distinction is preserved within the Inns of Court, and also wherever the distinction was used for counting the time for doing any legal act, and no other mode of counting such time is expressly substituted.

TERMS OF YEARS. When a man holds an estate for any limited or specific number of years, that is called his *term*, and he himself is called, with reference to the term he so holds, the *termor*, or tenant of the term. A term of years, considered as an estate or interest in lands, is but a particle, or portion, of some larger or greater estate or interest in the same lands, and hence is, with reference to such larger estate, termed a particular estate. Terms for years were commonly either short terms, i.e., terms at a rent; or long terms, i.e., terms for securing the payment of money, e.g., pin-money, jointure, and portions.

See titles **LANDLORD AND TENANT; TERMS OF YEARS, OUTSTANDING.**

TERMS OF YEARS, ATTENDANT: *See* title **TERMS OF YEARS, OUTSTANDING.**

TERMS OF YEARS, OUTSTANDING. A term of years is said to be outstanding when it is disconnected with the freehold title; and it is said to be attendant, when it is vested in some trustee upon trust to attend the inheritance. The phrases outstanding and attendant are only applicable to those terms of years which are called

TERMS OF YEARS, OUTSTANDING—
continued.

long terms, e.g., for 500 years, or 1000 years, or 2000 years, originally created by marriage settlement or other like instrument, or by will, for the purpose of securing the payment of money (whether pin-money, or jointure, or portions), and upon which money being paid, the purpose of the term is satisfied, and the term is therefore called a satisfied term. Immediately upon such a term being satisfied, it is either made to cease under the proviso for ceaser in that behalf contained in the deed or will or other instrument, or it is kept alive by being assigned to a trustee upon trust to attend the inheritance. The latter course is that which for many reasons was most frequently adopted, and when a term had been thus assigned, it was said to "attend upon the inheritance," because whosoever became entitled to the inheritance would be equitably entitled to such term. And a term so attendant was frequently of great use in protecting the estate of a purchaser against prior *unknown* incumbrances; but being also liable to abuse, it has been provided by the Satisfied Terms Act (8 & 9 Vict. c. 112), that terms already attendant on the 31st of December, 1845, and also terms becoming attendant subsequently to that date, shall absolutely cease; but as to the former, where they are attendant by express declaration only, they are to continue (although non-existing) to afford the old protection.

See title **SATISFIED TERMS.**

TERMS OF YEARS, SATISFIED: *See* title **SATISFIED TERMS.**

TERMINABLE ANNUITIES: *See* title **TERMINABLE PROPERTY.**

TERMINABLE PROPERTY. Is such property (e.g., leaseholds, terminable annuities, and the like) as has no permanent duration, but will and must end and determine at a certain term usually ascertained beforehand. When any such property is comprised in a residuary bequest, upon trust for successive takers of limited estates or interests therein, it is the duty of the trustee (unless relieved therefrom by the will itself) to sell and convert the property and invest the proceeds in some investment of a permanent and not terminable character (*Howe v. Lord Dartmouth*, 7 Ves. 137; *Wright v. Lambert*, 6 Ch. Div. 649).

TERMINUM QUI PRETERIIT, WRIT OF ENTRY AD. A writ which lay for the reversioner, when the possession was withheld by the lessee, or a stranger, after the determination of a lease for years.

TERRE-TENANT. He who is literally in the occupation or possession of the land.

TERRE-TENANT—*continued.*

as distinguished from the mere owner of the same. The phrase also denotes sometimes the owner of the legal estate, *e.g.*, the trustee's estate; and in that sense, although the *cestui que trust* should die without heirs, the lands will not escheat to the lord for want of a tenant (*per defectum sanguinis*), for the trustee is the terre-tenant (*Burgess v. Wheate*, 1 Eden, 177).

TERRITORIAL JURISDICTION. It is a maxim of almost every jurisprudence, that the jurisdiction of a country is limited by its territory, including in such phrase its dominions proper and also its territorial waters; and *extra territoriam jus dicenti impune non parebitur* (one may safely disregard a judge administering justice beyond his own country). However, by the comity of nations, the decrees of the country are in many instances aided by other countries in their execution; and certain offences (*e.g.*, international piracy) are justiciable everywhere.

TERRITORIAL WATERS. Under the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), the jurisdiction of the admiral (*i.e.*, of the Court of Admiralty) is declared or made to extend to and over offences committed by any person whatsoever (and whether or not a subject of the Queen) on the open sea within the territorial waters of the Queen's dominions; and by open sea is here intended any part of the open sea within one marine league of the coast as measured from low-water mark. The prosecution cannot, however, be instituted except with the sanction of a Secretary of State at home or of a governor abroad. The Act was passed in consequence of the decision in *Reg. v. Keyn*, 2 Exch. Div. 68; but the jurisdiction over territorial waters theretofore existing by statute or under the law of nations was not to be deemed to be affected or questioned by the passing of the Act.

TEST ACT. An Act of 1673, directing all officers, civil and military, to take the oaths, and make the declaration against transubstantiation in any of the King's Courts at Westminster, or at the quarter sessions, within six calendar months after their appointment, and also within the same time to receive the Sacrament of the Lord's Supper, according to the usage of the Church of England, in some public church immediately after Divine Service and sermon, and to deliver into the Court a certificate thereof, signed by the minister and churchwarden, and also to prove the same by two credible witnesses, under a forfeiture of £500, and disability to hold

TEST ACT—*continued.*

the office. This Act was frequently evaded (*see* title DISPENSING POWER), and was finally repealed (together with the Corporation Act) in 1828.

See title CORPORATION ACT.

TEST ACTION. Where in the same division of the High Court there are several pending actions instituted by divers plaintiffs against the same defendant or defendants,—then, if the question or questions in dispute are substantially the same in all the actions (and consequently, the evidence in proof or disproof of the question or questions, when of fact, is substantially the same), the Court will on the application of the plaintiffs (or such of them as choose to apply), or of the defendant or defendants, make an order which is in effect a consolidation order, that is to say, the Court will select one (or more) of the divers actions as a test-action (or test-actions), and the plaintiff undertaking to try these selected actions and to abide by the result therein in all the other actions, the Court will (in its discretion) allow for taking the next step in these other actions such an extension of time as will permit the selected actions to be first tried (*Amos v. Chadwick*, L. R., 4 Ch. Div. 869; 9 Ch. Div. 459; *Robinson v. Chadwick*, 7 Ch. Div. 878).

See title CONSOLIDATION OF ACTIONS.

TESTAMENT: *See* title WILL.

TESTAMENTARY CAUSES. Are causes, cognizable formerly in the Ecclesiastical Courts, and now in the Court of Probate, concerning last wills and testaments.

See title PROBATE DIVISION.

TESTAMENTARY GUARDIAN. A person appointed by a father in his last will and testament to be the guardian of his child until he or she attains the age of twenty-one years. The power of appointing such a guardian was first conferred on the father by stat. 12 Car. 2, c. 24.

See title GUARDIAN.

TESTAMENTORUM GENERA. In Roman Law, the ancient wills were two, *viz.*, (1.) That made in and with the sanction of the *Calata Comitia*, and which therefore was only open to the [Patrician] members thereof to make; and (2.) That made before going into battle, and called *In Procinctu* (*i.e.*, "with the loins girt about.") After the Twelve Tables, a third form of will called *Per æs et libram* was introduced, and was open alike to patricians and to plebeians to make. Subsequently, an alternative mode of will came into existence, the peculiarity of which was its seals (of seven witnesses), and this latter mode of will was and was called the Prætorian will. A fifth and subsequent form of will was

TESTAMENTORUM GENERA—contd.

called the *Tripartitum Jus*, because it combined peculiarities derived from the civil law, from the Prætorian edicts, and from Imperial legislation. There was also the informal will for soldiers, and the nuncupative (or word of mouth) will.

TESTATE: See title **INTESTATE**.

TESTATOR. The person who makes a will or testament is so called. The persons able to be testators are,—All persons of full age and not under the disability of coverture or of unsoundness of mind.

See title **INTESTATE**.

TESTATUM. This is the name given to those words in a deed, beginning, "*Now this Indenture witnesseth.*"

See title **DEED**.

TESTATUM WRIT. When a writ of execution was directed to the sheriff of a county, and he returned that there were no goods of the defendant in his bailiwick, a second writ, reciting the former writ, and the sheriff's return to the same used to be directed to the sheriff of some other county wherein the defendant was supposed to have goods, commanding such latter sheriff to make execution of the same; and this second writ was called a *testatum* writ, from the words in which the writ was concluded, viz., "Whereupon, on behalf of the said plaintiff, it is testified in our said Court that the said defendant has goods, &c., within your bailiwick." But now by the C. L. P. Act, 1852, s. 121, it is not necessary to issue any writ directed to the sheriff of the county in which the venue is laid, but writs of execution may issue at once into any county, and be directed to and executed by the sheriff of any county, without reference to the county in which the venue is laid, and without any suggestion of the issuing of a prior writ into such county. So that the *testatum* clause in the second writ (being now the only writ) is omitted, and the *testatum* writ may be regarded as being in that indirect manner abolished.

See title **EXECUTION, WRIT OF**.

TESTE. The teste of a writ is that clause at the bottom of a writ beginning with the word "witness." When, therefore, a writ is said to be tested in the name of such or such a judge, it means that it is witnessed in his name. Under the Judicature Acts, 1873-75, all writs are tested in the name of the Lord Chancellor.

TESTES, PROOF OF WILL PER. When the validity of a will is contested, the executor, instead of proving it in the common form, i.e., upon his own oath simply, in the Court of Probate, proves it *per*

TESTES, PROOF OF WILL PER—contd.

testes (by witnesses) in open Court. When a will is so proved, two witnesses are by the Civil Law indispensable; although it does not appear to be necessary that they should have read the will, or even heard it read, provided they can depose on oath that the testator declared that the writing produced was his last will and testament, or that he duly executed the same in their presence.

Two witnesses seem also to have been at one time required by the English Law in such a case (Godol. 66; Toll. Ex. 57); but at the present day the mode of proof is as follows:—

Where a will requiring attestation (as all wills now do) is subscribed by several witnesses, it is only necessary at Law to call ONE of them; but in *Chancery*, it was the invariable practice to require that ALL THE WITNESSES who were in England and capable of being called should be examined (Best on Evidence, 760), but the rule is now the same as at Law.

TESTES, TRIAL PER. Is a trial had before a judge without the intervention of a jury; in which the judge is left to form in his own breast his sentence upon the credit of the witnesses examined; but this mode of trial, although it was common in the Civil Law, was seldom resorted to in the practice of the Common Law, but it is now becoming common enough under the Judicature Acts, when each party waives his right to a trial by jury.

See title **TRIAL BY JURY**.

TESTIMONIAL. A certificate under the hands of a justice of the peace testifying the place and time when and where a soldier or mariner landed, and the place of his dwelling and birth, whither he is to pass (Cowel; 3 Inst. 85). The document holds a kind of doubtful position midway between a certificate and a permit, or pass.

TESTIS LUPANARIS. A whore is so called when she is giving evidence on oath or by solemn affirmation. She is a credible witness as regards all the domesticities and infelicities of the brothel (Moor, 817).

TESTIS OCULATUS UNUS, plus valet quàm decem auriti. One eye-witness is worth any number of hearsay deponents, scil., is much better.

THAMES CONSERVANCY. The conservators of the river Thames were appointed under the stat. 20 & 21 Vict. c. 147, to guard and conserve the river, with large powers for that purpose, but so as always to abstain from injury to private rights (*Lyon v. Fishmongers' Company*, 1 App. Ca. 662).

THANE. Thanes were those important personages who attended, *i.e.*, ministered, upon the Anglo-Saxon kings in their Courts, and who held their lands immediately of those kings. That portion of the king's land of which a thane was the ruler or governor, was termed "thaneage of the king;" and such lands as the Saxon kings granted by charter to their thanes were denominated "thane lands" (Cowel).

THEFT: See title LARCENY.

THEFT-BOTE. The offence of theft-bote arises by a party who has been robbed and knows the felon, taking his goods again, or receiving other amends upon agreement not to prosecute.

See title COMPOUNDING FELONY.

THEGN: See title THANE.

THELLUSSON ACT: See title ACCUMULATIONS.

THIRD PARTY NOTICE. It sometimes (and, in fact, often) happens, firstly, that a defendant (if found liable to the plaintiff) may have in respect of the same ground of action a remedy over (of some sort or other) against some other or third person,—such other or third person being subsidiarily liable: or, secondly, that either the plaintiff or the defendant may desire that the determination of some question in the action between the plaintiff (or plaintiffs) and the defendant (or defendants) should be a determination of that question, binding also as between them or either of them on the one hand and some other or third person or persons on the other hand,—such other, or third person or persons, being subsidiarily interested therein, or probably or possibly affected thereby. And in either of these cases the third person or persons (or one or some of them) may or may not be already parties in the original action. As regards such of these third persons as are already parties, the plaintiff merely delivers his defence to them; but as regards such of them as are not already parties, he obtains the leave of the Court to issue and then issues a notice of his claim (in the form No. 1 of Appendix B., Judicature Acts, 1873-75), stamped with the seal with which writs of summons are sealed (Order xvi., 18); and he then files a copy of such notice and also serves same, exactly as if it were a writ of summons. The third person so served may enter an appearance within eight days after service of the notice upon him, or (with the leave of the Court) after the expiration of such eight days; and upon appearing he usually gets liberty to defend the action.

THIRDS. The widow's right to one-

THIRDS—continued.

third part of her husband's personal property, in the case of his decease intestate leaving children or a child, is called by this name. The widow takes her thirds absolutely, and not (as in the case of her dower-third) for life only. Thirds (like dower) are defeasible by the husband's will, and have been so since the reign of Hen. II.

THIRTY-NINE ARTICLES: See title ARTICLES OF RELIGION, THIRTY-NINE.

THOMAS v. SORREL, CASE OF: See title DISPENSING POWER.

THOROUGHFARE. Is a street or road admitting a passage through it, that is, open for traffic or for passage at both ends. See title HIGHWAY.

TIDAL RIVERS: See titles NAVIGATION, PUBLIC RIGHT OF; RIVERS.

TILLAGE. Is land under cultivation, as opposed to lands lying fallow or in pasture. By express agreement or by custom, the landlord may be liable to the tenant to allow him compensation for tillage, remaining unexhausted at the determination of his tenancy.

See title AGRICULTURAL HOLDINGS ACT, 1875.

TIMBER. Every tenant for a limited estate (other than a tenant at will) is entitled to estovers (see title ESTOVERS). A tenant for life may therefore fell timber for (among other purposes in support of his enjoyment) the necessary repairs of his tenement; and such a tenant if without impeachment of waste may even cut timber (not being ornamental) for sale (see title WASTE). When timber is blown down or wrongfully cut, the property in it vests in the first estate of inheritance *in esse*, subject (when it is sold and proceeds invested) to the prior life estates; and this rule applies also to timber cut with the sanction of the Court, when the tenant in possession has no power to cut (*Tooker v. Annesley*, 5 Sim. 235). Sales of estates with the timber thereon are now partly regulated by the stat. 22 & 23 Vict. c. 35, s. 13, consequent on the decision in *Cockrell v. Cholmeley*, 1 Cl. & F. 60.

TIMBERLODE. A service which some tenants were bound to perform to their lords of carrying felled timber from the woods to the lord's house (Cowel).

TIMBER-TREES. In a legal sense include oak, ash, and elm. In some places, however, by local custom, where other trees are commonly used for building, these are on that account also considered as

TIMBER-TREES—continued.

timber-trees (*Honywood v. Honywood*, L. R. 18 Eq. 306).

See title POLLARDS.

TIME. The calendar, as amended by the stat. 24 Geo. 2, cc. 23 and 30, is that which is now in use in England. With reference to *days*, there is no general rule of law that in computing time the *day* is to be either inclusive or exclusive, but the reason of the thing, and the accompanying circumstances, are to decide (*Lester v. Garland*, 15 Ves. 248; *Migotti v. Colvill*, 4 C. P. Div. 233); the point is not unfrequently settled by statute in particular cases. Usually, fractions of a day count as an entire day; but when it is necessary to shew which of two events happening on the same day first took place, the Court will consider such fractions (*Clinch v. Smith*, 8 D. P. C. 337). With reference to *months*, the stat. 13 & 14 Vict. c. 21, enacts, that "month" in all future statutes shall mean calendar month, and not lunar month, although the latter was the meaning by the Common Law (*Lecon v. Hooper*, 1 Esp. 246), unless where the intention indicated a different use of the word (*Lang v. Gale*, 1 M. & S. 111), or custom controlled the meaning (*Turner v. Barlow*, 3 F. & F. 946). And under the Judicature Acts (Order LVII., 1), in all matters of procedure month is to mean calendar month; and in these matters Sunday, Christmas-day, and Good Friday are not to be reckoned, when the time limited for doing any act or taking any proceeding is less than six days (Order LVII., 2).

See titles DAY; MONTH; YEAR.

TIME-BARGAINS. These are (in effect) bargains to pay differences only in purchases and sales on the Stock Exchange, and are illegal at Common Law and under the stat. 8 & 9 Vict. c. 109 (*Thacker v. Hardy*, 4 Q. B. Div. 685).

See title JOBBERS.

TIME OF THE ESSENCE OF CONTRACTS. At Law, time used to be always of the essence of the contract (*Stowell v. Robinson*, 3 Bing. N. C. 928); but in Equity the question of time was differently regarded; for a Court of Equity discriminated between those terms of a contract which were formal, and those which were of the substance and essence of the agreement (*Parkin v. Thorold*, 16 Beav. 59); and accordingly held time to be *prima facie* non-essential. There were, however, certain cases where lapse of time was a bar to relief even in Equity, viz.,—(1.) Where time was originally of the essence of the contract, and that either by the express agreement of the parties or from the nature

TIME OF THE ESSENCE OF CONTRACTS—continued.

of the subject-matter itself; (2.) Where, though time was not originally of the essence of the contract, it was engrafted upon it by subsequent notice; and (3.) Where the delay had been so great as to constitute laches. And now the rules of Equity as to whether time is or not of the essence of the contract prevail at law also (Judicature Act, 1873, s. 25, sub-s. 7; *Noble v. Edwards*, 5 Ch. Div. 378).

TIME OUT OF MIND. Any period anterior to the reign of Richard I. (Bract. l. 2, c. 22; 3 Lev. 160).

See titles LEGAL MEMORY; LIVING MEMORY.

TIME POLICY: See title VOYAGE POLICY.

TIMES IN LEGAL PROCEEDINGS.

The Judicature Acts, 1873–75, and the orders and rules made thereunder, prescribe for the taking of the different steps in an action various limits of time (mostly extendible), and the principal of which times are the following:—

- (1.) Writ of summons to be served within one year after issue, or (if renewed) within period of renewal;
- (2.) Appearance of defendant to writ within eight days after service thereof;
- (3.) Plaintiff's statement of claim to be delivered within six weeks after defendant's appearance to writ;
- (4.) Defendant's defence to be delivered within eight days after delivery of plaintiff's statement of claim;
- (5.) Plaintiff's reply to be delivered within three weeks thereafter;
- (6.) Pleadings subsequent to reply to be delivered within four days;
- (7.) Notice of trial to be delivered within six weeks after close of pleadings;
- (8.) Appeals—
from Master at Chambers to Judge at Chambers, four days;
from Chambers to Court, twenty-one days in Chancery, and eight days Common Law;
from judgment (final or interlocutory) one year;
from interlocutory order twenty-one days;
to House of Lords one year;
and in case of disability, within five years.

TIMET, BILL QUIA: See title BILL QUIA TIMET.

TIN-BOUNDS. Under the customs of Cornwall and Devon, any tinner is allowed

TIN-BOUNDS—*continued.*

to bound any unappropriated *waste* lands, or any several or inclosed lands *which have been formerly waste land*, subject to the custom. The assessionable or conventional manors of the Duchy of Cornwall are subject to the custom. A tin-bound generally consists of about an acre of land, and is required to have four corners, unless it should be a side bound, which is generally triangular. In Cornwall tin-bounds are personal property, and all bounds require to be annually renewed. The owner of a bound may demise it subject to the payment of *farm-tin*, but the bound still continues liable to the render of *toll-tin* to the owner of the soil. In Devon tin-bounds are real estate, and by the custom in this county no toll-tin is payable to the landowner.

TINNER: See title **TIN-BOUNDS**.

TIPPLING ACT. The stat. 24 Geo. 2, c. 40, is so called, and as amended by the stat. 25 & 26 Vict. c. 38, it prohibits the sale on credit of spirits to be consumed on the premises in less quantities than 20s. worth.

TIPSTAFF. Tipstaves are officers who were formerly appointed by the marshal of the King's Bench Prison, or by the warden of the Fleet Prison, but who now, under the Act 25 & 26 Vict. c. 104 (Queen's Prison Discontinuance Act, 1862), are appointed by the respective chiefs of the Chancery, Queen's Bench, Common Pleas, and Exchequer divisions of the Court. They attend the King's Courts with a staff or rod tipped with silver, and take into their charge all prisoners committed by the Court (1 Arch. Pract. 11; Cowel).

TITHE COMMUTATION: See title **TITHE RENT-CHARGE**.

TITHE RENT-CHARGE. Under the Tithe Commutation Acts (6 & 7 Will. 4, c. 71; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; and 9 & 10 Vict. c. 73), tithes may be commuted into a rent-charge varying with the price of corn; and under the same Acts the tithes or tithe rent-charge may be merged by the tenant in fee simple or fee tail in possession, or other person capable of disposing of the fee simple, or by tenant for life in possession of both land and tithes or tithe rent-charge; or the tithes or tithe rent-charge may be redeemed, or (as the case may require) apportioned. And under the stat. 41 & 42 Vict. c. 42, the tithe rent-charge may be ordered to be compulsorily redeemed in certain cases at twenty-five years' purchase.

TITHES. A species of incorporeal hereditaments, defined to be the tenth part of the increase yearly arising and renewing (1) from the profits of the lands,

TITHES—*continued.*

(2) from the live-stock upon lands, and (3) from the personal industry of the inhabitants. The first species of tithe is usually called *predial*, and consists of corn, grass, hops, wood, and the like; the second *mixed*, as of wool, milk, pigs, &c., consisting, it will be observed, of natural products, but nurtured and preserved in part by the care of man; the third *personal*, as of manual occupations, trades, fisheries, and the like. Tithes have also been divided into great and small tithes; the former comprehending in general the tithes of corn, peas, beans, hay, and wood; the latter, all other predial, together with all mixed and personal tithes, tithes being great or small according to the nature of the things which yield the tithe, without any reference to the quantity; e.g., clover grass made into hay is of the nature of all other grass made into hay, and consequently is a great tithe, but if left for seed, its nature becomes altered, and, like other seed, it becomes a small tithe (2 Chit. Bl. 24, and n. (6); Cowel).

See title **IMPROPRIATION**.

TITHING. One of the civil divisions of the territory of England, being a portion of that greater division called a hundred. It was so called because ten freeholders with their families composed one. It is said that they were all knit together in one society, and bound to the king for the peaceable behaviour of each other. In each of these societies there was one chief or principal person, who, from his office, was called *teothing-man*, now *tithing-man* (Mirr. c. 1, s. 3; Cowel).

See titles **FRANKPLEDGE**; **TITHING-MAN**.

TITHING-MAN. The officer who, during Saxon times, was appointed to preside over tithings and to examine and determine all causes of small importance between the inhabitants of adjacent tithings, was so called. In the present day, however, tithing-men are a kind of constables, elected by parishes, and sworn in their offices in the Court Leet, and sometimes by justices of the peace, &c.

See title **TITHING**.

TITLE. This word may be defined generally to be the evidence of right or the right itself which a person has to the possession of property. The word "title" certainly does not merely signify the right which a person has to the possession of property, because there are many instances in which a person may have the right to the possession of property, and at the same time have no title to the same. It appears on the whole to signify the outward evidence of the right, rather than the mere

TITLE—continued.

right itself. The word is defined by Sir Edward Coke thus: "*Titulus est justa causa possidendi id quod nostrum est*" (1 Inst. 34); that is to say, the ground, whether purchase, gift, or other such ground of acquiring, *titulus* being distinguished in this respect from *modus acquirendi*, which is the *traditio*, i.e., delivery or conveyance of the thing.

See title ABSTRACT OF TITLE.

TITLE, ABSTRACT OF: See title ABSTRACT OF TITLE.

TITLE-DEEDS. Are the evidences of title to or ownership of real estate, and as being the sinews thereof they go with the land as portion thereof, or as real chattels. On any sale or mortgage of lands, all the title-deeds in the hands of the vendor or mortgagor, which relate exclusively to the property sold or mortgaged, are handed over to the purchaser or mortgagee; but where the title-deeds relate to other property, and cannot consequently be delivered over to the purchaser, he is entitled, at the expense of the vendor, to a covenant for their production, and also to attested copies of such of them as are not enrolled in any Court of record.

TITLE OF ENTRY. The right or title to enter upon lands. Thus, when one seised of land in fee makes a feoffment of the same on condition, and that condition is afterwards broken, then the feoffor has title to enter into the land (Cowel).

See title ENTRY.

TITLES OF CLERGYMEN. Before a candidate for holy orders can be ordained, he must obtain what is termed a title, which is an appointment either to a benefice actually vacant, or to a curacy, together with, in the latter case, a letter from the clergyman who gives the title, signifying the reason which obliges him to appoint a curate (Eccl. Leg. Guide, 4).

TITLES OF HONOUR. Such as Duke, Marquis, Earl, &c., are real property, and, according to English Law, are inalienable, excepting by descent.

See titles DIGNITIES; PEERAGE.

TITULUS ACQUIRENDI: See title TITLE.

TITULUS EST JUSTA CAUSA POSSIDENDI: See title TITLE.

TOFT. A messuage, or the site or piece of ground on which a messuage has stood; and the owner of a toft used to be termed a toftman (West. Symb.; Cowel).

TOLERATION ACT. The stat. 1 Will. & M. st. 1, c. 18, for exempting Protestant dissenters from the penalties of certain

TOLERATION ACT—continued.

laws is so called. The Act did not extend to exempt Roman Catholics or Unitarians.

See titles DISSENTERS; NON-CONFORMISTS; ROMAN CATHOLICS.

TOLL. This word has various significations. When used as a verb, it signifies to bar, to defeat, or to take away; thus, to toll the entry, signifies to deny or take away the right of entry. When used as a noun, it signifies either a liberty to buy or sell within the precinct of a manor, or a tribute or custom paid for passage (Cowel: *Les Termes de la Ley*; 1 M. & W. 19).

TOLL-HOUSES. On turnpike roads, when such houses become "useless and no longer required for the purposes of the road" within the meaning of the stat. 4 Geo. 4, c. 95 (s. 57), they must be pulled down and the materials removed; and the owner of the land adjoining may have a mandamus against the turnpike road trustees to compel them to pull them down, &c. (*Reg. v. Greenlaw Road Trustees*, 4 Q. B. Div. 447).

TOMBSTONES. As being portion of the churchyard (when situate therein) are the freehold of the incumbent of the church, who has the control of the inscriptions thereon (*Keet v. Smith*, 1 P. Div. 73). Moneys may be validly bequeathed to maintain tombstones in churches (as forming portions of the fabric of the church and being therefore charitable), but not tombstones in churchyards (*In re Rigley*, 15 W. R. 190).

TONNAGE. A duty imposed by Parliament upon merchandize exported and imported, according to a certain rate upon every ton.

See title TAXATION, HISTORY OF.

TONNAGE RENTS: See title ROYALTIES.

TORT. A wrong or injury that is "independent of contract." Personal actions are founded either on contracts or on torts. The latter signify such wrongs as are in their nature distinguishable from mere breaches of contract and are often mentioned as of three kinds, viz.: (1.) *Nonfeasance*, being the omission to do some act which a person is bound to do; (2.) *Misfeasance*, being the improper doing of some act which he may lawfully do; or (3.) *Malfeasance*, being the commission of some act which is positively unlawful. Torts have also been otherwise classified as follows: (1.) The invasion of some legal right of the plaintiff, and in that case it is not necessary to shew any damage, this being a case of *injuria sine damno*; (2.) The breach of some private duty which is incumbent on the defendant

TORT—*continued.*

(whether at Common Law or by statute), the neglect of that duty, and damage to the plaintiff resulting from such neglect, this being a case of *damnum injuria*; and (3.) The breach of some public duty which is incumbent on the defendant (whether at Common Law or by statute), the neglect of that duty, and damage to the plaintiff resulting from such neglect, this being also a case of *damnum injuria*; but it is to be remembered, that damage resulting to a plaintiff from the breach of a public duty is not invariably actionable, as some varieties of such damage are instances of *damnum sine injuriâ* (*Ward v. Hobbs*, 4 App. Ca. 13; *Forbes v. Lee Conservancy Board*, 4 Exch. Div. 116). Torts have also acquired distinctive names, such as Waste, Nuisance, Piracy of Copyright, Infringement of Patent-rights, Disturbance of Easements, Libel, Slander, &c.; and for every new kind of tort, the Common Law will find a remedy. Actions founded upon tort are sometimes described as actions *ex delicto*, in contradistinction to actions *ex contractu*, which are founded upon contract. The forms of action generally founded upon tort used to be *trover*, *detinue*, *trespass*, *trespass on the case*, and *replevin*; whilst *debt*, *assumpsit*, and *covenant* were the forms which used to belong to the class of actions founded upon contract (1 Chit. Pl. 3).

See titles DELICTO, ACTIONS EX; DAMNUM INJURIA; DAMNUM SINE INJURIA; INJURIA SINE DAMNO.

TORTFEASOR. A wrongdoer, or a trespasser. There is no contribution between tortfeasors, like that which subsists between co-debtors (*Merryweather v. Nixan*, 2 Sm. L. C. 481).

TORTIOUS CONVEYANCE. Prior to 8 & 9 Vict. c. 106, a feoffment might have had a tortious operation, that is to say, it might have passed to the feoffee a greater estate than that which the feoffer could lawfully pass. But all such tortious conveyances have now been abolished by the last-mentioned Act, unless indeed the disentailing assurance should be so regarded.

See title CONVEYANCES, sub-title *Feoffment*.

TORTURE. As a means of obtaining evidence is unknown to the law of England, meaning thereby physical torture; and that was the opinion of the judges of Charles I., when consulted regarding the case of Felton, the assassin of Buckingham; also, of Lord Coke (3 Rep. 35). But the practice of torture was not unknown in the reigns of Henry VI. and Henry VIII.

TORY AND WHIG. Names which at

TORY AND WHIG—*continued.*

the time of the Exclusion Bill (1679) became for the first time applicable respectively to the party who "*conserved*" the existing constitution (afterwards called Conservatives) and to the party who were for altering or amending it (afterwards called Liberals). Both terms are, or at least originally were, terms of abuse, Whigs having originally signified desperate Presbyterian fanatics in Scotland, and Tories the like fanatics of the Popish persuasion in Ireland.

See titles ABHORRERS; PETITIONERS.

TOTAL LOSS: See titles ABANDONMENT OF VESSEL OR CARGO; PARTIAL LOSS; UNDERWRITERS.

TOWAGE: See title TUGS.

TOWN. Is an expression varying (in general) with the growth of the buildings constituting it (*Collier v. Worth*, 1 Exch. Div. 464).

TOWNSHIP: See titles HIGHWAY; HUNDRED; PARISH.

TRADE. All contracts in restraint of trade are regarded with disfavour by the law; and if the restraint is general, it is wholly void; and if it is partial, it is only good when the restraint is reasonable AND a valuable consideration has been given by way of purchasing the restraint (*Mitchell v. Reynolds*, 1 Sm. L. C. 356). A reasonable restraint may be either in respect of locality or of time, or of both combined; and in every trade, what is reasonable in these respects varies with the character of the trade. It is from the like disfavour which the law bears towards such restraints that the stat. 54 Geo. 3, c. 96, s. 1, repealed the prohibitions contained in 5 Eliz. c. 4, whereby persons who had not served an apprenticeship were forbidden to be employed as journeymen, or to otherwise exercise their particular trades or occupations; and that the 7 & 8 Vict. c. 24, repealed a variety of other obsolete Acts which operated in restraint of trade. There are, nevertheless, certain restraints which the law favours, and that chiefly from a regard to the public health; thus, the 11 & 12 Vict. c. 63, s. 64, forbade, and the Public Health Act, 1875, which has repealed the last-mentioned Act, forbids, the establishment of new offensive trades unless with the consent of the local board of health; and the 16 & 17 Vict. c. 128, s. 1, renders liable to summary conviction persons carrying on offensive trades within the metropolis, when they do not use the best means of preventing annoyance to the neighbourhood.

See title TRADE-MARKS.

TRADE-MARKS. Are a branch of the goodwill of the business with which they are connected, and the right to a trade-mark is transmissible as portion thereof, wherever the goodwill is mentioned, even although the trade-mark should not be mentioned (*Shipwright v. Clements*, 19 W. R. 599). It was at one time thought that there was no property in trade-marks, but in the *Leather Cloth Company's Case* (33 L. J. Ch. 199), Lord Westbury pointed out that there was (in effect) a property in trade-marks, i.e., in the marks as applied to designate certain vendible commodities. And under the Trade-Marks Registration Acts, 1875-77 (38 & 39 Vict. c. 91; 39 & 40 Vict. c. 33; and 40 & 41 Vict. c. 37), a trade-mark, if it accord with the definitions contained in s. 10 of the Act of 1875, and is not objectionable under s. 6 of the same Act, may be registered; and upon such registration, the right to it is strictly a right of property, and the person entitled to it is the proprietor (Sebastian on Trade-Marks). And in the case of a trade-mark properly so called, wilful fraud is not necessary to be averred or proved in order to obtain the protection of the Court for it, but it is simply necessary to prove the right of the plaintiff to the mark, and the injury done by the defendant to that right (*Singer Machine Manufacturers v. Wilson*, 3 App. Ca. 391); whereby an actual deception is practised on the public, although there should be no fraud on the part of the defendant (*Farina v. Silverlock*, 6 De G. M. & G. 214). Where a trade-name is to be made a trade-mark, it must be printed, impressed, or woven in some particular or distinctive manner (Act 1875, s. 10; *Burgess v. Burgess*, 3 De G. M. & G. 89; *Ainsworth v. Walsley*, L. R. 1 Eq. 518). In a case which is not one of trade-mark pure and simple, actual fraud must be proved (*Singer Manufacturing Company v. Wilson*, L. R. 2 Ch. Div. 434, 451).

TRADE-NAME: See title TRADE-MARKS.

TRADE-USAGE. Persons contracting with a knowledge thereof, or under circumstances which impute to them a knowledge thereof, are bound thereby; and such a usage may be annexed to the contract by extrinsic evidence, provided the contract be not thereby varied.

TRADERS AND NON-TRADERS. The distinction between persons as being or not traders has several important consequences in the law of bankruptcy.

TRADES-UNIONS. Combinations on the part either of employers or of *employés* to regulate the price of labour are, within certain limits, valid by the Common Law (*Rex v. Batt*, 6 C. & P. 329); but such combinations, when carried the length of

TRADES-UNIONS—continued.

violence in any phase or shape, are illegal. Wherefore the stat. 6 Geo. 4, c. 129, placed such combinations, on the part of *employés* chiefly, under a most rigorous restraint; and, under that statute, anything in the nature of a threat put forward with a view to forcing or endeavouring to force a workman to leave his employment was made a criminal offence (*Walsby v. Anley*, 3 El. & El. 516). Of recent years, the stat. of Geo. 4 has been thought too rigorous, and under the stats. 22 Vict. c. 34, 32 & 33 Vict. c. 61, and 34 & 35 Vict. c. 31, combinations on the part of *employés*, or (as these combinations are usually called) *Trades-Unions*, are recognised as legal associations with legitimate objects, and which objects they may endeavour to secure (if so advised) by pecuniary and other means of supporting strikes, &c., so long as they do not resort to open or secret violence, or to threats, intimidation, rattening, and the like.

TRADING WITH ENEMY. Is unlawful as well on the part of the belligerent country's subjects, as also on the part of the subjects of allied states (*The Hoop*, 1 Rob. Adm. 196; Wheaton's Inter. Law, pp. 392-403), the rights of inter-commercing being wholly suspended by the war.

TRADITIO. Was and is the simple act of delivery, a mode of transferring the title to corporeal property.

See titles LIVERY OF SEISIN; USUCAPIO.

TRADITIO LOQUI FACIT CHARTAM. Delivery makes the deed speak, i.e., makes the deed take effect. This delivery must be made to the feoffee or grantee, and not to a stranger.

See titles ESCROW; FEOFFMENT.

TRAMWAYS. The construction and maintenance thereof are regulated by the stats. 33 & 34 Vict. c. 78; 34 & 35 Vict. c. 69; and 35 & 36 Vict. c. 43.

See titles COMPANIES; PASSENGERS, CARRIAGE OF.

TRANSACTIO. Was one of the innumerate contracts of Roman Law, and is equivalent to the *transaction* of French Law.

See title TRANSACTION.

TRANSACTION. In French Law is the *transactio* of Roman and the *compromise* of English Law, being an agreement to give up the residue (if any) of an unascertained debt, in consideration of the payment of an agreed sum.

TRANSFER OF ACTION. The Lord Chancellor, for the convenience of the administration of justice, may transfer from one Division of the High Court of Justice to another Division an action or actions, subject to the president or judge of the

TRANSFER OF ACTION—*continued.*

transferee Division assenting thereto (Order LI., 1); and the Lord Chancellor may also for the like reason make the like transfer from one judge in the Chancery Division to another judge of that Division, and the last-mentioned transfer may be for the purpose of trial, or of trial and further trial, or generally (Order LI., 1). And upon the application of either of the parties to an action, a transfer may be ordered from an inappropriate Division of the Court into the appropriate Division, subject to the consent of the president of the proposed transferee Division (Order LI., 2); but this transfer of the action will not be directed on slight grounds (*Storey v. Waddle*, 4 Q. B. Div. 289). See Brown's Snell's Principles of Equity and Practice, 5th ed., pp. 648-9.

TRANSFER OF MORTGAGE. A mortgagee desiring his money may, instead of being paid off by the mortgagor, make a transfer of the mortgage debt and security therefor to a third person who pays him the money. Such transfers are commonly effected with the concurrence of the mortgagor, so that the original mortgagee escapes all future liability to account.

TRANSFER OF SHARES OR STOCK: See titles SHARES; SHARE-WARRANTS; SHARE-CERTIFICATES.

TRANSHIPMENT OF CARGO. The master navigating a merchant vessel may under certain circumstances of emergency tranship the cargo, and he may do so either as agent of the shipowner or as agent of the cargo-owner. As agent of the shipowner, he may make a transhipment of cargo, where the vessel is so much damaged by perils of the sea as to be incapable of repair, except at a cost exceeding both her value when repaired and the freight; but he is not even in that case obliged to tranship; and he should never tranship excepting at a rate of freight not exceeding that originally bargained for. As agent of the cargo-owner, he may (but only after communicating with such owner, if communication is possible) tranship the cargo, wherever a prudent owner would do so; but he is not bound in any case to do so; and he may even tranship at a higher rate of freight. The shipper may accept delivery (in lieu of transhipment) of the cargo at any intermediate port, paying *pro rata* freight; but if he insist on transhipment, and transhipment is practicable, but the master nevertheless refuses to tranship, then the shipper (i.e., cargo-owner) may accept delivery at the intermediate port, paying no freight even *pro rata itineris peracti* (*Kay's Shipmasters*, 287-292).

TRANSIRE: See title CLEARANCE.

TRANSIT: See title STOPPAGE IN TRANSITU.

TRANSIT IN REM JUDICATAM. "The matter passes into a judgment," and thereby the original cause of action is merged and destroyed in the judgment.

See titles CONTRACTS; LITIS CONTESTATIO; MERGER; JUDGMENT, PLEA OF.

TRANSITORY ACTIONS. Actions were said to be either local or transitory. An action was *local* when all the principal facts on which it was founded were of a local character, and carried with them the idea of some certain place; these were generally such as related to realty. An action was termed *transitory* when the principal fact on which it was founded was of a transitory kind, and might be supposed to have happened anywhere; and, therefore, all actions founded on debts, contracts, and such like matters relating to the person or personal property, used to come under this latter denomination (*Steph. Pl.* 316, 317). If the action was local, the *venue* also was local; and if the action was transitory, the *venue* also was transitory. But under the Judicature Act, 1873, there is now no local *venue* for the trial of any action.

See title VENUE.

TRANSLATION. This word, as applied to a bishop, signifies removing him from one diocese to another (*Cunningham*).

See title POSTULATION.

TRANSLATIONS. Copyright may exist in translations, these latter being regarded as original works (*Wyatt v. Barnard*, 3 V. & B. 78).

See title COPYRIGHT.

TRANSLATITUM EDICTUM. The edict (or portion thereof) which as being of a permanent character was repeated (i.e., transferred) from edict to edict by each succeeding prætor for his own particular year of office.

See title EDICT.

TRANSPORTATION. Ceased to be a punishment, and became transmuted into penal servitude, by the stat. 16 & 17 Vict. c. 99, and now by stat. 20 & 21 Vict. c. 3, s. 2.

TRAVERSE. In the language of pleading signifies a denial. Thus, where a defendant denies any material allegation of fact in the plaintiff's declaration or statement of claim, he is said to traverse it, and the plea itself is thence frequently termed a traverse. Besides the common traverse, as explained above, there is one of occasional occurrence termed a special traverse, or traverse with an *absque hoc*.

TRAVERSE—continued.

This, instead of being framed in the shape of a simple denial, consists ordinarily of two branches, one involving the introduction of new affirmative matter, which, inferentially or argumentatively, denies the disputed allegation of fact upon which the defendant purposes raising an issue; the other, being the *absque hoc* clause, consisting of a direct denial of such allegation of fact.

See titles **ABSQUE HOC**; **SPECIAL TRAVERSE**.

TRAVERSE OF AN INDICTMENT. The word "traverse," as applied to an indictment, has the same import as when applied to a declaration, signifying to contradict or deny some principal matter of fact therein, *e.g.*, in a presentment against a person for a highway overflowed with water, for default of scouring a ditch, &c., he may allege that there is no highway, or that the ditch was sufficiently scoured (Cowel).

See title **TRAVERSE**.

TRAVERSE OF AN OFFICE. The proving that an inquisition made of lands or goods by the escheator is defective and untruly made (Kitchin, 227).

TRAVERSING NOTE. This was a pleading in Chancery, and consisted of a denial put in by the plaintiff on behalf of the defendant generally denying all the statements in the plaintiff's bill. The effect of it was to put the plaintiff upon proof of the whole contents of his bill, and it was only resorted to for the purpose of saving time, and in a case where the plaintiff could safely dispense with an answer. A copy of the note must have been served on the defendant. Under the present practice, there appears to be no occasion for a traversing note.

See title **DEFAULT, JUDGMENT BY**.

TREASON. This word, in its original sense, denoted the betrayal of confidence or of trust, and such betrayal was of two species, according as it was either—

- (1.) Against the King as supreme; or
 - (2.) Against a subject as superior;
- the former species was called High Treason, and the latter Petit Treason.

Petit treason has been abolished by stat. 9 Geo. 4, c. 31, s. 2, although, of course, breach of confidence or trust, in so far as it is a civil wrong, is still a tort, and as such is remediable in a Court of Law or (more commonly) of Equity.

High treason is, therefore, now called treason simply.

The charge of treason, being vague, was dangerous to the liberty of the subject; and inasmuch as trivial or dubious offences

TREASON—continued.

were imputed in the reign of Edward II. as treasonous under the designation of *encroachments* upon the royal power; therefore it was enacted by 25 Edw. 3, st. 5, c. 2, that the following offences (and none other) should be deemed treasons:—

- (1.) Compassing the death of the Sovereign, or his or her consort, or of the Prince of Wales;
- (2.) Violating the consort of the King, or his eldest daughter unmarried, or the Princess of Wales;
- (3.) Levying war against the Sovereign within the realm, or being adherent to such, or relieving same;
- (4.) Counterfeiting the King's money, or importing counterfeit money;
- (5.) Killing the Lord Chancellor or the Lord Treasurer, or any judge while on the bench; and generally,
- (6.) Committing such other offence or offences as should by any future Parliament be declared treason.

The general provision of the above-mentioned statute was put in exercise by Richard II., who enacted (21 Rich. 2, c. 3) that the mere intent to kill or depose the King should, without proof of any overt act of treason, amount to the offence of treason; but this statute was repealed by 1 Hen. 4, c. 10. Again, Henry VIII. enacted many new and capricious treasons, *e.g.*, denying the pre-nuptial chastity of Anne Boleyn, denying the King's right with the authority of Parliament to devise the Crown, and such like; but these new treasons were repealed by 1 Edw. 6, c. 12. In more modern times, the following treasons have been added permanently to the list enumerated in 25 Edw. 3, viz.:—

- (1.) Hindering from his accession to the Crown any one entitled next in succession under the Act of Settlement,—this by 1 Anne, st. 2, c. 17, s. 3;
- (2.) Declaring that the Sovereign, with the authority of Parliament, could not direct the devolution of the Crown,—this by 6 Anne, c. 7;
- (3.) Imagining the death, bodily harm, or imprisonment of the Sovereign, and expressing the same in writing or by overt act,—this by 36 Geo. 3, c. 7; and
- (4.) Forging the great seal,—this by 11 Geo. 4 & 1 Will. 4, c. 66, s. 2.

By the stat. 7 Will. 3, c. 3, no prosecutions for treason were to be brought but within *three* years from the alleged commission of the offence; and by the same statute, coupled with that of 7 Anne, c. 21, there must, in order to secure a conviction, be two witnesses to one and the same act

TREASON—continued.

of treason, or to different acts of the same treason. Moreover, by these two statutes a list of the witnesses for the prosecution, together with a copy of the indictment, is to be delivered to the prisoner *ten* days before the trial; also a copy of the panel of jurors *two* days before the trial. The prisoner is also allowed to make his defence by counsel.

Under the stat. 39 & 40 Geo. 3, c. 93, when the treason consists in an attempt to assassinate the Sovereign, the offence is made triable as *murder*, but continues punishable as treason; under the stat. 11 & 12 Vict. c. 12, it is made a *felony* to intend to depose the Sovereign, or to place duress upon her in order to compel her to change her counsels, or to intimidate either House of Parliament, or to incite any foreigner to invade the kingdom. Lastly, under the stat. 5 & 6 Vict. c. 51, s. 2, it is made a high misdemeanor to strike at the Sovereign or to discharge, or pretend to discharge, fire-arms near her person with intent to alarm her, it making no difference whether the pistol is loaded or not.

See titles OVERT ACT; SCRIBERE EST AGERE.

TREASURE-TROVE. Any money, coin, gold, silver, plate, or bullion *found* (*trouv *) hidden in the earth, the owner thereof being unknown; such kind of treasure in general belongs to the king, and forms one of the precarious sources of his revenue. When, however, it is found in the sea or upon the earth it does not belong to the king, but to the finder in case no owner appears. In many cases treasure-trove belongs to the lord of the manor within whose limits it is found, by special grant or prescription (Cowel.)

See title TAXATION, HISTORY OF.

TREASURY: See titles EXCHEQUER, COURT OF; REMEMBRANCES OF THE EXCHEQUER.

TREASURY BENCH. In the House of Commons the first row of seats on the right hand of the Speaker is so called, because occupied by the First Lord of the Treasury or principal Minister of the Crown.

TREASURY, PROSECUTIONS BY. Any subject may prosecute for a criminal offence, whether or not he is directly affected thereby; but in cases of magnitude, the Treasury not unfrequently undertakes the prosecution, thereby relieving the private individual.

See titles DIRECTOR OF PUBLIC PROSECUTIONS; PUBLIC PROSECUTOR.

TREATIES. The power of negotiating and contracting public treaties between nation and nation exists in full vigour in

TREATIES—continued.

every sovereign state which has not parted with that portion of its sovereignty, or agreed to modify its exercise by compact with other states. Sovereigns treat with each other through the medium of plenipotentiaries; and reserve to themselves the power of ratifying or not what has been concluded in their name by their ministers. The municipal constitution of every particular state determines in whom resides the authority to ratify; in absolute monarchies, it is the prerogative of the Sovereign himself to confirm the act of his plenipotentiary by his final sanction; in certain limited or constitutional monarchies, the consent of the legislature is required for that purpose; in some republics, as in that of the United States of America, the advice and consent of the Senate are essential. In all these cases, it is, consequently, an implied condition in negotiating with foreign powers, that the treaties concluded by the executive government shall be subject to ratification in the manner prescribed by the fundamental laws of the state. Regarding the effect of war on treaties, those of friendship and alliance are necessarily annulled by a war between the contracting parties, except such stipulations therein as are made expressly with a view to a rupture; and treaties of commerce and navigation are in general suspended but are sometimes entirely extinguished by a war between the parties. On the other hand, all stipulations with respect of the conduct of the war, or with respect to the effect of hostilities upon the rights and property of the citizens and subjects of the parties continue in full force until mutually agreed to be rescinded, that being the very contingency intended to be provided for. The power of making treaties of peace, like that of making other treaties with foreign states, is limited by the national constitution. A general authority to make treaties of peace necessarily implies a power to stipulate the conditions of peace, including the cession of the public territory. In England the treaty-making power, as a branch of the royal prerogative, has in theory no limits; but it is practically limited by the general controlling authority of parliament, whose approbation is always necessary to carry into effect a treaty, whereby the existing territorial arrangements of the empire are to be altered, or whereby money is to be found for the purposes of the treaty. The effect of a treaty of peace is to put an end to the war. It does not extinguish claims founded upon debts contracted or injuries inflicted previously to the war, and unconnected with its causes, unless there be an express stipulation in the treaty to that effect.

TREATIES—continued.

Hence debts previously contracted between the respective subjects, though the remedy for their recovery is suspended during the war, are revived on the restoration of peace. The treaty of peace leaves everything in the state in which it found it, unless there be some express stipulation in the treaty to the contrary.

TREBLE COSTS. Were three times the amount of the costs incurred by a party in an action, and the payment of such costs was by various statutes imposed as a punishment upon persons violating the provisions of those statutes. Thus by 29 Eliz. c. 4, the sheriff for extortion on final process, in addition to treble damages (or three times the amount of the sum which he had extorted), was liable to pay also treble costs, which was the amount of the plaintiff's costs reckoned three times over (2 B. & Ald. 393; 1 Ch. Rep. 137; 2 Ch. Pl. 326), n. (h), 6th ed.); but all provisions entailing treble costs and double costs were repealed by the stat. 5 & 6 Vict. c. 97.

See titles **DOUBLE COSTS**; **COSTS**.

TREBUCKET. A certain engine of correction, in which persons convicted of the offence of being common scolds were placed; it was also called the castigatory or cuoking stool, which latter is said to signify in the Saxon language scolding stool, though frequently corrupted into ducking stool, from the circumstance of the offender placed therein being plunged in the water for her punishment (3 Inst. 219).

TRESPASS. This word, in its ordinary sense, signifies an injury committed with violence, either actual or implied; for the law will imply violence though none is actually used, when the injury is of a direct and immediate kind, and committed on the person or tangible and corporeal property of the plaintiff. Of *actual* violence, an assault and battery is an instance; of *implied*, a peaceable but wrongful entry upon a person's land. The action of trespass is usually either an action of *trespass vi et armis*, or an action of *trespass on the case*; the former being brought to recover damages for wrongs done with direct violence, the latter to recover damages for wrongs not done with direct violence, or if done with direct violence, yet resulting from negligence as distinguished from design (Steph. Plead. 17; Smith's Action at Law, 2). Again, where trespass is done to lands or real property, it is called *trespass quare clausum fregit*: and to support this action, the plaintiff must have been in the actual possession of the land at the time of the trespass committed. On the other hand, where

TRESPASS—continued.

the trespass is done to goods or personal property, it is called *trespass de bonis asportatis*—an action which, equally with the other, rests upon possession, but the possession in this case may be either actual or constructive, constructive possession being that which ownership or property draws with it by implication or construction of law.

TRESPASS ON THE CASE. Is the form of action adopted for the recovery of damages for some injury resulting to a party from the wrongful act of another, unaccompanied with direct or immediate force. Thus, if a man in throwing a log into the highway, strikes a passer-by, he may sue in an action of trespass simply so-called, and only in that action for damages for the injury he may have sustained; but if after the log has fallen and rested on the ground, he stumbles over it, and so receives an injury, then "trespass on the case," or, as it is commonly called, an action "on the case," would be his appropriate remedy. It is called an action upon the case, because the original writ by which this action was formerly commenced was not conceived in any fixed form, but was framed and adapted to the nature and circumstances of the case by virtue of the statute *De Consimili Casu* (13 Edw. 1, Statute of Westminster the Second), c. 24 (*Scott v. Shepherd*, 2 Bl. Rep. 892; 1 Smith's L. C. 210; 1 Chit. on Pl. 127, 6th ed.; Com. Dig. tit. "Action upon the Case" (a)).

TRESPASS OR CASE, WHICH? Prior to the Judicature Acts, 1873–75, the distinction was important between actions of trespass and of case; and the rule was, that trespass (and not case) lay for injuries at once wilful and direct, and case (and not trespass) for injuries neither wilful nor direct, but negligent and indirect only, and that case or trespass lay indifferently when the injury, although direct, was not wilful but only negligent (*Scott v. Shepherd*, 2 W. Bl. 892; *Moreton v. Hardern*, 4 B. & C. 224).

TRESPASS DE BONIS ASPORTATIS. Is the name of the action which lay prior to the Judicature Acts, 1873–75, for injuries caused directly to personal property, and was for the wrongful taking away thereof, while trover was for the wrongful keeping of property in the first instance rightfully obtained. The action was founded on the right of possession in the plaintiff, but the possession might be either constructive or actual.

See title **TROVER**.

TRESPASS QUARE CLAUSUM FREGIT. Is the name of the action which lay prior to the Judicature Acts, 1873–75, for inju-

TRESPASS QUARE CLAUSUM FREGIT
—continued.

ries caused directly to real property, and was for the wrongful entry upon land, without any retention of the possession, *ejectment* being the action for the wrongful retention of the possession. The action was founded on the right of possession in the plaintiff, which must have been actual and not merely constructive.

See title **EJECTMENT**.

TRESPASS VI ET ARMIS: See title **TRESPASS**.

TRIA CAPITA. In Roman Law, were *civitas*, *libertas*, and *familia*, that is, citizenship, freedom, and family rights.

See titles **CAPUT AND STATUS**; **STATUS**.

TRIAL. The mode of determining a question of fact in an action, or the formal method of examining and adjudicating upon the matter of fact in dispute between the plaintiff and the defendant. There are various species of trials according to the nature of the subject or thing to be tried. A trial at bar, which is a species of trial now seldom resorted to excepting in cases where the matter in dispute is one of great importance and difficulty, is a trial which takes place before all the judges at the bar of the Court or division in which the action is brought (Steph. Pl. 84). The recent case of *Reg. v. Castro*, otherwise *Tichborne*, or *Orton* (1872-3), was an example of trial at bar. The more usual varieties of trial are the following,—(1.) Before a judge or judges sitting alone; (2.) Before a judge or judges sitting with assessors; (3.) Before a referee (official or special) sitting alone; (4.) Before a referee (official or special) sitting with assessors; and (5.) Before a judge with a jury (Order xxxvi., 2).

See title **TRIAL BY JURY**.

TRIAL, APPEARANCE AT. If the plaintiff appears and the defendant does not appear at the trial when the action is called on, the plaintiff proves his claim so far as the burden of proof rests with him (Order xxxvi., 18); and conversely, if the defendant appears and the plaintiff does not appear at the trial, when the action is called on, the defendant (not having raised any counter-claim) may have an immediate judgment dismissing the action (Order xxxvi., 19), and a defendant, who has raised a counter-claim, proves such counter-claim so far as the burden of proof rests with him (Order xxxvi., 19); but in either case the judge may postpone or adjourn the trial upon terms (Order xxxvi., 21); or the non-appearing party may appear within six days after trial to set aside the judgment upon terms (Order xxxvi., 20).

TRIAL, ENTRY FOR. The party who gives the notice of trial (see title **TRIAL, NOTICE OF**), is to enter the action for trial on the day of or day after the notice; and if he fail to do so, the other party may within the next four days enter the action for trial (Order xxxvi., 14). The entry is made by leaving two copies of the pleadings (Order xxxvi., 17) at the Associate's Office, if trial is by jury; and if not, then at the office of the division in which the action is.

TRIAL BY JURY. There being five various modes of trial specified by the Judicature Acts, the party giving the notice of trial specifies in his notice the mode of trial which he selects; for he has the first right of selection. If he specify trial before a judge and jury, and the question is one which (prior to the Judicature Acts) might and would have been tried by a judge sitting alone, then the judge may in his discretion, upon the application of the other party, direct a trial without a jury (Order xxxvi., 26; *Rushton v. Tobin*, 10 Ch. Div. 558); and the Court will always do so, if there has been a consent to take the entire evidence by affidavit at the trial (*Brooke v. Wigg*, 8 Ch. Div. 510). But otherwise trial by jury is at the option of either party to demand as a right (*Sugg v. Silber*, 1 Q. B. Div. 362).

TRIAL, NOTICE OF. The plaintiff in an action is to give the defendant notice of trial, and he may do so either along with his reply (when that is the close of the pleadings) or at any time afterwards (Order xxxvi., 3); and if the plaintiff fail for six weeks to give the requisite notice, the defendant may do so (Order xxxvi., 4). The notice is usually a ten days' notice, short notice of trial being four days (Order xxxvi., 9). And the notice is to specify the mode of trial. The notice ceases to be in force, unless the action is entered for trial by one party or another within six days after the notice (Order xxxvi., 10 a); and excepting by consent or with leave no notice of trial can be countermanded (Order xxxvi., 13).

TRIBUNALS. Tribunals, i.e., Courts of Justice, are of three great varieties, viz.: (1.) Regular; (2.) Summary; and (3.) Casual. *Regular* tribunals are those which (like the High Court of Justice) are constantly sitting and proceed in accordance with a well-defined and formal procedure; *Summary* tribunals are those which (like justices of the peace) exercise a summary jurisdiction, principally under particular statutes authorizing them in that behalf; and *Casual* tribunals are Courts or commissioners constituted for emergencies of

TRIBUNALS—continued.

rare occurrence, and which (when the emergency is over) cease to exist.

See title COURTS OF JUSTICE; SUMMARY JURISDICTION; MARTIAL LAW.

TRIBUNALS OF COMMERCE: See title TRIBUNAUX DE COMMERCE.

TRIBUNAUX DE COMMERCE. In French Law are Courts consisting of a president, judges, and substitutes elected in an assembly of the principal traders. No person under thirty years is eligible as a member of the tribunal, and the president must be forty years of age at the least. The tribunal takes cognizance of all cases arising between merchants, and also of all disagreements arising among partners. The course of procedure is as in civil cases, and with an appeal to the regular Courts.

TRIENNIAL ACT. Was an Act passed by the Long Parliament, 1640–1, and repealed by the Convention Parliament, 1660, and was more particularly the Act 6 Will. & M. c. 2, whereby every Parliament, unless sooner dissolved, came to an end in three years. It was repealed on the accession of Geo. I. by the Septennial Act.

See titles CONVENTION PARLIAMENT, ACTS OF; SEPTENNIAL ACT.

TRINITY HOUSE. Consists of the Master, Wardens, and assistants of the Guild of St. Clement in the parish of Deptford, in the county of Kent, at one time (if not still) known as the Guild of the Trinity at Deptford, and it has, subject to the control of the Board of Trade, a general controlling authority over all subordinate pilotage authorities; and it licenses the pilots within the "London District" (viz., the Thames), "the English Channel District," and "the Trinity House Outport Districts" (being any pilotage districts for which parliament has made no other particular provision). A Trinity House pilot is not liable for damage beyond the penalty of the bond (£100) which he executes to the House, and the amount of his pilotage. A Trinity House pilot pays an annual poundage of sixpence on his earnings as pilot, and also an annual fee of £3 3s., these payments constituting the Trinity House Pilot Fund, which goes to maintain the House in the exercise of its duties.

TRINODA NECESSITAS: See title TENURE OF LAND, HISTORY OF.

TRIOBS OF JURORS. Persons selected by the Court to examine whether a challenge made to the panel of jurors, or any of them, be just or not. These, if the first juror be challenged, are two indifferent persons named by the Court; if they find

TRIOBS OF JURORS—continued.

one man indifferent, he shall be sworn, and he with the two triors shall try the next, and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest (Cowel; Smith's Action at Law, 146).

See title CHALLENGE OF JURORS.

TRIPERTITUM JUS: See title TESTAMENTORUM GENERA.

TRITHING: See title RIDINGS.

TROVER. Is that form of action adapted to try a disputed question of property in goods or chattels. It is called trover, because it is founded upon the supposition (which, however, is in general a mere fiction), that the defendant *found* (*trouvé*) the goods in question; and the declaration, after stating such a finding, proceeded to allege that the defendant *converted* them to his own use (such conversion being the true gist of the action); and then the plaintiff claims damages for the injury which he has sustained by such wrongful conversion. In substance, the remedy is to recover the *value* of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and has been brought, in many cases, where in truth the defendant has got the possession unlawfully. It is an action of tort, and the whole tort consists in the wrongful conversion. Two things are necessary to be proved to entitle the plaintiff to recover in this kind of action; First, property in the plaintiff, and, secondly, a wrongful conversion by the defendant (see *per* Lord Mansfield in *Cooper v. Chitty*, 1 Burr. 20; 1 Smith's L. C. 230). Moreover, the property necessary to support the action must be one which draws with it a right to the *immediate* possession also of the thing converted (*Gordon v. Harper*, 7 T. R. 9); consequently, if the thing is in pledge to another, the pledgor, although owner, cannot bring the action. But the pledgee, as having what is called a *special property* in the thing, may bring the action; and generally any bailee of the goods may do so on the like ground.

TRUCK ACT. Is the stat. 1 & 2 Will. 4, c. 37, providing that in all contracts for the hiring of any artificer in any of the trades following, viz., in the making, casting, converting, or manufacturing of iron or steel, or in the working or getting of any mines of coal, ironstone, limestone, salt rock, or in the working or getting of stone, slate or clay, or in the making or preparing of salt, bricks, tiles, or quarries, and in

TRUCK ACT—continued.

various other trades particularly mentioned, or for the performance by any artificer of any labour in any of the said trades, the wages of such artificer shall be made payable in the current coin of the realm only, and any contract making the wages payable and all payments in any other manner, shall be void. Any contract containing any provision with respect to the place where, or the manner in which, or the person or persons with whom any part of the wages shall be laid out or expended, shall be void. Penalties may be recovered from employers entering into contracts that are illegal under the Act. But contracts (being in writing) for stoppages on account of medical relief, &c., out of the wages of artificers are permitted by the Act. Artificers, within the meaning of the Act, are ordinary workmen.

TRUE BILL. When any offence charged in a bill of indictment appears to the grand jury to be sufficiently proved, the clerk of the grand jury indorses on the bill the words "True Bill;" and when the offence charged does not appear to be sufficiently proved, the indorsement is "No true bill;" in other words, the grand jury throw out the indictment in the latter case, and send it to the petty jury for trial in the former case.

See titles GRAND JURY; PETTY JURY.

TRUSTEE. Any one may be a trustee, but a corporation (by reason of the Mortmain Acts) and an infant and *feme covert* (by reason of their respective disabilities) are not suited to be trustees. A trustee, having once accepted the trust, cannot delegate the office; but he may retire from the trust, under an authority in that behalf in the instrument of trust, or else with the sanction of the Court of Chancery. He is liable personally for every breach of duty, no matter how careful he supposes himself to be; but when a discretion is vested in him regarding the administration of the trust, then he is exempted from liability for losses, so long as he uses average and customary diligence. He is practically liable also for the acts and defaults of his co-trustee, unless the trust instrument expressly exempts him from such liability.

TRUSTEE ACTS. These are the stats. 13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55, under which, orders vesting lands or stocks in new trustees may be made, when the existing trustees are either lunatics, or infants, or are out of the jurisdiction, or are uncertain, or refuse to convey; and under which, new trustees may be appointed whether there are existing trustees or not; and under which, specified persons may be

TRUSTEE ACTS—continued.

directed to convey the trust property to such person or persons as the Court directs; the Acts containing also various incidental directions with regard to the mode of effectuating these various purposes.

TRUSTEE FOR CREDITORS. In bankruptcy and also in liquidation (but not in composition), a trustee for the creditors is appointed, and immediately upon his appointment there vests in him all the property of the debtor, together with all powers (i.e., general powers) which the debtor may exercise for his own benefit. And the trustee decides upon the proofs of debts, subject to the pretending creditor's right of appeal; and the trustee also collects and distributes the assets *pro rata* among the creditors. He is a trustee for the creditors only, and not for the debtor.

See titles BANKRUPTCY; SURPLUS IN BANKRUPTCY; &c.

TRUSTEE RELIEF ACT. Is the Act 10 & 11 Vict. c. 96, amended by the Act 12 & 13 Vict. c. 74, under which trustees, executors, administrators, &c. (or the major part of them), having in their hands any moneys or having any stocks of the Bank of England or of the East India Company, or South Sea Company, or any government or parliamentary securities standing in their names or in the names of their deceased testator or intestate, belonging to any trust, are at liberty to pay such moneys into the Bank of England to the account of the Paymaster-General of the Chancery Division of the High Court, or to transfer or deposit such stocks in the name of such Paymaster in the matter of the particular trust, in trust to attend the orders of the said Court, and so as to relieve themselves of their duties as trustees.

TRUSTS. Uses having existed previously to the Statute of Uses (27 Hen. 8, c. 10), although merely as confidences which the Court of Chancery upheld and enforced, these early confidences were the earliest form of trusts; but after that statute, these uses having in consequence thereof become transmuted into legal estates, the jurisdiction of Equity over trusts promised to cease, or at any rate, to become unnecessary, when the decision in *Tyrrell's Case* (4 & 5 Phil. & M.), whereby the Courts at Westminster refused to recognise any second use upon a first use, i.e., a use upon a use, revived or restored to the Courts in Lincoln's Inn, and even increased, their former jurisdiction over trusts.

In regulating the qualities and incidents of trust estates, Equity followed the Law in its leading principles, construing, for

TRUSTS—continued.

example, words of limitation in the like manner as the same were construed at Law, and generally (although with some exceptions hereinafter mentioned), adopting the rules of Law with little or no variation. Thus, in fact, in every estate, there came to exist, by possibility at least, and in general in actual fact as well, two estates of equal quality and duration, existing side by side, and like parallel lines of equal length running beside each other, the one estate being called the equitable estate and the other the legal estate. And like parallel lines, the two estates in their own nature never meet, although just as the two parallel lines being laid upon the top of each other would coincide and grow into one line only, so the two estates being by force, *ab extra* themselves, brought together do also coincide and grow into one estate only, a union which is called the union of the equitable with the legal estate in fee.

Two statutes are all-important in their bearing upon trusts, the first of the two being the Statute of Uses already mentioned, and the other of them the Statute of Frauds (29 Car. 2, c. 3); and in distinguishing these two statutes, it is essential to note,—(1.) That the Statute of Uses, on the one hand, extends to freehold hereditaments only, and neither to leaseholds nor to copyholds; and, *à fortiori*, not to pure personal estate; and (2.) That the Statute of Frauds, on the other hand, extends to freeholds, leaseholds, and copyholds indifferently, requiring for the creation of a trust thereof respectively the use of *writing*, but as the latter statute does not extend to pure personal estate, it follows that a trust of pure personal estate may be created without writing, or by word of mouth only (*McFadden v. Jenkins*, 1 Phil. 157).

Trusts are manifold; but are commonly arranged under the following heads:—

I. Express Trusts,—being trusts which are created in so many fit and appropriate terms, and which are subdivided thus,—

- (a.) Express Private Trusts,—being trusts affecting private individuals only; and
- (b.) Express Public Trusts,—being trusts affecting public bodies primarily.

II. Implied Trusts,—being trusts founded on the presumable, although unexpressed, intention of the party who creates them; and

III. Constructive Trusts,—being trusts which are founded neither on an expressed nor on any presumable

TRUSTS—continued.

intention of the party, but which are raised by *construction* of Equity without any regard to intention, and simply for the purpose of satisfying the demands of justice and of good conscience.

The following is a more or less exhaustive list of all the varieties of trusts falling under each of the three principal heads above enumerated, viz.—

I. Express Trusts.

(1.) Express Private Trusts:

- (a.) Executed and executory trusts;
- (b.) Trusts voluntary and for value;
- (c.) Trusts in favour of creditors;

(2.) Express Public Trusts, called also Charitable Trusts.

II. Implied Trusts.

- (a.) Trusts resulting from a purchase in the name of a stranger;
- (b.) Trusts resulting from an incomplete disposition of the equitable estate; including
- (c.) Trusts of the undisposed of surplus of personal estate for the next of kin, or of real estate for the heir-at-law;
- (d.) Trusts under conversions that fail wholly or partially;
- (e.) Trusts in cases of joint tenancies whether of purchasers, or of mortgagees.

III. Constructive Trusts.

- (a.) Vendor's lien, also vendee's lien, in respect of purchase-money either unpaid or prematurely paid;
- (b.) Renewal of leases by trustee in his own name;
- (c.) Permanent improvements to an estate which were unavoidable;
- (d.) Heir of mortgagee in respect of mortgage loan for next of kin of mortgagee.

There are certain requisites for the creation of a trust, other than and in addition to the statutory requisite of writing above mentioned, where writing is required, these requisites being *three* in number, and familiarly called

The Three Certainties in Trusts. These three certainties are,—

- (1.) Certainty in the *words* creating the trust;
- (2.) Certainty in the *subject* of the trust, i.e., in the trust property;
- (3.) Certainty in the *object* of the trust, i.e., in the beneficiary.

(*Knight v. Knight*, 3 Beav. 172; 11 Cl. & F. 518); and failing any one or more of these three certainties, the trust which was intended, inevitably fails; but it being clear that some trust was intended, the

TRUSTS—continued.

trustee is not, in such cases, entitled or permitted to take or keep the property for his own benefit (*Briggs v. Penny*, 3 Mac. & G. 546), if there are any other persons entitled (whether as devisees or legatees of the residue, or as heirs, or next of kin of the testator or intestate), to have it made over to them according to its quality; and if there are no such other persons as last mentioned, then the Crown takes the personal estate as *bona vacantia* (*Taylor v. Haygarth*, 14 Sim. 8), but the trustee keeps the real estate for his own benefit, his tenure thereof excluding escheat (*Burgess v. Wheate*, 1 Eden, 177).

Executed and Executory Trusts.—An *executed* trust is one which the person creating it has fully and finally declared, whence also it is called a Complete Trust; an *executory* trust is one which the person creating it has not fully or finally declared, but has given merely an outline of it by way of direction to the conveyancer, whence also it is called sometimes an Incomplete and sometimes a Directory Trust.

The Court of Chancery deals very differently with executory trusts to what it does with executed ones.

Thus (1.) That Court follows the Law (*æquitas sequitur legem*) with regard to executed trusts, e.g., the rule in *Shelley's Case* applies to these, without any exception; whereas with regard to executory trusts the Court takes the following distinction, viz. :—

(a.) If the executory trust occurs in marriage articles (*Trevor v. Trevor*, 1 P. Wms. 622), or in a will manifestly pointing at marriage (*Papillon v. Voice*, 2 P. Wms. 571), the Court refuses to follow the rule in *Shelley's Case* as to their construction, as by so doing it would give to the intended husband full power of defeating the prospective issue of the intended marriage of the provision presumably intended to have been made in their favour; but

(b.) If the executory trust occurs in a will, and that will does not manifestly point at marriage, the Court follows the rule in *Shelley's Case*, and gives to the ancestor an estate in fee simple or in fee tail without reference to his issue, there being no presumption in this case of any intention to provide for such issue (*Sweetapple v. Bindon*, 2 Vern. 536; *Papillon v. Voice*, *supra*); and

(2.) The Court of Chancery is ready, and is even compellable, in all cases of an executed trust to give full effect to the same, saving all prior equitable rights, and that even in favour of *volunteers*, but the Court refuses, and is not compellable, in any case of an executory trust (being in favour of a *volunteer*) to give any effect whatever

TRUSTS—continued.

to the same, which consequently falls to the ground, although the Court will in many cases of executory trusts (being in favour of *purchasers for value* and such like) give effect thereto, saving all prior equitable rights.

A trust may be an *executed* trust in either of two ways, either,—

(1.) By *declaration of trust*, which is a simple and informal mode of creating it, requiring, however, writing (although not a deed) in the case of land (whether freehold, copyhold, or leasehold), but not even requiring any writing in the case of pure personal estate. The Court of Chancery is bound to enforce a trust that is completely created in this simple manner (*Ex parte Pye*, *Ex parte Dubost*, 18 Ves. 140). If the person should be both legal and equitable owner of the property of which he declares the trust, he declares himself the trustee thereof; if, on the other hand, he is the equitable owner only, he directs his own trustee (who is the legal owner) to hold the property upon the trusts which he then and there specifies in the direction; and such latter direction, although it has not (nor any notice of it) been sent to the trustee, and although the trustee refuses his assent to it, is binding and effectual against the party giving it; but notice to the trustee is necessary to give the new *cestui que trust* a right *in rem* over the trust property which shall protect him in it against third persons claiming without notice thereof (*Bill v. Cureton*, 2 My. & K. 503);

Or, again, a trust may be an *executed* trust,—

(2.) By *assignment or conveyance* of the trust property, according as it is personal or real estate, to a trustee, accompanied with a limitation or declaration of the trusts thereof; but many difficulties have arisen with reference to this second mode of creating a trust, which manifestly is a mere technical or formal mode of doing so. The sources of the difficulty have been two, and (apparently) only two, that is to say,—

(a.) The circumstance that, at Law, and also in Equity, there can be no assignment, strictly so called, of personal estate, and no conveyance, strictly so called, of real estate otherwise than by *deed*; and neither the statutes (e.g., the 30 & 31 Vict. c. 144, as to Policies of Life Assurance; the 31 & 32 Vict. c. 86, as to Policies of Marine Assurance), which prescribe a simple statutory form of assignment or conveyance, nor the Judicature Act, 1873, ss. 25, 26, itself have altered the former law of the Courts in this respect; and

(b.) The further circumstance, that

TRUSTS—continued.

until the Judicature Act, 1873, s. 25, the Courts of Law and the Courts of Equity respectively proceeded upon different principles with regard to the assignability of *chooses in action*, which constitute by far the larger part of the personal property which is made the subject of a trust.

From these two sources of difficulty combined, it has been held in numerous cases that trusts attempted to be created in the more formal manner, *i.e.*, by assignment or conveyance accompanied with an express declaration of the trusts, are executory only and not executed in the following cases,—

(a.) When the assignment was attempted to be made by the use of the words, "I do hereby assign," &c., indorsed on the back of the receipt given for a subscription paid upon a call in respect of shares in a company, the indorsement not having been executed and delivered as a deed (*Antrobus v. Smith*, 12 Ves. 39);

(b.) Where the assignment was attempted by the like form of words also indorsed on the back of a bond, the indorsement not having been executed and delivered as a deed, although the bond itself was delivered (*Edwards v. Jones*, 1 My. & C. 226); and even

(c.) When collateral formalities, being such as went to affect the efficacy of the deed for the purpose of assignment, had been neglected, although the assignment was by deed duly executed and delivered, and therefore valid by the general law (*Searle v. Law*, 15 Sim. 95).

On the other hand, it has been held in still more numerous cases, that trusts attempted to be created in the more formal manner are executed, and not executory merely, in the following cases:—

(a.) Where the property was assignable at Law, and the person assuming to assign it used for that purpose a deed duly executed and delivered, there being no neglect of collateral formalities interfering with the validity of the deed for the purpose of assignment; and even

(b.) Where the property was not assignable at Law, but the person assuming to assign it used for that purpose a deed duly executed and delivered, there being no neglect of collateral formalities interfering with the validity of the deed for the purpose of assignment (*Fortescue v. Barnett*, 3 My. & K. 36; *Kekewich v. Manning*, 1 De G. M. & G. 176).

And a comparison of the two cases just cited shews, that for the validity of such an assignment in the creation of a trust it makes no difference whether the assignor is both legal and equitable owner, or equitable owner only, provided that if equitable

TRUSTS—continued.

owner only, it is not within his power at the time of the assignment to clothe himself with the legal ownership as well, before making the assignment (*Gilbert v. Overton*, 2 H. & M. 110); but the assignment is executory only, if it is within his power to do so at the time of the assignment and he neglects to do it before assigning (*Bridge v. Bridge*, 16 Beav. 322), but of course only if he knows it (*Gilbert v. Overton*, 2 H. & M. 110).

Trusts Voluntary and for Value.—Voluntary Trusts are trusts in favour of a volunteer, *i.e.*, of a person as to whom the trust is a pure bounty or gift, for which he pays or gives nothing as the price thereof; on the other hand, trusts for value are trusts in favour of purchasers, mortgagees, or others, whom the Courts of Equity regard as valuable claimants.

(A.) If a voluntary trust is *executed*, *i.e.*, complete, the Court is ready and is compellable to enforce it; but if a voluntary trust is *executory*, *i.e.*, incomplete, the Court refuses and is not compellable to enforce it, and accordingly it falls to the ground (*Jefferys v. Jefferys*, Cr. & Ph. 138). This rule is without any exception, excepting (but to a very limited extent) in the case of powers, and excepting in the case of powers in the nature of trusts; and accordingly, in the case of voluntary trusts, the conflict has in general been confined to the finding of one fact, *viz.*, whether the trust is executed, *i.e.*, complete, or is executory, *i.e.*, incomplete.

(B.) On the other hand, a trust for value, whether it be executed or executory, is invariably enforced by the Court of Chancery, saving all prior equitable rights.

Voluntary trusts and trusts for value are also distinguished by the Courts of Equity in many other ways; thus

(a.) A voluntary settlement, whether of real or of personal estate, if it be fraudulent within the meaning of the stat. 13 Eliz. c. 5, is void against creditors who were in existence at the date of the settlement, and are thereby hindered in the recovery of their debts (*Spiro v. Willows*, 3 De G. J. & S. 293), or who not having become creditors already at the date of the settlement, have an equity to stand in the position of the creditors who were already such at that date (*Freeman v. Pope*, L. R. 5 Ch. 538); but although being fraudulent it is good and valid against the settlor himself (*Smith v. Garland*, 2 Mer. 123). On the other hand, a settlement for value, whether of lands or of goods, if it be not fraudulent within the meaning of the Common Law, *i.e.*, in common sense and reason, is valid against all the world, including the settlor, and also creditors and

TRUSTS—continued.

purchasers, no matter although these latter persons may be hindered or frustrated in the recovery of their debts or purchases; and a very little value, not being colourable, will in general suffice, more especially if it be conjoined with the consideration of blood or natural affection, which the Law considers meritorious (*Hewison v. Negus*, 16 Beav. 594); again,

(b) A voluntary settlement (being, however, of real estate only), if it be fraudulent within the meaning of the stat. 27 Eliz. c. 4, is void against purchasers, including mortgagees, who become such subsequently to its date; but such a settlement is good against subsequent judgment creditors (*Beavan v. Earl of Oxford*, 6 De G. M. & G. 507), and as against the settlor himself and volunteers claiming under him that are subsequent in date, and even (it has been held) against a *bona fide* purchaser for value from such latter volunteers (*Doe v. Rusham*, 17 Q. B. 723; *Lewis v. Rees*, 3 K. & J. 132; *Richards v. Lewis*, 11 C. B. 1035). On the other hand, a voluntary settlement, being of personal estate, can in no case be fraudulent within the meaning of, not being in fact comprised within, the stat. 27 Eliz. c. 4, and therefore is good against all the world, so far, at any rate, as that statute is concerned (*Jones v. Croucher*, 1 S. & S. 315); but it is clear it may be fraudulent either within the meaning of the 13 Eliz. c. 5, or within the meaning and intention of the Common Law, or under the Bankruptcy Act, 1869, or the Bills of Sale Act, 1878, in any of which cases it would have no validity excepting as against the settlor himself, volunteers claiming under him, and, *semble*, purchasers under such volunteers. On the other hand, a settlement for value, whether of lands or of goods, not being fraudulent within the meaning of the Common Law, is good against all the world. Lastly,

(c.) Under the Bankruptcy Act, 1869, s. 91, settlements that are post-nuptial are *ipso facto* void on the ground of fraud, if the settlor becomes bankrupt within two years from their date, and are also void upon the like event happening within ten years until proof of solvency at their date, the property settled being the bankrupt's in his own right, and not what he takes in right of his wife.

Trusts for Creditors.—Deeds of trust in favour of creditors, although they contain no express power of revocation, are (unlike other deeds, and unlike even voluntary deeds) revocable by the settlor, as a general rule (*Garrard v. Lord Lauderdale*, 3 Sim. 1), being arrangements for the debtor's own convenience merely, and not investing his creditors with the character

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of *certain que trust*. Made one day, they may be unmade the next, upon a happier thought. Nevertheless, such deeds become irrevocable in certain cases, being principally two, namely,—

(a.) Where the creditors, or one or more of them, are parties to the deed, and execute it, it becomes irrevocable as to the executing creditor or creditors (*Mackinnon v. Stewart*, 1 Sim. (N.S.) 88); and

(b.) Where the deed is communicated to non-executing creditors, and they, or one or more of them, after such communication, relying on the deed, have altered their positions or position relatively to the debtor, *e.g.*, by abandoning some compulsory proceeding which they had commenced against him for the recovery of their debts (*Acton v. Woodgate*, 2 My. & K. 495; *Field v. Lord Donoughmore*, 1 Dru. & War. 227); but mere communication, not followed by such an alteration of position, does not make the deed irrevocable (*Biron v. Mount*, 24 Beav. 649). A creditor to whom the deed has not been communicated has no equity under it (*Johns v. James*, 8 Ch. Div. 744); but if it contain *all* the debtor's property, he may make him a bankrupt on the ground of it (*see title BANKRUPTCY*).

Trusts in Joint Tenancies.—Equity acting upon the maxim that equality is equity, although it is bound to recognise the joint tenancies which the rules of law create, nevertheless seizes upon the very slightest grounds of difference, distinction, or inequality for neutralising in effect the incident of survivorship which attaches to joint tenancies, on the ground that such incident is unequal or inequitable as between the tenants. And, accordingly, in the case of MORTGAGES, although the mortgagees are as a general (and, indeed, almost invariable) rule made joint tenants at law, and the legal estate accordingly survives to the survivor wholly, yet Equity, as well (a) where the amounts advanced by the respective mortgagees are *equal*, as also (b) where they are *unequal*, breaks through the rule of Law to this extent, that it secures to the deceased his due proportion of the mortgage debt, and for that purpose, and because it finds the legal estate already vested wholly in the survivor, declares the latter a trustee (1) for the deceased, to the extent of his proportion, and (2) for himself, as to the residue of the money lent. And again, in the case of PURCHASES, although the purchasers are made joint tenants, and necessarily, therefore, are to remain so at Law, so that the legal estate survives to the survivor wholly, yet Equity (c) where the amounts advanced by the respective purchasers are *unequal*, breaks through the

TRUSTS—continued.

rule of Law to this extent, that it secures to the deceased his due proportion of the purchased land, and for that purpose, and because it finds the legal estate already vested wholly in the survivor, declares the latter a trustee (1) for the deceased to the extent of his proportion, and (2) for himself, as to the residue of the purchased land: but (d) where the amounts advanced by the respective purchasers are equal, Equity has no ground for breaking through the rule of Law, and in that case therefore (being one case only out of four) permits the incident of survivorship at Law to have its way in Equity as well.

Charitable Trusts.—These are trusts in favour of hospitals, the people, and such like. As compared with trusts in favour of individuals, trusts in favour of charities are treated by the Court of Chancery as being,—

- (1.) In some respects on a level with individuals;
- (2.) In other respects with more favour than individuals; and
- (3.) In two respects with less favour than individuals.

Thus (1.) They are treated on a level with individuals in the two following respects:—

(a.) The Court of Chancery will supply the want of a trustee or executor in the case of a gift to a charity, just as it will do (at any rate, since the Trustee Act, 1850, and Trustee Extension Act, 1852) in the case of a gift to an individual (*Mills v. Farmer*, 1 Mer. 55);

(b.) The Court of Chancery, equally with the Courts of Law, requires charitable bodies to bring their actions and suits within the times limited for the same by the Statutes of Limitation (3 & 4 Will. 4, c. 27; 37 & 38 Vict. c. 57); *Att.-Gen. v. Christ's Hospital* (3 My. & K. 344), being no longer law. Again,

(2.) Charities are treated with more favour than individuals in the two following respects:—

(a.) Where a general intention to give to charities is evidenced by the particular intention which is expressed in the instrument of gift, and that particular intention fails from any cause, the Court of Chancery will find some other particular mode of making the gift effectual for a charity (*Moggridge v. Thackwell*, 7 Ves. 69); whereas in the case of individuals the trust in such a case would be void for want of one of the three requisite certainties.

(b.) The Court of Chancery will also supply in favour of a charity defects in conveyances, not being defects which any statute has rendered fatal to the gift (*Sayer v. Sayer*, 7 Hare, 377); but no such assist-

TRUSTS—continued.

tance would be rendered to individuals; lastly,

(3.) Charities are less favoured than individuals in these two respects, viz., (a.) that the Court will not marshal assets in favour of charities, although it will do so in the case of individuals (*Williams v. Kerrhaw*, 1 Keen, 274, n.); but this only means where the will contains no express direction to marshal (*Mills v. Harrison*, L. R. 9 Ch. App. 316); and (b.) that secret trusts, if they offend against the Mortmain Acts, are void (see title SECRET TRUSTS).

Vendor's Lien.—Where the vendor conveys the estate sold before receiving the whole or some part of the purchase-money thereof, he has a lien, i.e., hold, on the estate for the unpaid purchase-money or unpaid part thereof; and conversely, the purchaser or vendee also has a lien on the estate contracted to be sold for the purchase-money or the part thereof where he has already paid or prematurely paid, the same, by way of deposit or otherwise, and the contract for any reason not imputable to himself afterwards goes off (*Mackreth v. Symmons*, 15 Ves. 329; *Wythes v. Lee*, 3 Drew. 390). Either the vendor or the vendee may, however, by his own negligence, or by being party to a fraud, prejudice or lose the priority of his lien over subsequent charges or claims (*Rice v. Rice*, 2 Drew. 73). Moreover, he will be taken to have abandoned his lien in the following cases:—

(1.) Where a bond, bill, promissory note, or covenant, is taken expressly in lieu of, or in substitution for, the unpaid purchase-money (*Buckland v. Pocknell*, 13 Sim. 406; *Parrott v. Sweetland*, 3 My. & K. 655);

(2.) Where any security (not of a personal nature), e.g., either a long annuity (*Nairn v. Prowse*, 6 Ves. 752), or a mortgage either of the same (*Bond v. Kent*, 2 Vern. 281), or of a distinct estate (*Cowell v. Simpson*, 16 Ves. 278), is taken for the unpaid part of the purchase-money. But the lien will remain where any security which is of a personal nature is taken generally, that is to say, is not taken in express substitution for the purchase-money (*Collins v. Collins*, 31 Beav. 346).

The lien (where it exists) avails against the following parties:—

- (1.) The purchaser or vendor, as the case may be;
- (2.) The heir of either;
- (3.) Volunteers claiming under either;
- (4.) *Malâ fide* purchasers for value under either;
- (5.) The trustee in bankruptcy of either; and
- (6.) *Bonâ fide* purchasers for value under either, not having the legal estate.

TRUSTS—continued.

All these distinctions depend upon the simple principle, that the lien being a real right, and therefore higher in quality than a personal right, is not lost or merged in the subordinate right, unless the parties have so expressly agreed.

Trustee's Renewal of Lease.—In the case of a renewable lease which is held in trust by A. for B., upon the time for renewal coming round, if A. renews the lease in his own name, and expressly or impliedly for his own benefit, he is nevertheless held by the Court of Chancery to be a trustee for B. of the renewed lease, and it does not matter that the landlord, for reasons of his own, expressly and persistently refused to grant a renewal to B., or in favour of B. (*Krech v. Sandford*, 1 W. & T. L. C. 39), the trustee being the only person in the world who, in such a case, is incapacitated from taking a renewal in his own name. The like stringent rule applies in the case of one co-partner taking a renewal behind the backs of his co-partners (*Featherstonhaugh v. Fenwick*, 17 Ves. 311); also, of an executor *de son tort* doing the like (*Mulvany v. Dillon*, 1 Ball. & B. 409); also, of a tenant for life doing the like (*Rince v. Chichester*, Amb. 211); also of a joint tenant doing the like (*Palmer v. Young*, 1 Vern. 276); also of a mortgagee (*Rushworth's Case*, Freem. 12), or mortgagor (*Smith v. Chichester*, 1 C. & L. 486; *Seabourne v. Powell*, 2 Vern. 11) doing the like.

Permanent Improvements by Tenant.—Where a tenant for life (but not also where a tenant in tail, or a tenant in fee simple) expends money in finishing the unfinished buildings of the testator or settlor, or in doing other works of the like permanent and beneficial nature, *being also works which are necessary to be done, and which will not wait*, then he is entitled to be repaid a proportion of those expenses, as for unexhausted improvements (*Hibbert v. Cooke*, 1 S. & S. 552; *Dent v. Dent*, 30 Beav. 363). But, excepting in the two cases before mentioned, he is not entitled to any such repayment, however beneficial or meritorious the result may be to the estate generally (*Dent v. Dent*, *supra*); and in all cases, therefore, other than the two before mentioned, it is advisable for him, on the one hand, if the improvements are of an agricultural nature, to borrow money for the purpose under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), or, on the other hand, if the improvements are of a residential nature, to borrow the necessary money under the Limited Owners' Residences Act, 1870 (33 & 34 Vict. c. 56).

Heir a Trustee—When a person has a

TRUSTS—continued.

mortgage in fee which he has not foreclosed, and dies intestate, the legal estate in the mortgaged property descends to his heir or real representative; but the administrators of the deceased, or his personal representatives, are entitled to the beneficial ownership of the moneys due on the mortgage, and to the security for the same; and, accordingly, the Court of Chancery, finding the legal estate in the heir, declares him a trustee for them to the extent of the moneys secured by the mortgage (*Thornborough v. Baker*, 1 Ch. Ca. 28).

TRUSTS, RESULTING. Either,

- (1.) From purchase in name of stranger; or
- (2.) From incomplete disposition of equitable estate; or
- (3.) From the failure of equitable conversions.

(1.) In the case of purchasers, whether of lands or of goods, the conveyance or assignment of which is taken or made in the name of a party other than the purchaser himself or person who pays the money, the GENERAL RULE is, that the grantee or assignee in whom the legal estate is so vested holds the property in trust for the purchaser and for the benefit of the purchaser only. This is merely one form of the old rule that a feoffee without consideration was a trustee for the feoffor. But the EXCEPTIONS to this rule are more important than the rule itself, and are generally summed up under the title *Advancement*.

(2.) In the case of a conveyance or assignment, or devise or bequest of lands or of personal estate to A. in fee simple, or other estate, *upon trust* for certain estates and purposes which do not exhaust the entire fee simple or other estate, it is a general rule and without any exceptions, that all that part of the estate which is not exhausted by the trusts declared results in the case of a settlement to the settlor, and in the case of a will to the heir or real representatives of the testator if the estate is in realty, and to the executors or personal representatives of the testator if the estate is in personalty (*Parnell v. Hingston*, 3 Sm. & Giff. 344). But in applying this rule it is necessary to distinguish conveyances or assignments, or devises or bequests *upon trust*, from conveyances or assignments, or devises or bequests, which are merely *subject to* or *charged with* certain limited beneficial interests, the grantee or devisee, assignee or legatee, in the latter case taking the entire residue for his own benefit after satisfying the charge (*King v. Denison*, 1 Ves. & B. 272).

- (3.) When money is directed to be turned

TRUSTS RESULTING—*continued.*

into land, or land is directed to be turned into money, for certain purposes or upon certain trusts, the property is in Equity considered as already, from the date of the direction taking effect, converted into that into which it is directed to be converted, in other words, the money as being notionally land, and the land as being notionally money. But this equitable conversion is subject to the following limitation, that is to say, the direction extends no further than the trusts or purposes for the sake of which it is given, or such of the same trusts or purposes as are capable of taking effect, and as also take effect, require it to extend; and accordingly the margin or surplus of the property over and above what is required for those trusts or purposes results in the case of a deed to the settlor, and in the case of a will to the next of kin, so far as the direction for conversion concerns personal estate, and to the heir-at-law so far as it concerns real estate.

TRUSTS, SECRET: See title SECRET TRUSTS.

TUBMAN: See title PRE-AUDIENCE.

TUGS. Are steam-vessels that take ships in tow, either upon entering or upon leaving ports. Although the tug is the moving power, still it is under the control of the master or pilot on board the ship in tow; and it is only when no directions are given by the latter, that the tug is free to direct the course. The two vessels are respectively controlled in other respects by their respective crews, who are respectively liable for negligence. A tug may under exceptionally dangerous circumstances become entitled, for services rendered, to salvage either in lieu of or in addition to towage; but of course not so, when the services are rendered necessary through the tug's own negligent towage (*The Robert Dixon*, 4 Prob. Div. 121). (Kay's Shipmasters, 908; 1042-1047).

TURBARY. Turbary, or common of turbary, is the right or liberty of digging turf upon another man's ground (Kitchin, 94).

See title COMMON, RIGHT OF.

TURNPIKE ROADS. These are roads on which parties have by law a right to erect gates and bars, for the purpose of taking toll, and of refusing the permission to pass along them to all persons who refuse to pay (*Northam Bridge and Roads Co. v. London and Southampton Ry. Co.*, 6 M. & W. 428). So in the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), s. 50, a turnpike road means a road which is repaired by tolls payable by passengers for the use of the road (*Reg. v. East and West India Docks and Birmingham Junction Ry. Co.*,

TURNPIKE ROADS—*continued.*

2 El. & Bl. 466). The law of turnpike roads is partly regulated by statute, the Act 3 Geo. 4, c. 126, being the General Turnpike Act, and having been amended by subsequent Acts. A turnpike road may become a highway (30 & 31 Vict. c. 121). A *mandamus* does not lie to compel the repair of a turnpike road (*Reg. v. Oxford and Witney Roads (Trustees)*, 12 A. & E. 427); but the proper proceeding is to summon in the first instance the treasurer, surveyor, or other officer of the turnpike-road trust before the justices at special sessions, under the stat. 5 & 6 Will. 4, c. 50, s. 94.

See titles HIGHWAY; WAYS.

TURPIS CAUSA. Is, e.g., future illicit cohabitation. A contract resting upon such an "immoral consideration" (*turpis causa*) is void for the immorality.

TUTELA, VARIETIES OF. In Roman Law, the varieties of tutela (i.e., guardianship of minors) were the following:—

(1.) *Testamentarius*,—Appointed by the will of the *parens* in whose *potestas* the child was; this tutor was called *dativus* (if nominated by the will) and *optivus* (when, but in the case of females only, a right of choosing a guardian was given by the will);

(2.) *Legitimus*,—Appointed by the law of the Twelve Tables,—either directly as in the case of the agnatic tutor, or by analogy thereto, as in the case of the patron and *parens* being tutor; and as a sub-variety, *cessicius*, being the tutor to whom the tutor *legitimus* had ceded, i.e., surrendered (but in the case of females only) the guardianship;

(3.) *Juliotitianus*,— } Tutors appointed
(3a.) *Atilianus*,— } under particular statutes.

(4.) *Ex inquisitione*,—Appointed by the Court upon affidavit as to their competency and probity.

See title GUARDIAN.

TUTEUR OFFICIEUX. In French Law, a person over fifty years of age may be appointed a tutor of this sort to a child over fifteen years of age, with the consent of the parents of such child, or (in their default) the *conseil de famille*. The duties which such a tutor becomes subject to are analogous to those in English Law of a person who puts himself in *loco parentis* to any one.

See title IN LOCO PARENTIS.

TUTEUR SUBROGÉ. In French Law, in the case of an infant under guardianship, a second guardian is appointed to him, the duties of the latter (who is called the *subrogé tuteur*) only arising where the

TUTEUR SUBROGÉ—*continued.*

interests of the infant and his principal guardian are in conflict (Code Nap. 420).

TUTIUS SEMPER, &c. It is always safer to err on the side of mercy than on the side of severity. Whence arises the presumption of innocence, until conviction.

See title **PRESUMPTIONS IN CRIMINAL LAW.**

TUTORS: See title **TUTELA.**

TWELVE TABLES. A system of laws (civil and criminal), drawn up in B.C. 450, and extending the protection of the law to the plebeians as well as to the patricians.

U.

UBI JUS IBI REMEDIUM. Where there is a right there is a remedy. This maxim was the foundation of Equity interfering in aid of the Common Law, when (but for some technical defect) the Common Law itself would have given the remedy.

ULTRA VIRES. Means literally "beyond the power," i.e., the legal authority, of any corporation or company; and opposed to this phrase is that other phrase *intra vires*, which denotes within the power or legal competence of such corporation or company (Brice on *Ultra Vires*).

UMPIRAGE. When matters in dispute are submitted to two or more arbitrators and they do not agree in their decision, it is usual for another person to be called in as umpire, to whose sole judgment it is then referred; the word "umpirage," in reference to an umpire, is the same as the word "award" in reference to arbitrators; but award is commonly applied to the decision of the umpire also.

See title **ARBITRATION AND AWARD.**

UMPIRE: See title **UMPIRAGE.**

UNBORN PERSONS, GIFTS TO: See titles **PERPETUITIES; REMOTENESS OF ESTATES.**

UNCERTAINTY. In Law, any uncertainty in pleading is the subject of objection as being embarrassing, and may be ordered to be amended. Uncertainty in the language of a testator may be such as to vitiate the intended bequest; and other legal documents may also be void for uncertainty.

See titles **CERTAINTY IN PLEADING; CONTRACTS; TRUSTS.**

UNCLAIMED DIVIDENDS. In bankruptcy, dividends remaining unclaimed for five years are forfeited to the Government (Bankruptcy Act, 1869, s. 116); but may, upon satisfactory proof of right thereto, be

UNCLAIMED DIVIDENDS—*continued.*

paid over to the creditors entitled (38 & 39 Vict. c. 77, s. 32). And in Chancery, the Lord Chancellor may, under stat. 16 & 17 Vict. c. 98, s. 3, order dividends unclaimed for fifteen years to be carried to "the suitors' unclaimed dividend account;" and these, under 32 & 33 Vict. c. 91, are transferred to the public on their indemnity. Dividends not being claimed for ten years on stock in the Bank of England, the stock is forthwith transferred to the Government on the like indemnity.

UNCONSCIONABLE BARGAINS. Are void on the ground of fraud, apart even from the ability or inability of the party to contract, and solely from a regard to public policy.

UNDER-CHAMBERLAIN OF THE EXCHEQUER. An officer in the Exchequer who cleared the tallies written by the clerk of the tallies, and read the same, that the clerk of the pell and the comptroller might see that their entries were true. He also made searches for all records in the treasury, and had the custody of Domesday Book. There were two officers of this name, but their office is now abolished (Cowel).

UNDERLEASE. Is a lease granted by one who himself is only a lessee of the premises which he underlets. Thus, if A. grants a lease of land to B. for twenty-one years, and B. afterwards grants a lease of the same land to C. for fourteen years, here C. would be termed the underlessee, and the lease, by virtue of which C. held the land, an underlease. In this respect an underlease differs from an assignment, which is a transfer of the entire term, or residue thereof. The underlessee has no privity with the original lessor, and is liable for rent to his immediate lessor only. But it is different with the assignee.

See title **CONVEYANCES**, sub-title *Assignment.*

UNDERTAKERS: See title **ELECTIONS, CROWN'S INFLUENCE IN.**

UNDERTAKING. This word has two principal significations in Law, viz. (1.) In legal procedure, it is used to denote the obligation under or subject to which an interim injunction against an alleged tortfeasor's act is granted, the undertaking being to pay the damages (if any) occasioned in the interim by the grant of the injunction; and (2.) In Company Law, the word undertaking denotes all the property of the company past, present, and future, and is a mortgageable interest, being commonly charged by the debentures of the company. (*Re Panama Co.*, L. R. 5 Ch. App. 318; *Ex parte Grissell*, 3 Ch. Div. 411).

UNDERVALUE: See title REVERSIONS, SALES OF.

UNDERWOOD: See titles ESTOVERS; TIMBER.

UNDERWRITERS. Are marine insurers; and it is a practice among them to make contracts of re-assurance *inter se* (see titles INSURANCE; RE-ASSURANCE). In the case of a total loss (either actual or constructive), the property insured vests in the underwriter, as a partial indemnity to him against the payment he has to make under the policy.

See title ABANDONMENT OF CARGO OR VESSEL.

UNDISCHARGED DEBTOR: See title DISCHARGE, ORDER OF.

UNDUE PREFERENCE: See title RAILWAY COMMISSIONERS.

UNDUE PRESSURE: See titles ACCIDENT; MISTAKE; FRAUD.

UNIFORMITY, ACT OF. The Act of 1559 is the 1 Eliz. c. 2, and that of 1662 is the 13 & 14 Car. 2, c. 4. By the first Act the Book of Common Prayer was to be uniformly used in churches, and all good subjects were to attend regularly; by the second Act, the like provisions were re-enacted, with immaterial variations. Compulsory attendance at church was repealed in the present reign (7 & 8 Vict. c. 102; 9 & 10 Vict. c. 59).

UNIFORMITY OF PROCESS ACT. Is the title commonly given to the statute 2 Will. 4, c. 39, by which a more simple and uniform course of proceeding for the commencement of personal actions was established at Common Law. Until the passing of that Act, the practice or forms of proceeding in the three superior Courts at Westminster differed greatly from each other. The improvements introduced by the Act were founded on the report of the Common Law Commissioners, a body of men appointed to consider the effects of the then existing system, with a view to its correction. In some important particulars, however, the enactments of the stat. 2 Will. 4, c. 39, were again altered by the more recent Act of 1 & 2 Vict. c. 110; for instance, under the Act of Will. 4 an action might be commenced either by a writ of summons or by a *capias*, whereas under the subsequent Act it could only be commenced by a writ of summons. More sweeping enactments were afterwards made by the C. L. P. Act, 1852; and the present practice is of course regulated almost exclusively by the Judicature Acts, 1873-75, and the orders and rules thereunder.

See title PROCEDURE.

UNILATERAL CONTRACTS. Are contracts in which all the benefit is on one side and all the burden on the other; and *bilateral* contracts are those in which there are (as there usually are) benefits and burdens on both sides, or in which "*alter alteri obligatur in id quod justum ac æquum est.*" The phrase bilaterality should not be confused with mutuality of obligation, which is a very different thing, and which denotes that where either party to an alleged contract is not bound, the other is not bound either (*Burton v. Great Northern Ry. Co.*, 9 Exch. 507; *Great Northern Ry. Co. v. Witham*, L. R. 9 C. P. 16).

See titles CONTRACTS; MUTUALITY OF OBLIGATION.

UNION ASSESSMENT ACT. This is the stat. 25 & 26 Vict. c. 103, amending the Parochial Assessment Act, 6 & 7 Will. 4, c. 96, and prescribes that the poor rate shall be assessed upon real property at a rateable value thereof to be determined on the fiction of an hypothetical yearly tenancy.

UNION, POOR LAW: See title POOR.

UNITY OF POSSESSION. Joint possession of two rights by several titles. As if I take a lease of land from a person at a certain rent, and afterwards I buy the reversion in fee simple of such land (*Cowel*); or again, if, being owner of the dominant tenement, I buy the servient, or, being owner of the servient tenement, I buy the dominant one. The effect of this unity of possession is (in general) to extinguish charges and easements.

See titles EASEMENTS; MERGER.

UNIVERSITIES TESTS ACT, 1871: See title NON-CONFORMISTS.

UNLAWFUL ASSEMBLY: See title RIOT.

UNLAWFUL ASSEMBLIES ACT. The Act 3 & 4 Edw. 6, c. 5, rendered it treason for any twelve or more persons to meet together on any matter of state, and rendered it felony if the object of the assembly was to destroy enclosures. The Act appears to have been determined in the following reign of Mary.

See titles RIOT; RIOT ACT; SEDITION ASSEMBLY.

UNLIMITED LIABILITY: See title LIMITED LIABILITY.

UNLIQUIDATED DAMAGES: See titles ACCORD AND SATISFACTION; DAMAGES.

UNREGISTERED BILLS OF SALE: See titles BILL OF SALE; FRAUDULENT CONVEYANCES.

UNREGISTERED COMPANIES. If not illegal (e.g., if not exceeding twenty persons altogether, *Re South Wales Atlantic Steam-*

UNREGISTERED COMPANIES—contd.

ship Co., 2 Ch. Div. 763), may be compulsorily wound up under the provisions of the Companies Act, 1862.

See title WINDING-UP.

UNREGISTERED MORTGAGES. Under the Companies Act, 1862 (s. 43), every limited company is required to keep a register of all mortgages specifically affecting the property of the company, the wilful or culpable non-registration involving a penalty not exceeding £50. And it has been held that no director of the company who is so in fault can obtain any benefit as mortgagee from an unregistered mortgage (*Ex parte Valpy and Chaplin*, L. R. 7 Ch. App. 289; but see, as to partners one only of whom is a culpable director, *Smith's Case*, 11 Ch. Div. 579).

UNREGISTERED WILLS: See titles REGISTRY OF DEEDS; REGISTRY OF LAND.

UNSOUND MIND: See title LUNACY.

UNUMQUODQUE EODEM MODO, &c.: See title EODEM MODO QUO COLLIGATUR.

UPPER BENCH, COURT OF. The Court of Queen's Bench was so called during the interval between 1649 and 1660, the period of the Commonwealth.

USAGE. In the French Law is the *usus* (as opposed to the *usufructus*) of Roman Law, and corresponds very much to the tenancy at will or on sufferance of English Law.

See titles SUFFERANCE, TENANT AT; TENANT AT WILL; USUS.

USAGES. Usage differs from custom and prescription, in that no man may claim a rent, common, or other inheritance by usage, though he may by prescription or custom. A village or township may, however, enjoy certain rights in the village-green, and that by usage as distinguished from custom or prescription. Moreover, a usage is local in all cases, and must be proved; whereas a custom is frequently general, and as such is noticed without proof.

See titles CUSTOM; EASEMENTS, QUASI; TRADE-USAGE.

USANCE. The time which, by the usage of different countries between which bills of exchange are drawn, is appointed for their payment. This is frequently a calendar month, as from the 20th of May to the 20th of June, and what is termed a double usance consists in that case of two such months (*Chitty on Bills*). But the usance differs with different countries, that with India having been and, *semble*, still being six months.

USE AND OCCUPATION. An action lies by a landlord against his tenant for use and occupation of the premises demised, where the lease is not by deed, provided the tenant have entered upon the premises and not otherwise. The entry, *semble*, may be constructive.

USER. Is the act of using or enjoying any profit or benefit, or any easement upon or over any land or water. And in Law the effect of such user (if continued for a period sufficiently long, and under circumstances which indicate the exercise of a right on the part of the person so using the land), is to establish a prescriptive claim ever after to enjoy the same profit or easement (Co. Litt. 115 a).

See titles EASEMENTS; NON-EXISTING GRANT, TITLE BY; PRESCRIPTION.

USES. The word "*use*," in its original legal application, denoted simply the benefit or beneficial enjoyment of land. The invention of uses is commonly attributed to the ecclesiastics; and they having been the early lawyers, that origin is probable enough. The system of uses was attended with numerous advantages to the true owners of the land,—the use not being subject to escheat or to forfeiture, and being devisable by will, and transferable without livery of seisin; but like other systems it was made the channel of numerous abuses, lands being conveyed by means of it to persons and in ways forbidden by the words—or, at all events, by the policy—of the Statute Law. Thus, by means of the use, lands came largely into mortmain to spiritual corporations, contrary to the Statutes of Mortmain (7 Edw. 1; 15 Ric. 2, c. 5); and, ultimately, after some Acts of a more imperfect character, the Statute of Uses (27 Hen. 8, c. 10) was passed, which enacted in effect that the *use* should be the *land*, and that where the *use* was there the land or *legal estate* should be and should be deemed to be. In consequence of this statute the word "*use*" departed with its original signification, and became equivalent to seisin or legal estate. And whether the use was *express*, or was *implied*, or was *resulting*, the Statute of Uses was held equally to apply to it; it was turned into the legal estate or seisin.

By the decision in *Tyrell's Case* (4 & 5 Ph. & M.) the Courts of Law held that the Statute of Uses intended the first use only, and that as soon as it had executed that use and made it the legal estate, it was exhausted. But the Courts of Chancery, while adopting the rule of Law so far, went further, and gave the benefit or beneficial enjoyment, as before, to the person intended to benefit, calling the first use the legal

USES—*continued.*

estate man or trustee merely, and the proper beneficiary being the second or last usee, the equitable estate man or *cestui que trust* and true owner in Equity.

By the joint operation of the Statute of Uses and the decision in *Tyrrell's Case* two lines of estate have become well established in Law,—namely, (1) the legal estate in the *trustee*, which retains all, or nearly all, its ancient incidents; and (2) the equitable estate in the *cestui que trust*, which has received incidents analogous to those of the legal estate, upon the maxim, *Equity follows the Law*.

By the means of these uses new facilities have been furnished for the conveyance of property.

See title CONVEYANCES.

USES, CHARITABLE: See title CHARITABLE USES.

USES, IMPLIED. Are uses which are raised from a regard to the intention of the party, which intention is not expressed in so many words, but is gathered, *i.e.*, implied, from the act and its circumstances. Prior to the Statute of Uses, many uses were implied by the Court of Chancery; and since that statute these implied uses have been affected by it equally with express uses.

See titles USES; TRUSTS.

USES, RESULTING. Are uses which are raised without any regard to the intention of the party, which intention whether it exist or not is immaterial, because the Court itself raises or constructs the use, for the purposes of justice and equity. Again, resulting uses are occasionally like *residuary* uses, *e.g.*, A. being owner in fee simple grants his lands to B. and his heirs, to the use of C. for life, and there stops; in such a case the Court fills up the residuary use, and holds that after C.'s death there is a resulting use to A. in fee simple. Prior to the Statute of Uses, there were many resulting uses recognised by the Court of Chancery; and since that statute these resulting uses have been affected by it equally with express and implied uses.

See titles USES; TRUSTS.

USES, SUPERSTITIOUS: See title SUPERSTITIOUS USES.

USHER. A subordinate officer in the Courts of Law; the word means literally a doorkeeper (*Fr. huissier*). The chief usher in the Court of King's Bench used to hold his office by letters patent under the great seal for two lives, and to execute it by three deputies. But now 15 & 16 Vict. c. 73, ss. 16–21, enacts that the ushers of the Superior Courts shall be appointed by the Chief Justices and Chief Baron respec-

USHER—*continued.*

tively, and prescribes their salaries and tenure of office. There are also ushers in the Courts of Chancery, appointed in like manner by the judges of those Courts (1 Chitty's Arch., 12th ed., 11).

USHER OF THE BLACK ROD. The Gentleman Usher of the Black Rod is an officer of the House of Lords appointed by letters patent from the Crown. His duties are, by himself or deputy, to desire the attendance of the Commons in the House of Peers when the royal assent is given to bills either by the Queen in person or by commission, to execute orders for the commitment of persons guilty of breach of privilege, and also to assist in the introduction of peers when they take the oaths and their seats (May's Parliamentary Practice).

USUCAPIO. A term of Roman Law, used to denote a mode of acquisition by the civil—*i.e.*, old strict, law. It is, however, sometimes used as interchangeable with *longi temporis possessio*; but, strictly speaking, *longi temporis possessio* was confined to immoveables (*i.e.*, real property), and was always adverse, while *usucapio* extended both to immovable and moveable property, and might be either adverse or consistent. It corresponds very nearly to the English term prescription or limitation, which by the stats. 3 & 4 Will. 4, c. 27, and 37 & 38 Vict. c. 57 (as to corporeal hereditaments), and 2 & 3 Will. 4, c. 71 (as to incorporeal hereditaments) confers a positive (although merely possessory) title on the holder. But the prescription of Roman Law differed from that of the English Law, not only in its times (which are of less importance), but also in this great and peculiar feature, that no *malâ fide* possessor (*i.e.*, person in possession *knowingly* of the property of another) could by however long a period acquire title by possession merely, the two never-failing requisites not only to *usucapio*, but also to *longi temporis possessio*, being *justa causa* (*i.e.*, title) and *bona fides* (*i.e.*, ignorance). In Roman Law, re-acquisition by *usucapio* was called *usureceptio*.

See title ADVERSE POSSESSION.

USUFRUCT. An usufruct has been defined to be that real right in another's property which entitles a party to reap all the fruits of the thing, and in general to have the whole use and enjoyment of it, as far as is practicable, without injury to its substance (*salvâ rerum substantiâ*). He who is so entitled to enjoy the fruits of another's property is termed the *usufructuary*, in contradistinction to the actual proprietor of the thing (Just. Inst. ii. 4).

USUFRUCT—continued.

The usufructuary was invariably entitled for life, and for no less a period; he, therefore, corresponds to our tenant for life.

See title **USUS**.

USUFRUCTUARY: See title **USUFRUCT**.

USUFRUIT. This is, in French Law, the usufruct of English and Roman Law.

USURA MARITIMA: See titles **FŒNUS NAUTICUM**; **MARITIME INTEREST**.

USURECEPTIO: See title **USUCAPIO**.

USURIOUS CONTRACT: See title **USURY**.

USURPATIO. In Roman Law, was an interruption of the legal possession, and was either physical (i.e., natural) interruption, or legal interruption (e.g., when a hostile claim was set up.)

See title **USUCAPIO**.

USURPATION OF ADVOWSON. An injury which consists in the absolute ouster or dispossession of the patron, and which happens when a stranger who has no right presents a clerk, and the latter is thereupon admitted and instituted.

See titles **DISTURBANCE**; **SPOLIATION**.

USURPATION OF FRANCHISES, or OFFICES. The unjustly claiming or usurping any office, franchise, or liberty.

See title **DISTURBANCE**.

USURY. The loan of money at exorbitant interest by way of compensation for the use of the principal lent. Such contracts were at one time void on the ground of usury. The rate of interest in Roman Law was 12 per cent. per annum on ordinary contracts of loan, but Justinian reduced it to 4 per cent. The rate of interest in English Law was 10 per cent. in the reigns of Henry VIII. and Elizabeth, reduced by Jac. I. to 8 per cent., and by Car. II. to 6 per cent., and last of all by stat. 12 Anne, st. 2, c. 16, fixed at 5 per cent. on ordinary contracts,—any contract (being an ordinary contract) for the loan of money at a higher rate being void for usury or illegality. However, all restrictions upon the rate of interest were abolished by stat. 17 & 18 Vict. c. 90.

USUS. In Roman Law, was a precarious enjoyment of land, corresponding with the right of *habitatio* of houses, and being closely analogous to the tenancy at sufferance or at will of English Law. The *usuarius* (i.e., tenant by *usus*) could only hold on, so long as the owner found him convenient, and had to go, so soon as ever he was in the owner's way (*molestus*). The *usuarius* could not have a friend to share the produce,—it was scarcely permitted to him (Justinian says) to have even his wife

USUS—continued.

with him on the land; and he could not let or sell, the right being strictly personal to himself.

See titles **HABITATIO**; **USUSFRUCTUS**.

USUSFRUCTUS: See title **USUFRUCT**.

UT RES MAGIS VALEAT QUAM PEREAT. Means literally, that the matter may have effect rather than fail of effect. This maxim is a rule of construction, remotely underlying that rule which directs such a construction to be put upon an ambiguous document (or ambiguous words therein) as that the document shall be and remain valid, and not be or become invalid from uncertainty or illegality or other like cause.

UTILIS, ACTIO. In Roman Law, an *actio utilis* or *action uti* was a civil action adapted by the Prætor to meet a case substantially the same as (but in some technical respect different from) that which would have been proper for the civil action to which it corresponded; e.g., the *actio publiciana* was an action *uti* adapted from the action of *vindicatio*.

UTTER, TO. In Law signifies to put in circulation, to offer or tender to another man, and is used in reference to forged instruments or counterfeit coin.

See titles **FORGERY**; **COUNTERFEIT COIN**.

UTTER BAR. Is the bar at which those barristers, usually junior men, practise who have not been raised to the dignity of queen's counsel. These junior barristers are said to plead without the bar, while those of the higher rank are admitted to seats within the bar, and address the Court or a jury from a place reserved for themselves and divided off by a bar.

See title **UTTER BARRISTERS**.

UTTER BARRISTERS. Barristers-at-law, in general, who plead without the bar. They are called utter barristers, i.e., pleaders without the bar, to distinguish them from the benchers, or those who are admitted to plead within the bar, as king's or queen's counsel are (Cowel).

V.

VACATION. The interval between each term used to be termed the vacation, that is, between the end of one term and the beginning of the next. These intervals are retained in principle under the Judicature Act, 1873, but are differently reckoned, the distinction of terms having been abolished by that Act; and now the Long Vacation is fixed between the 10th day of

VACATION—*continued.*

August and the 24th day of October following, both days being included (Order LXI., 2, 3).

VACATION OF LIS PENDENS.: See title LIS PENDENS.

VACUA POSSESSIO. Is the vacant possession, *i.e.*, free and unburdened possession, which (*e.g.*) a vendor had and has to give to a purchaser of lands.

VADIMONIUM. In Roman Law, was the Personal Bail of English Law.

VADIUM MORTUUM: See title VADIUM VIVUM.

VADIUM VIVUM. When a man borrows a sum of money of another (suppose £200), and grants him an estate, as of £20 per annum, to hold till the rents and profits shall repay the sum so borrowed; in this case the land or pledge is said to be living; it works off, *i.e.*, repays and survives, the debt, and immediately on the discharge of that reverts back to the borrower. It is called a *vivum vadium*, or living pledge, in contradistinction to a *mortuum vadium*, the land in which does not of itself work off, *i.e.*, repay the debt, but the mortgagor must needs himself repay the same, before the land reverts to him. In the case of both these species of *vadium*, the pledgee receives the rents and profits without account, in which respect they both differ from a modern mortgage.

See title MORTGAGE.

VAGABONDS. Under the stat. 5 Geo. 4, c. 83 (which repeals the prior Acts), every able-bodied person, refusing to work and thereby becoming (or his or her family becoming) chargeable to the parish; also, every noisy prostitute; also, every beggar,—is an idle and disorderly person, *i.e.*, a vagrant or vagabond, and may be sent to the House of Correction; likewise every fortune-teller; every person unlawfully sheltering himself or herself in a barn, or cart, &c., &c., by night, and not being able to account satisfactorily for his or her so doing; every person selling or offering for sale in the street or (1 & 2 Vict. c. 38), in a window, obscene books, pictures, &c.; every male person exposing his private parts indecently, in a public place or road for a female to be shocked thereby; and many other such-like offenders against the peace of the community, are vagabonds and vagrants. And under the stat. 31 & 32 Vict. c. 52, tossing with coppers and other like gaming in the public streets, &c., renders the offender a rogue and vagabond within the meaning of 5 Geo. 4, c. 83.

See title PUBLIC MORALS.

VAGRANCY: See title VAGABONDS.

VAGRANTS: See title VAGABONDS.

VALOR MARITAGII. During the prevalence of the feudal tenures, the guardian was at liberty to exercise over his infant ward the right of marriage (*maritagium*), that is, he had the power of tendering him or her a suitable match, without disparagement or inequality, and if the ward refused the offered match, then he or she forfeited the value of the marriage (*valorem maritagii*) to the guardian, that is, so much as a jury would assess, or any one would *bonâ fide* give, to the guardian for such an alliance; and if the infant married without the guardian's consent he or she forfeited double the like value, *duplicem valorem maritagii* (Litt. 110).

VALUABLE CONSIDERATION. The distinction between a good and a valuable consideration is, that the former consists of considerations of blood, or of natural love and affection; as when a man grants an estate to a near relation from motives of generosity, prudence, and natural duty; and the latter consists of such a consideration as money, marriage which is to follow, or the like, which the law esteems an equivalent given for the grant. The conveyance by bargain and sale requires to be for valuable consideration, as distinguished from that by a covenant to stand seised, which requires to be for blood or natural affection. In the statutes of Elizabeth against fraud (13 Eliz. c. 5, and 27 Eliz. c. 4), a *good* consideration means a valuable one.

See title CONSIDERATION.

VALUATION. The ascertaining of the value of property is so called. Such a valuation is commonly provided in the case of partnerships by the partnership articles to be taken and made periodically, and also upon the dissolution of the partnership from any cause. And in Bankruptcy, a secured creditor may value his security instead of realising same, and may then prove for the deficiency (if any) of the value, as regards the debt. Also, under the Lands Clauses Act, 1845, the purchase price of lands compulsorily taken by public companies is in some cases ascertained by a valuation.

See title APPRAISE.

VALUED POLICY. A policy may be either *open* or *valued*. In the former, the value of the subject-matter of the insurance is not stated in the policy, and must be proved after a loss. In the latter, to prevent the necessity of proving the actual value in the event of a loss, a value agreed upon by the parties is mentioned in the policy, and is conclusive between them in case of loss. But where there are several

VALUED POLICY—*continued.* †

insurances upon the same vessel the valuation is conclusive only between the assured and the underwriters of that policy which contains the valuation (*Maunder v. Pollock*, 343-4).

See title VOYAGE POLICY.

VARIANCES. It is a general rule that a party must recover *secundum allegata et probata*; but in matters impertinent or immaterial to the issue, or merely formal or superfluous, a variation between the pleading and the evidence is unimportant, more especially since the powers of amendment conferred by the modern statutes.

Variances are of the following kinds:—

(1.) Variance in the *parties* to a contract,—being either the omission of a plaintiff who ought to be joined (*Graham v. Robertson*, 2 T. R. 282), or the misjoinder of a plaintiff or defendant, not also the non-joinder of a defendant (1 Wms. Saund. 291-4), which could only be pleaded in abatement. These cases of variance may be amended even at the trial.

(2.) Variance in the *consideration* of a contract,—being the omission of any part of the consideration. The variance in such a case used to be fatal (*Dashwood v. Peart*, Manning's Index, 308), unless the omitted part was not material (*Clarke v. Gray*, 6 East, 568); but it would not usually be fatal now.

(3.) Variance in the *promise* in a contract,—being the omission of any part of the promise. The variance in such a case might or might not be fatal; e.g., the omission of an exception contained in the promise would have been fatal (*Latham v. Rutley*, 2 B. & C. 20), but the omission of an addition or of a defeasance would not have been so (*Miles v. Sheward*, 8 East, 7; *Hotham v. E. I. Co.*, 1 T. R. 640).

See titles AMENDMENT; EVIDENCE.

VASSAL. Originally signified a feudal tenant or grantee of land. The exact relationship was usually that of landlord and tenant, but occasionally the vassal was little better than the slave or bondman of his lord. The state or condition of a vassal was termed vassalage (2 Chitty's Bl. 52, n. (6)).

VENDITIO BONORUM: See title EMPTIO BONORUM.

VENDITIO, EMPTIO: See title EMPTIO VENDITIO.

VENDITIONI EXPONAS, WRIT OF. This is a writ of execution assistant to a writ of *fi. fa.*, and issues where the sheriff upon the *fi. fa.* has taken goods, and to the writ returns that he has taken same but that they remain in his hands for want of buyers; and the writ is simply a direction

VENDITIONI EXPONAS, WRIT OF—*continued.*

to the sheriff to go on with the sale in a particular manner, and do his duty at all costs and hazards (1 Chitty's Practice, 12th ed., pp. 678-9).

See title EXECUTION, WRIT OF.

VENDOR'S LIEN. An unpaid vendor of lands is entitled to a lien thereon for the purchase-money (or the proportion thereof) remaining unpaid after execution of the conveyance and possession delivered; and such a lien is equivalent in value to an equitable mortgage, being a real right and not a merely personal one. The lien is not lost by taking a collateral security, e.g., a bond; but if the bond was substitutive of, and not cumulative with, the lien, then the lien is gone. The lien when it exists and is not lost, waived, or abandoned, holds good against the purchaser himself, and his heirs, and all persons taking under him or them as volunteers; also, against subsequent purchasers for valuable consideration who bought with notice of the purchase-money remaining unpaid; also, against the assignees, i.e., trustees, of a bankrupt, although they may have had no notice of it; and if the legal estate is outstanding, then also against all subsequent purchasers and mortgagees of the land. On the other hand, the lien will not prevail against a *bona fide* purchaser for valuable consideration without notice, who has the legal estate in him.

See title LIEN.

VENDORS AND PURCHASERS. The vendor of *lands* undertakes to make a good title thereto, and should he fail to do so, the purchaser is discharged from his contract, and recovers damages (*Flureau v. Thornhill*, 2 W. Bl. 1078; *Hopkins v. Grazebrook*, 6 B. & C. 31). The duties of such a vendor are now regulated in all material points by the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, and incidentally also by the other sections of that Act, relative to Abstracts of Title, Sales by Trustees, Protection of Legal Estate, and Tacking. On the other hand, the vendor of personal property (not being chattels real), comes under no such liability, unless he chooses to give some express warranty, the general maxim of the Common Law in the case of sales of personal property being *caveat emptor* (*Morley v. Attenborough*, 3 Ex. 500); nevertheless, it has been stated by Mr. Benjamin (and this is undoubtedly the more sensible view), that upon a sale of personal estate, there is an implied warranty of title, unless the particular circumstances of sale show that the vendor did not undertake to assert an actual ownership (Benjamin on

VENDORS AND PURCHASERS—contd.

Sale, 523). Usually, upon a purchase, the risk of the thing purchased attaches to the purchaser, as from the moment that the sale is complete (*Tarling v. Baxter*, Tud. L. C. Mer. Law, 596).

See titles COVENANTS FOR TITLE; WARRANTY.

VENIRE FACIAS. A judicial writ which used to be directed to the sheriff of the county in which a cause was going to be tried, commanding him to cause a jury of twelve men to come from the body of his county to try the issue between the litigating parties. The writ was abolished by the C. L. P. Act, 1852, s. 104.

See titles JURY; PANEL.

VENIRE DE NOVO. A fresh or new *venire*, which the Court grants when there has been some impropriety or irregularity in returning the jury, or where the verdict is so imperfect or ambiguous that no judgment can be given on it (2 Arch. Pract. 1549; Smith's Action at Law, 173). In all cases where this trial *de novo* is grantable, the Court is bound to grant it as of right, and without being shackled with any restrictive or other condition.

See title NEW TRIAL, MOTION FOR.

VENTER. Is used in law as designating the maternal parentage of children. Thus, where in ordinary phraseology, we should say that A. was B.'s child by his first wife, he would be described in law as "by the first venter;" similarly, we say, "A. died seised, leaving two infant daughters by different venters" (*Doe d. Burdett, v. Keen*, 7 T. R. 886).

VENUE. The county in which an action is intended to be tried, and from the body of which the jurors are accordingly to be summoned, is so called. This county, or *venue*, as it is termed, when fixed upon and determined by the plaintiff, used to be inserted in the margin of his declaration, which was termed "laying the *venue*" in such a county; and the action itself was then said to be "laid" or brought "within that county." By the Judicature Act, 1873, there is no local *venue* for the trial of any action, but when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he is in his statement of claim to name the county or place in which he proposes that the action shall be tried; and the action thereupon shall, unless the judge otherwise orders, be tried in the county or place so named (Order xxxvi., 1).

VERBA CHARTARUM POTIUS ACCIPIUNTUR CONTRA PROFERENTEM. The words of a deed are to be construed most strongly against the grantor, a maxim

VERBA CHARTARUM POTIUS ACCIPIUNTUR CONTRA PROFERENTEM
—continued.

of construction which is now practically exploded, and which was never at any time applicable until all other canons of construction had been exhausted.

VERBA RELATA INESSE VIDENTUR.

Words in one document referred to in another and therein purporting to be incorporated, are incorporated by force of such reference simply. Even an entire Act of Parliament or other legal document may be so incorporated by apt words of reference.

VERBIS OBLIGATIO: See title STRICT-LATIO.

VERDEROR. An officer of the king's forest, who is sworn to maintain and keep the assizes of the forest, and to view, receive, and enrol the attachments and presentments of all manner of trespasses of vert and venison in the forest (*Manwood*, c. 6, s. 5).

See title VERT.

VERDICT. A verdict is the unanimous judgment or opinion of the jury on the point or issue submitted to them. A verdict is either general or special. It is said to be *general* when it is delivered in general words with the issue; as if the issue be on a plea of not guilty, then a general verdict would be that the defendant is guilty, or is not guilty, as the case may be. It is said to be *special* when the jury instead of finding the negative or affirmative of the issue, as in the case of a general verdict, declare that all the facts of the case as disclosed upon the evidence before them, are in their opinion proved, or, in other words, find the special facts of the case, but that they are ignorant in point of law on which side they ought, upon these facts, to find the issue; that if upon the whole matter the Court shall be of opinion for the plaintiff, they find for the plaintiff accordingly, and assess the damages at such a sum, &c.; but if the Court are of an opposite opinion, then *vice versa*. This special verdict was then, together with the whole proceedings on the trial, entered on the record, and under the present practice it would be taken down in some authentic shape, although not necessarily entered upon or annexed to any record, and the question of law arising on the facts found is argued before the Court *in banc*, and decided by that Court. A verdict is called a *privy* verdict when the judge has left or adjourned the Court; and the jury being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the

VERDICT—continued.

judge out of Court, which privy verdict, however, was of no force, unless afterwards affirmed by a public verdict given openly in Court (Boote's Suit at Law, 273; Steph. Pl. 100; Sm. Act. at Law, 159).

See titles JUDGMENT, VARIETIES OF; REPORT OF REFEREE.

VERDICT, JUDGMENT UPON. Under the Judicature Acts, 1873-75, and the orders and rules thereunder, the judgment of the Court is to be obtained on motion for judgment; and no judgment is to be entered after a trial without the order of the Court or a judge thereof (Order xxxvi., 22). Upon the trial of an action, whether with or without a jury, the judge may at or after the trial direct that judgment be entered *simpliciter* for any or either party (Order xxxvi., 22, Dec. 1876). On the other hand, upon the trial of an action whether with or without a jury, the judge may at the trial leave any party to move for judgment (Order xxxvi., 22, Dec. 1876), or may at the trial direct judgment to be entered for either or any of the parties subject to leave to move. Where the judge has at the trial directed judgment to be entered subject to leave to move (Order xl., 2), in such a case the party to whom the leave has been reserved is to set down the action on motion for judgment, and is to give to the other party notice of such setting down within ten days after the trial or within the time specified in the reservation of leave (Order xl., 2); and where the judge has abstained from making any direction at the trial as to entering judgment for either party, in such a case, the plaintiff may within ten days after the trial (Order xl., 3) set down the action on motion for judgment and give notice of such setting down to the defendant; and if the plaintiff does not do so, then the defendant may set it down so, and give to the plaintiff notice of such setting down (Order xl., 3). Upon the report of a referee, which, if not set aside, is equivalent to the verdict of a jury (Act 1873, s. 58), judgment may be obtained by subsequent motion for judgment.

VERGE. The Court of the Marshalsea had jurisdiction within the verge of the Court, which, in this respect, extended for twelve miles round the king's place of residence. The word "verge" is also used to signify a rod or stick by which one is admitted tenant to a copyhold estate, by holding it in one's hand and swearing fealty to the lord of the manor (Old Nat. Brev. 17).

See title VINDICTA.

VERIFICATION. Is a certain formula

VERIFICATION—continued.

with which all pleadings containing new affirmative matter used to conclude. It was in itself an averment that the party pleading was ready to establish the truth of what he had set forth. It was either common or special, the common verification being "And this the plaintiff [*or* defendant] is ready to verify;" and a special verification, which was used only when the matter pleaded was to be tried by record, or by some other method than the ordinary mode of trial by jury, being "And this the plaintiff [*or* defendant] is ready to verify by the said record" (Steph. Pl. 479). The verification ceased to be necessary under the C. L. P. Act, 1852, s. 67.

See title ET HOC PARATUS EST VERIFICARE.

VERT. In general signifies everything that grows and bears green leaf within the forest. There are two sorts of vert in every forest, viz., over-vert and nether-vert. *Over-vert*, sometimes also called *hault-boys*, is all manner of great trees, as well such as bear fruit as do not; and old ash and holly trees are accounted over-vert. *Nether-vert*, sometimes also called *south-boys*, comprises all kinds of under-wood, bushes, thorns, gorse, and such like; but whether fern and heath are included under the term "nether-vert," seems doubtful, Manwood arguing that they are not, Fleetwood and Hesketh maintaining the contrary opinion. The vert which grows in the king's demesne woods is termed *special vert*. From this word "vert" is derived the word "verderer" (Harewood, c. 6, ss. 2, 4, 5).

VERT AND VENISON: See title VERT.

VESTED INTEREST. An interest, property, or estate, whether in possession or not, which is not in general subject to any condition precedent unperformed. The interest may be either a present and immediate interest, or a future but uncontingent, and therefore usually transmissible, interest. Thus, a vested remainder is that description of remainder by the creation of which a present interest passes to the party; and though the remainder itself, *ex vi termini*, can only be enjoyed *in futuro*, yet a present, immediate, and disposable interest, as remainderman, is at once conveyed, and therefore the remainder is called a vested remainder. A vested interest is not necessarily an unconditional interest; on the contrary, it is occasionally qualified by some condition, being, however, a condition which does not extend to delay the vesting of the interest.

See titles VESTED LEGACY; VESTED REMAINDER.

VESTED LEGACY. A legacy is said to be vested when the words of the testator making the bequest convey a transmissible interest, whether present or future, to the legatee in the legacy. Thus a legacy to one, to be paid when he attains the age of twenty-one years, is a vested legacy, because it is given unconditionally and absolutely, and therefore vests an immediate interest in the legatee, of which the enjoyment only is deferred or postponed; and if such legatee die before that age, his representatives shall receive it out of the testator's personal estate at the time that it would have become payable had the legatee himself lived. But if the legacy were given when or if the legatee attain a certain age, it would not be vested, *i.e.*, transmissible, until that age; and if the legatee were to die before that age, the legacy would fail to take effect, and his representatives could make no claim to it; for in this case the bequest is a kind of conditional one, depending upon the happening of a certain event, *viz.*, the legatee's attaining the specified age. But legacies charged on land, even although vested, are not therefore transmissible, the law holding that such a legacy sinks for the benefit of the inheritance when the legatee dies before the period of payment (*Boraston's Case*, *Pawlett v. Pawlett*, *Stapleton v. Cheales*, and *Hansom v. Graham*, *Tud. L. C. Conv.* 713).

See title LEGACIES.

VESTED REMAINDER: See titles INCORPOREAL HEREDITAMENTS; REMAINDER.

VESTING ORDER. An order of the Chancery Division of the High Court vesting any property (real or personal) in the person or persons specified in the order is called a vesting order, and bears the same stamp duty as if the same were a deed of conveyance. Such orders are made under the Trustee Acts, 1850 and 1852.

See title TRUSTEE ACTS.

VESTRIES. Are local governing bodies with limited powers in municipal corporations in the provinces; and there are similar bodies for the Metropolis (see title METROPOLITAN MANAGEMENT ACT, 1855). A parish usually has a vestry to itself, and consists of the minister and churchwardens of the parish, with a selected number of parishioners. Their duties extend to the levying of poor rates and some few other rates; the regulation of workhouses, and of baths and washhouses for the people; the scavenging and cleaning of the streets, and the lighting and watching thereof. The members are called vestrymen; and they hold their meetings in the vestry of the parish church or (in the case of large

VESTRIES—continued.

wealthy parishes) in a building (called a vestry hall) specially provided for them.

See titles CORPORATIONS, MUNICIPAL; PARISH.

VETO. The royal veto was the Crown's refusal of its assent to Bills which had passed both Houses of Parliament. The last occasions on which this prerogative was exercised were in 1692, when Will. III. refused his assent to the Triennial Bill, and 1707 when Anne rejected a Scotch Militia Bill.

VEEXATIONENESS. An action is said to be vexatious when it is not brought for any *bond fide* purpose, but for some purpose other than and collateral to the ostensible purpose; also, where it is instituted (*e.g.*, in cases of ejectment) after repeated unsuccessful trials of the same question; and so forth. Vexatiousness is a ground for ordering security for costs to be given; and sometimes for commencing an action in the nature of a Bill of Peace.

VI BONORUM RAPTORUM. In Roman Law, the offence of rapina or robbery, *i.e.*, theft accompanied with violence (*vis*), might be treated as a tort, in which case the action called *vi bonorum raptorum* lay to recover fourfold if the action was brought within the year, and onefold if brought afterwards; or it might be treated as a crime and prosecuted in a *publicum judicium* called *de vi* under the *Lex Julia*.

VIAGÈRE, RENTE. In French Law is a rent-charge or annuity payable for the life of the annuitant.

See title ANNUITY.

VICAR. The priest or parson of every parish is termed a rector, unless the predial tithes be appropriated, and then he is called a vicar, that is, has the part of a vice-rector. The distinction, therefore, between a parson and a vicar is this, that the parson has for the most part the whole right to all the ecclesiastical dues in his parish; but a vicar has generally an impropriator over him, entitled to the best part of the profits, and to whom he is in effect perpetual curate, with a standing salary (Cowel; *Wms. Real. Prop.* 330, 8th ed.)

See titles ADVOWSON; RECTOR; TITHES.

VICAR-GENERAL. Is an ecclesiastical officer in each diocese, appointed by, and acting under, the authority of the bishop. Formerly he was only occasionally constituted during the bishop's absence from his diocese; but now he is the perpetual representative of the bishop in certain matters, such as the granting of licences, &c.,

VICAR-GENERAL—continued.

where there is nothing of contention or litigation between the parties. He appears to have no criminal jurisdiction, and therefore cannot inquire, in the place of the bishop, into such offences as quarrelling, brawling, or smiting, &c. (Roger's Ecc. Law, 143, 144; Gibs. Introd. 23; *Thorpe v. Mansel*, 1 Hag. Con. 4, *in notis*).

VICARIAL TITHES. Those tithes to which vicars are entitled, and which are generally called privy or small tithes.

See title **TITHES**.

VICINAGE. Common because of vicinage or neighbourhood (Fr. *voisinage*), signifies the right exercised by the inhabitants of two townships which lie contiguous to each other, of intercommoning one with another: the beasts of the one straying mutually into the other's fields without molestation from either. The right must have originated either in grant or in manorial custom (*Jones v. Robin*, 10 Q. B. 581). Some acts of intercommoning must be proved, and not a mere straying from want of fences (*Clarke v. Tucker*, 10 Q. B. 604). Common *pur cause de vicinage* cannot exist among three or more townships, but between two only (*Commissioners of Sewers of City of London v. Glasse*, L. R. 19 Eq. 134).

See titles **COMMON, RIGHT OF; PASTURE, COMMON OF**.

VIDELICET, or SCILICET. The words to wit, or, that is to say, used in pleading, are technically called the *videlicet* or *scilicet*; and when any fact alleged in pleading is preceded by, or accompanied with, these words, such fact is, in the language of the law, said to be laid under a *videlicet*. The use of the *videlicet*, or *scilicet*, is to point out, particularise, or render more specific that which has been previously stated in general language only; also to explain that which is doubtful or obscure. Where the *scilicet* is contrary to the preceding general statement it may be rejected (*Dakin's Case*, 2 Wms. Saund. 678). But a *videlicet*, or *scilicet*, which is not so contrary, and which is not mere surplusage, cannot be rejected as immaterial, but may be traversed like any other averment.

See title **PLEADING**.

VIEW. If a real action were brought against a tenant, and such tenant did not exactly know what land it was that the demandant asked, then he might have prayed the view, which was that he might see the land which the demandant claimed, in order to ascertain its identity and other circumstances (F. N. B. 178). And now an inspection either of real or of personal property may be had or made whenever it

VIEW—continued.

would be conducive to the right decision of a case.

See titles **DISCOVERY; INSPECTION OF PROPERTY**.

VIEW OF FRANKPLEDGE. The office which the sheriff in his County Court, or the bailiff in his hundred, performed in looking to the king's peace, and seeing that every man was of some pledge.

See title **FRANKPLEDGE**.

VIEW OF AN INQUEST. Is a view or inspection taken by a jury, summoned upon an inquisition or inquest, of the place or property to which the inquisition or inquiry refers.

See title **INQUEST**.

VI LAICÂ REMOVENDÂ, WRIT OF.

A writ that lies where two persons contend for a church, and one of them enters into it with a great number of laymen, and keeps out the other *vi et armis*; then he who is so kept out may have this writ directed to the sheriff to remove such lay force. But the sheriff must not remove the incumbent out of the church, whether he is rightfully there or not, but only the force, or laymen, that accompanied him (*Les Termes de la Ley*; Cunningham).

See titles **SPOILIATION; USURPATION OF ADVOWSON**.

VIGILANTIBUS NON DORMIENTIBUS, ETC.: See title **DELAY DEFEATS EQUITIES**.

VILL. Seems to bear the same signification in law as a town or tithing, and is said to have had originally a church with the celebration of divine service, sacraments, and burials; and hence it is that the word "vill" has been described as a parish or manor. Sir Henry Spelman conjectures entire vill to have consisted of ten freemen or frankpledges (hence tithing), and demi vill to consist of five (Co. Litt. 115 b.; stat. 14 Edw. 1; Spel. Gloss. 274; 1 Inst. 115; Bract. lib. 4, c. 31).

VILLAGE-GREENS: See title **EASEMENTS, QUASI**.

VILLAINS: See title **VILLEINS**.

VILLANIS REGIS SUBTRACTIS REDUCENDIS. A writ that lay for the restoring the king's bondmen who had been carried away by others out of his manors to which they belonged (Reg. Orig. 87; Cowel).

VILLANOUS JUDGMENT. Such a judgment as threw the reproach of villany and shame on those against whom it was given, and by which they were discredited and disabled as jurors or witnesses; forfeited their goods, and chattels, and lands for life; had their lands wasted, their

VILLANOUS JUDGMENT—continued.

houses razed, their trees rooted up, and their bodies committed to prison (1 Hawk. P. C. 193; Lamb. Eiren.). A judgment in attain against unjust jurors had these effects, and was, therefore, a villanous judgment.

See titles **ATTAINT**, **WRIT OF**; **JURORS**, **IMMUNITY OF**.

VILLEIN SOCAGE. A tenure of lands in villenage by freemen, who were thence called villeins by tenure only, because, subject to doing the base but certain services of their tenure, they were personally free.

See titles **ANCIENT DEMESNE**; **FEUDAL SYSTEM**; **SOCAGE**; **VILLEINAGE**; **VILLEINS**.

VILLEIN TENURE. Was of two kinds, viz., Pure and Privileged. Pure villenage was where a man held upon terms of doing whatsoever was commanded of him, nor knew in the evening what was to be done in the morning, and was always bound to an uncertain service. Privileged villenage was holden of the king, the tenants of the king's demesnes having the privilege that they could not be removed from the land while they did the services due; and these villein-socmen are properly called *glebe ascriptitii*. They performed villein services, but such as were certain and determined.

See title **VILLEIN SOCAGE**.

VILLEINS. Were a sort of people under the Saxon government in a condition of downright servitude, who were used and employed in the most servile works, and who are said to have even belonged to the lord of the soil, like the cattle or stock upon it. They seem to have been those who held what is termed the folk-land, from which they were removeable at the lord's pleasure. These villeins, belonging principally to lords of manors, were either *villeins regardant*, that is, annexed to the manor or land, or else they were *villeins in gross*, or at large, that is, annexed to the person of the lord, and transferable by deed from one owner to another, either apart from, or with, the land. The tenure by which villeins held their land, and their condition in general, was termed "villenage" (Cowell; *Les Termes de la Ley*).

See title **VILLENAGE**.

VILLENAGE. This was the species of slavery or serfdom in which villeins lived,—a state of society recognised by the law, but which, from various circumstances favouring liberty, has entirely disappeared out of England; the latest cases on the subject being *Crouch's Case* (9 & 10 Eliz.), and *Pigg v. Caley* (15 Jac. 1); and according to the genius of the English constitution,

VILLENAGE—continued.

as explained by Mr. Hargreaves in his argument in *Somerset's Case*, no new slavery can be introduced into England. So jealous, indeed, was the law of any such new form of it, that it was at one time doubted whether a contract of service, intended to last during the life of the servant, was legal; a question decided in favour of the legality of it in *Wallis v. Day* (2 M. & W. (1837)). A slave who is for one moment introduced by his master on English territory is, therefore, absolutely free (*Somerset's Case*, 20 St. Tr. 1), nor may his owner carry him by force out of the country (Magna Charta and Habeas Corpus Act); although if the slave of his own accord return with his master to the slave country, his slavery at once re-attaches (*The Slave Grace*, 2 Hagg. Adm. 94).

See titles **SOMERSETT'S CASE**; **VILLEIN TENURE**; **VILLEINS**.

VINCULO MATRIMONII, DIVORCE A. A divorce from the bond of matrimony.

See title **DIVORCE**.

VINCULUM JURIS. In Roman Law, an obligation is defined as a *vinculum juris*, i.e., "a bond of law," whereby one party becomes or is bound to another to do something according to law.

See title **OBLIGATIO**.

VINDICATIO. In Roman Law, was the real action, or *actio in rem* of the old law, and was and continued to be available for the recovery both of lands and of goods. But its procedure was simplified, or rather simpler and more direct forms of procedure were substituted for it, accomplishing in effect the same object.

See titles **INTERDICTA**; **VINDICTA**.

VINDICTA. In Roman Law, was a rod or wand; and from the use of that instrument in their course, various legal acts came to be distinguished by the term, e.g. one of the three ancient modes of manumission was by the *vindicta*; also, the rod or wand intervened in the progress of the old action of *vindicatio*, whence the name of that action.

VIOLENT PRESUMPTION: See title **PRESUMPTIONS**, **QUALITY OF**.

VIRTUTE CUJUS. That part of the declaration in an action which, after setting forth the various grievances complained of, proceeded to point out the injurious results which had flowed therefrom, was frequently spoken of as the "*virtute cujus*," from the words employed therein, which were, "by reason whereof." Thus, in an action for diverting water from the plaintiff's mill, the declaration, after stating

VIRTUTE CUJUS—continued.

the plaintiff's right to the water, and particularising the injurious act complained of, proceeded to point out the injury which the plaintiff had sustained in consequence, in the following manner: "and the plaintiff, *by reason of the premises*," had been prevented from working his said mill in so beneficial a manner as he theretofore had, and otherwise could and would have done, &c. &c. (11 Rep. 106; Steph. Pl. 221, 5th edit.).

VIS MAJOR. Is some physical force which no reasonable human foresight or contrivance could have resisted. It is a ground of exemption in cases of torts (*Nichols v. Marsland*, L. R. 10 Exch. 255; and on appeal 2 Exch. Div. 1); and it is a ground for avoiding contracts in certain cases.

VISIT AND SEARCH. The British Government, in former times, claimed and exercised a right to search vessels suspected of being slave-traders; but the right as existing apart from conventions was abandoned in 1858; and at the present day it exists for the repression of slave-trading only where the respective countries regard that practice as an international piracy, and mutually concede for its repression the right of visit and search. Prior to the Declaration of Paris, 1856, England also claimed and (as against persons not parties to that declaration) still claims the right of visit and search in times of war, for enemy's goods suspected to be on board of neutral vessels; but by that declaration it was declared that, "The neutral flag covers enemy's goods, with the exception of contraband of war;" in other words, that free ships make free goods. The practice of nations as regards neutral goods on board of enemy vessels has varied at different times and under different treaties, it having been at one time held that as free ships did not make free goods, so enemy ships did not make enemy goods (*Consolato del Mare*), and at other more recent times, that enemy ships did make enemy goods, and, in the latter case, the two maxims were frequently conjoined in the doggerel, "Free ships, free goods; Enemy ships, enemy goods."

See titles CONTRABAND; CONVOY.

VISITATION. The office performed by the bishop of every diocese once in every three years, or by the archdeacon once in every year, of visiting the churches. These visitations were instituted for the purpose of correcting any abuses or irregularities that might arise therein; and the persons who perform such visits are termed the visitors (Cowel). Most, if not all, of the

VISITATION—continued.

colleges at Oxford and Cambridge have their visitors.

VISITOR: See title VISITATION.

VISITORS OF COLLEGES: See titles JUDGES, IMMUNITY OF; VISITATION.

VIVÂ VOCE. As applied to the examination of witnesses, this phrase is equivalent to oral; it is used in contradistinction to evidence by affidavit.

VOID OR VOIDABLE. Prior to the Infants Relief Act, 1874, the contracts of infants for non-necessaries were voidable only and not absolutely void; but by that Act they are now void, and (as a consequence) not confirmable upon the infants attaining full age. Usually, contracts affected by fraud are voidable and not void, and the contract must be repudiated within a reasonable time, and before action commenced. Void in leases means in general voidable only by the person for whose benefit the provision is inserted. But certain acts and contracts are inherently void, *e.g.*, for immorality, illegality, or the like, appearing on the face of the instrument.

VOIDANCE: See title AVOIDANCE.

VOIR DIRE (*see him speak*). This phrase is applied to denote that preliminary examination which the judge makes of one presented as a witness, where the witness's competency is objected to, the witness being a child of very tender years; the judge examines him or her on the *voir dire*, to test his or her knowledge of the sacredness of an oath. If the result of such preliminary examination supports the objection to incompetency, then the witness will be rejected; but in the general case the judge inclines to allow the competency, leaving the objection to go to the credibility merely. The examination on the *voir dire* may be made at any stage of the trial, whenever the occasion for it arises.

VOLENTI NON FIT INJURIA. Means literally, an injury is not done to any one, if he (or she) consents to the act, *e.g.*, with the consent of the other party, either of the parties to a contract may break it, without becoming liable as for a breach.

VOLUMUS. The first word of a clause in the king's writs of protection and letters patent (Cowel).

See title MERE MOTION.

VOLUNTARY BOND. Is an obligation under seal, creating a debt in favour of some person or persons voluntarily and without any consideration moving from the obligee; in the administration of the assets of a deceased insolvent, such a debt now

VOLUNTARY BOND—*continued.*

ranks *pari passu* with other debts (*Ex parte Pottinger, In re Stewart*, 8 Ch. D. 621).

VOLUNTARY CONVEYANCE. Is a conveyance of lands to or in favour of a person or persons without any consideration of value.

See title TRUSTS.

VOLUNTARY CURTESY. An act of kindness performed by one man towards another, of the free will and inclination of the doer, without any previous request or promise of reward made or offered by him who is the object of the curtesy. From such a voluntary act of kindness the law implies no promise on the part of him who is benefited by such act that he will make any remuneration or return for the same; for if it were otherwise, one man might impose a legal obligation upon another against his will. If, however, the curtesy or act of kindness was performed at the instance or request of the party benefited, then the law implies a promise on the part of the latter to make a remuneration or return for such act. Hence the meaning of the phrases, that a "voluntary curtesy will not support an assumpsit," but that "a curtesy moved by a previous request will" (*Lampleigh v. Braithwait*, Hob. 105; 1 Smith's Leading Cases, 139; 3 Bos. & P. 250, *in notis*; *Durnford v. Messiter*, 5 M. & S. 446).

See titles CONTRACTS; EX NUDO PACTO NON ORITUR ACTIO.

VOLUNTARY JURISDICTION. Those Courts are said to have a voluntary jurisdiction which are merely concerned in doing or settling what no one opposes, and which keep an open office for that purpose (as granting dispensations, licences, faculties, and other remnants of the old ecclesiastical jurisdiction), but do not concern themselves with administering redress for any injury.

See title NON-CONTENTIOUS JURISDICTION.

VOLUNTARY OATHS are such as persons take in extra-judicial matters, and not regularly in a Court of Justice, or before an officer invested with authority to take the same.

See title OATHS.

VOLUNTARY SETTLEMENTS: See titles FRAUDULENT CONVEYANCES; VOLUNTARY TRUSTS.

VOLUNTARY TRUSTS: See titles TRUSTS, sub-title *Voluntary and for Value*; VOLUNTEER.

VOLUNTARY WINDING UP: See title WINDING UP.

VOLUNTAS REPUTATUR PRO FACTO.

"The will or intention is reputed for the act," is a maxim which can be applied (if at all) with only the greatest care in English Law, the nearest approach to any application of it having been under the cognate maxim *scribere est agere* in the case of an alleged treason. But in English Law, a man is always deemed to have intended that which is the *natural consequence* of his act; and the intention may even be inferred from the overt act, and that is probably the true meaning of this maxim. Certainly the maxim does not mean (nor does the English Law hold) that the mere intention to do a criminal act, not being accompanied with any accomplishment thereof or step towards (*i.e.*, overt act of) accomplishment, is punishable at all.

See titles ATTEMPT; INTENTION.

VOLUNTEER. In the language of Equity, denotes a person becoming entitled to property *ex causâ lucrativâ* (*i.e.*, without giving any payment or other consideration for the same), and in that sense is opposed to a purchaser for value.

See title VOLUNTARY TRUSTS.

VOLUNTEERS: See title ARMY, sub-title *Volunteers*.

VOTE: See titles ELECTIONS, MUNICIPAL; ELECTIONS, PARLIAMENTARY; ELECTORAL FRANCHISE; VOTES AND PROCEEDINGS.

VOTES AND PROCEEDINGS. In the Houses of Parliament the clerks at the table make brief entries of all that is actually done; and these minutes, which are printed from day to day for the use of members, are called the "Votes and Proceedings of Parliament." The votes and proceedings of the House of Commons are published by the Speaker's authority, and are sold to the public as well as distributed gratis among the members themselves; but those of the House of Lords are not published or sold, although they can be obtained as a favour by persons desiring them.

VOUCHEE. In an action of common recovery, the demandant commenced his action against the tenant to the *præcipe*, and he vouched, *i.e.*, called upon the tenant in tail to warrant his title; and such tenant in tail (who was therefore called the first vouchee) vouched over the officer of the Court to warrant him, and such officer from being so vouched was called the second vouchee; and the recovery was then said to be in that case with "Double Vouchee," which was more efficacious than where there was the single voucher only of the officer (*Burton's Compendium*).

See title COMMON RECOVERY.

VOUCHERS. Are the corroborating documents (e.g., receipts for purported payments, &c.) which are produced by trustees, agents, and others in proof of the correctness of their accounts, in all actions involving the taking of such accounts.

See title ACCOUNT, ACTION OF, &c.

VOUCHING TO WARRANTY: See title RECOVERY, COMMON.

VOYAGE POLICY. An insurance may be effected either for a voyage, or for a number of voyages, in either of which cases the policy is called a *voyage* policy; or the insurance may be for a particular period, irrespective of the voyage or voyages upon which the vessel may be engaged during that period, and the policy is then called a *time* policy. In England time policies made for a longer period than one year are, by statute (35 Geo. 3, c. 63, s. 12), void *ab initio*. Where a ship is insured "from A. to B. for a year," the policy is called a mixed policy, being in effect a time policy with the voyage specified; and such a policy runs for the whole period insured, irrespective of the completion or non-completion of the voyage, but does not attach, unless the ship sails upon the voyage named (*Way v. Modigliani*, 2 T. R. 30; *Maude & Pollock*, 345).

See title VALUED POLICY.

W.

WADSET. A Scotch term for mortgage.

WAGER OF BATTLE. This was a mode of trial in a civil action, but it was abolished in writs of rights by the 59 Geo. 3, c. 46; and as the same statute abolished also appeals of murder, of treason, and of felony, this mode of trial may be considered to have been then abolished altogether.

See title JURY, TRIAL BY, HISTORY OF.

WAGER OF LAW. This was a species of "decisory oath" taken by the defendant to an action on a simple contract, and in some few other actions, not being on specialties. The defendant swore in Court, in the presence of eleven compurgators, that he owed the plaintiff nothing, or that he did not detain the plaintiff's goods, and the eleven swore that they believed his oath to be true. This mode of trial was only admissible in the absence of all evidence properly so called; the Court would rather discharge the defendant on his oath than charge him on the plaintiff's uncorroborated oath. Wager of law was abolished by 3 & 4 Will. 4, c. 42, s. 13.

See titles DECISORY OATH; SUPPLETORY OATH.

WAGERING. By the stat. 8 & 9 Vict. c. 109, all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, are declared null and void; and no action or suit is maintainable for recovering any sum of money or other valuable article alleged to be won upon any wager, or which has been deposited in the hands of any person to abide the event of the wager. And by the stat. 16 & 17 Vict. c. 119 (extended to Scotland, and generally rendered more rigorous, by the Betting Act, 1874, 37 & 38 Vict. c. 15) a penalty is imposed upon persons being the occupiers or owners of betting-houses, and who receive money to abide the event of any wager, or who advertise advice on races, subject to certain exceptions mentioned in the Act. Those statutes have produced an alteration in the Common Law; for by the Common Law an action might have been maintained on a wager, strictly so called, if it was not against the interests or the feelings of third persons, and did not lead to indecent evidence, and was not contrary to public policy (*Thackoorseydass v. Dhondmull*, 4 Moo. Ind. App. 339).

WAGES. The payments made to servants and workmen are so called. This amount is usually fixed by the contract or agreement of the parties; the old Statute of Labourers, which attempted to interfere with the law of the supply and demand of labour as affecting such contracts or agreements, proving as inefficacious as the modern attempts of the trade unions. Upon the bankruptcy of the employer or master wages are treated as preferential debts of the bankrupt, the wages or salary of any clerk or servant not exceeding four months and not exceeding £50, and the wages of any labourer or workman not exceeding two months, at the date of the order of adjudication (Bankruptcy Act, 1869, s. 32). Similarly, three months' wages are allowed to workmen on the winding-up of a company (32 & 33 Vict. c. 10, s. 26).

See titles LABOURERS, STATUTE OF; MASTER AND SERVANT.

WAIFS. If a felon, in his endeavour to escape pursuit, waived, i.e., threw away, the goods stolen, then the king's officers (or the lord's bailiff) might seize the goods to the king's (or the lord's) use, and keep them as a punishment upon the true owner, if he did not prosecute the thief within a year and a day, or at least give evidence against him leading to his conviction; but such owner, if he was a foreign merchant, i.e., a stranger, to our laws, was not to be so punished. Waifs are to be distinguished from *bona fugitiva*, which are the goods of

WAIFS—continued.

the felon himself, which he abandons in his flight from justice.

See title **FUGITIVE'S GOODS**.

WAIN, WAINAGE. A cart or waggon, with its equipments. The early law exempted the labourer's wainage from being taken for debt; and many similar exceptions, suited to modern society, are afforded by our law to the honest but unfortunate debtor (*Simpson v. Hartopp*, 1 Sm. L. C. 385; Bankruptcy Act, 1869).

See title **AMERCEMENT**.

WAITING CLERKS: See title **SIX CLERKS**.

WAIVER. This word is commonly used to denote the declining to take advantage of something or other, usually of a forfeiture incurred through breach of covenants in a lease. A gift of goods or of money may be waived by a disagreement to accept; and then it is no gift (*Hill v. Wilson*, L. R. 8 Ch. 888). So, also, a plaintiff may commonly sue in contract, *waiving* the tort. But the doctrine of waiver is chiefly valuable in connection with covenants in leases; and in this use of it waiver is commonly said to be of two sorts, namely, (1.) *Implied waiver*, and (2.) *Actual waiver*. With reference to the first kind of waiver, a receipt of rent by a landlord after notice of a breach of covenant committed by his tenant prior to the rent becoming due, was and is an implied waiver of his right of entry for that particular breach (Co. Litt. 211, s. 6); and with reference to the second kind of waiver, if a landlord, in express terms, waived his right of re-entry on the ground of the breach for that once, he was considered in law to have waived it also for all subsequent breaches of the same covenant; but by the stat. 22 & 23 Vict. c. 35, s. 6, the effect of an actual waiver is now reduced in this respect to that of an implied waiver, and does not extend beyond the particular instance.

WALES. It appears that England and Wales were originally but one country; and that even after Wales had princes of its own, the kings of England exercised a superiority over them. King Edward I., in the twenty-eighth year of his reign, annexed the marches of Wales perpetually to the Crown of England; and the annexation was completed by the 27 Hen. 8, c. 26. By the subsequent stat. 34 & 35 Hen. 8, c. 26, Wales was divided into twelve counties, a president and council were appointed for the Principality, and two justices were to be assigned to hold a session twice every year. By the 1 Wm. & M. st. 1, c. 27, the Court of the President and Council was abolished, and the process of the Courts at Westmin-

WALES—continued.

ster was partially extended to Wales. And now by 20 Geo. 2, c. 42, s. 3, in an Act of Parliament, the word "England" is made to include Wales and Berwick-on-Tweed as well as England proper; and by 1 Geo. 4 & 1 Will. 4, c. 70, the process of the Courts at Westminster was made the exclusive process in Wales, and the circuits of North and South Wales were established.

WAPENTAKE. A local division of the country; the name is in use north of the Trent to denote a hundred. The derivation of the name is said to be from *weap* and *take*, and indicates that the division was originally of a military character.

See title **HUNDRED**.

WAR: See titles **MARTIAL LAW**; **TRADING WITH ENEMY**; **TREATIES**.

WAR-OFFICE. Is the office of the Secretary of State for War, and has the management of the civil side (more properly so called) of the defence of the kingdom and its colonies and dependencies, i.e., the acquisition of sites for fortifications, &c., the audit of accounts, &c., the payment of officers, soldiers, &c., and so forth; the Horse Guards being the corresponding office for the military side (properly so called).

WARD. A division in the city of London and in some other towns committed to the special ward, i.e., guardianship, of an alderman. The name also denotes a prison or division thereof. All infants are likewise denominated *wards*.

WARDEN. A keeper, e.g., the Warden of the Cinque Ports, the Warden of the Stannaries, and the Warden of the Fleet Prison. He is sometimes invested with judicial functions.

WARD-MOTE. The Court of the division of the City of London or of any town which is called a "ward."

WARDS, COURT OF. This was a Court established by Henry VIII., and to which he afterwards added the office of *liveries* (32 Hen. 8, c. 46). The Court was abolished by 12 Car. 2, c. 24, along with the military tenures.

WARDSHIP. In the tenure of lands by knight service, if the heir were under age, the lord had the wardship (i.e., the custody of the body and of the lands of the heir) until such heir attained 21 if a male, and 16 if a female; and such wardship was without account. In the tenure of lands by socage, the lord (or guardian) was

WARDSHIP—*continued.*

strictly liable to account, as all guardians now are.

See titles GUARDIANS; INFANTS, JURISDICTION OVER.

WAREHOUSEMEN'S CONTRACTS: See titles LIEN; STOPPAGE IN TRANSITU.

WAREHOUSING SYSTEM. This system, called also the Bonded Warehouse, or Bonding, System, is that by which goods imported are allowed to be deposited in public warehouses at a reasonable rent without payment of the duties on importation if they are re-exported; or if they are afterwards withdrawn for home consumption, without payment of such duties until they are so withdrawn.

See titles CUSTOMS; EXCISE.

WARES: See titles FRAUD, STATUTE OF; SALE.

WARING, EX PARTE, CASE OF. This is a celebrated case reported in 19 Ves. 345, and which decided that bills (or other securities) held by a banker against his acceptances are available to the holders of the acceptances to have them applied in discharge of the acceptances, not indeed directly, but through the equity of the accepting banker; and the principle of the case is applicable only when there is a right of double proof, i.e., against both drawer and acceptor, both of whom are bankrupt, the effect of the application of the principle being to adjust the equities as between the two bankrupt estates (*Ex parte Smart*, L. R. 8 Ch. App. 220; *Vaughan v. Halliday*, L. R. 9 Ch. App. 561). This appropriation of securities is a species of appropriation of payments, made by the Law, according to the equities of the parties (*Shepherd v. Harrison*, L. R. 5 H. L. 116).

See titles APPROPRIATION OF PAYMENTS; APPROPRIATION OF SECURITIES.

WARRANT. A precept under hand and seal to an officer to take up an offender, to be dealt with according to due course of law. It issues only upon a sworn information. If the magistrate issuing it has authority, it is a protection to all persons acting under it; but not if upon the face of it, it is shewn to be without authority.

See titles ARREST; CONSTABLE; POLICE.

WARRANT OF ATTORNEY: See title ATTORNEY, WARRANT OF.

WARRANT, DOCK: See title DOCK-WARRANTS.

WARRANTIA CHARTA, WRIT OF. A writ which lay for a man who was enfeoffed of lands with warranty, and who

WARRANTIA CHARTA, WRIT OF—*continued.*

being afterwards sued or impleaded in assize or other actions in which he could not vouch to warranty, was permitted by means of this writ to compel the feoffor, or his heirs, to warrant the land to him; and if that writ were obtained by the feoffee pending the first writ against him, then in case the land were recovered from him, he should recover as much lands in value against the warrantor (F. N. B. 134; *Les Termes de la Ley*, 372, 588). The writ was abolished by 3 & 4 Will. 4, c. 27, s. 36; and at the present the remedy would be on the covenant for title.

WARRANTY. This word applies both to real and to personal property.

I. As applied to real property—it is a covenant, i.e., a promise by deed, by the grantor for himself and his heirs to warrant, i.e., secure, the grantee and his heirs in the thing granted against all the world. The benefit of such a warranty appeared when it was attempted to evict the grantee of the lands, who thereupon either vouched his warrantor, or obtained judgment in a writ of *warrantia charta* against him to defend his title, or else to recompense him with other lands of equal value.

Warranty was either *implied* or *express*. By the old law, every feudal grant, by the word "*dedi*," involved or implied a warranty; but in other modes of grant of a more recent origin, an express clause of warranty was required.

A warranty bound not only the warrantor himself but also his heirs, and it made no difference whether the warranty was *lineal* or *collateral*, that is to say, whether the heirs had or not derived, or might or not by possibility have derived, title from or through the warrantor. But the heir in either case was in theory bound only if he had received other sufficient lands or assets by descent from the warrantor, although both in lineal and in collateral warranty he was in effect bound, whether he had received such lands or not, inasmuch as the assets he should have recovered upon upsetting the warranty of his ancestor were regarded as assets by descent from his ancestor, and as such would be liable to make good his warranty. This was an evident abuse of a proper principle; and the abuse was corrected,—as to the warranties of tenants by the curtesy, by the stat. 6 Edw. 1, c. 3; and as to the warranties of tenants in dower, by the stat. 11 Hen. 7, s. 20; and as to the warranties of tenants for life generally, by the stat. 4 & 5 Anne, c. 16; and last of all, as to the warranties of tenants in tail, by the stat. 3 & 4 Will. 4, c. 74, s. 14.

WARRANTY—*continued.*

II. As applied to personal property—a warranty may also be either express or implied. The better opinion is, that there is an implied warranty of *title* upon the sale of personal chattels, unless the circumstances are such as evidently exclude the implication; and there may, of course, be an express warranty of title. But there is no implied warranty of the goodness or soundness of the articles sold, although there may of course be an express warranty to that effect; yet there is an implied warranty that the goods sold are fairly merchantable, or will fairly answer the purpose for which they are known to be bought, *e.g.*, that provisions are wholesome. The custom of trade may also give rise to an implied warranty of goodness, *e.g.*, where goods are bought and sold by sample (2 East, 314). A general warranty does not extend to obvious defects, *e.g.*, to the want of the tail in a horse that is warranted perfect (Dig. 18, 1, 43, s. 1; 1 Salk. 211).

A warranty differs from a misrepresentation in that a warranty must always be given contemporaneously with and as part of the contract, whereas a misrepresentation precedes and induces to the contract. And while that is their difference in nature, their difference in consequence or effect is this: that upon breach of warranty (or false warranty), the contract remains binding and damages only are recoverable for the breach; whereas upon a false representation the defrauded party may elect to avoid the contract, and recover the entire price paid.

See titles FRAUD; VENDORS AND PURCHASERS; WARRANTY, BREACH OF.

WARRANTY, BREACH OF. This must be distinguished from misrepresentation. For the warrantor is liable for damages for breach of warranty whether he knew or did not know that the thing sold was imperfect, whereas for a misrepresentation he would only be liable if he knew it was false when he made it, or made it with culpable recklessness.

The *remedy* for a breach of warranty differs also from the remedy for a misrepresentation. Thus, on breach of warranty the purchaser is not entitled to return the article and get back his money; at the most he can only obtain damages which will go in part reduction of the price. On the other hand, in case of a misrepresentation the purchaser is entitled to send back the article and have his money returned to him.

See titles FRAUD; DESCRIPTION NOT ANSWERED.

WARREN. A free warren is a franchise

WARREN—*continued.*

to have and keep certain wild beasts and fowls called game within the precincts of a manor, or other known place. This franchise, like that of chase, or park, must be derived from a royal grant, or from prescription, which supposes such a grant, it being laid down in the case of monopolies (11 Rep. 87 b., 44 Eliz.): "That none can make a park, or chase, or warren, without the king's licence." Beasts of warren are hares and rabbits; fowls of warren are pheasants and partridges. And the effect of a grant of free warren is, to vest in the grantee a qualified property in those beasts and fowls as long as they remain on the lands comprised in the grant, and even after they are hunted out of the warren. And although a person may have a property in some wild animals, namely, rabbits, *ratione soli*, yet this property is subservient to that of the person having the franchise of free warren, which is *ratione privilegii*, and suspends it; for in that case the property of the wild animals is in the person having the warren, not in the proprietor of the soil.

WASON v. WALTER. A case in 1868 which decided that it was no libel for a newspaper to publish a faithful report of debates in Parliament.

See titles PRESS, LIBERTY OF; STOCKDALE v. HANSARD.

WASTE. This word, which is derived from *vastum*, denotes that havoc or devastation which arises from exceeding the right of user. The word is, therefore, applicable only to persons having limited interests or estates in lands, *e.g.*, tenant for life, or *pur autre vie*, tenant in dower, and tenant by the curtesy; and it is inapplicable, as a general rule, to tenants in fee tail or in fee simple.

By the Common Law, waste was punishable in the cases only of tenants for life who were such by operation of law, namely, tenants in dower and tenants by the curtesy; but by the Statute of Marlbridge (52 Hen. 3), c. 23, it was made punishable in the cases also of tenants for life, or *pur autre vie*, or for years, who were such tenants by the creation of the parties or of the settlor. Furthermore, the Courts of Equity long interfered to remedy waste in cases in which the Courts of Law were powerless to interfere; and there grew up accordingly a distinction of waste into *legal* on the one hand, being such as Law could restrain; and *equitable* on the other hand, being such as Equity alone could restrain. However, by the Judicature Act, 1873, this distinction is abolished (36 & 37 Vict. c. 66, s. 25, sub-s. 3), as from the 2nd of November, 1875, and Law and Equity are now equally

WASTE—continued.

competent and compellable to restrain waste, whether it be of the kind formerly called legal or of the kind formerly called equitable.

While the distinction before mentioned subsisted, the divisions and sub-divisions of waste were the following:—

(1.) Legal waste, being either

(a.) Voluntary waste; or

(b.) Permissive waste; and

(2.) Equitable waste, which was in all cases voluntary, and so is described as equitable waste only.

(1 a.) Voluntary legal waste consisted in the following particulars: pulling down houses, pulling down wainscots, doors, windows, furnaces, and other such fixtures, causing timber trees to decay, stubbing up underwood, cutting down fruit-trees in an orchard, cutting down trees which shelter the mansion; also opening *new* gravel pits, lime pits, clay pits, &c., or new mines of metal, coal, and the like; also the conversion of old meadow land into arable, or of arable into plantation, or the like; and even ploughing up a rabbit warren (*Angerstein v. Hunt*, 6 Ves. 488), or reclaiming deer in a park (*Ford v. Tynte*, 2 J. & H. 153), or altering the character of a building.

(1 b.) Permissive legal waste consisted in suffering houses to get into decay; but the Courts have ceased to give any remedy or assistance in such cases (*Warren v. Rudall*, 1 J. & H. 1, 13), notwithstanding the same are generally considered to have been comprised in the Statute of Gloucester, 6 Edw. 1, c. 5.

(2.) Equitable waste consisted in "malicious, extravagant, or humorsome" acts of destruction on the part of a tenant who was not impeachable for waste at law, *e.g.*, where a tenant for life without impeachment of waste, pulls down or dismantles, without any proper purpose, the mansion-house (*Vane v. Lord Barnard*, 2 Vern. 738), or pulls down farm-houses (*Aston v. Aston*, 1 Ves. 265), or totally destroys a plantation (*Id.*), or fells ornamental timber (*Rolt v. Lord Somerville*, 2 Eq. Ca. Abr. 759); or, again, where a tenant in tail after possibility of issue extinct commits the like acts of waste (*Att.-Gen. v. Duke of Marlborough*, 3 Madd. 538); or, again, where a devisee in fee simple with an executory devise over on his death without leaving issue, or on any other event, does the like acts of waste (*Turner v. Wright*, 1 Johns. 740); or, again, where a tenant in possession under a disputed title does the like acts of waste (*Earl Talbot v. Hope Scott*, 4 K. & J. 96).

Procedure in cases of waste: The legal remedy for waste used to be either a writ of waste (which, however, was abolished

WASTE—continued.

by 3 & 4 Will. 4, c. 27, s. 36), or an action on the case; and at the present day the legal remedy is an action on the case, in which action an injunction may also be obtained. But the equitable remedy, which was by bill, was more generally resorted to; and Equity, which, until 1854, had exclusive jurisdiction by injunction used to interfere, and also still interferes, although now Law may also interfere, in the three following groups of cases in particular, that is to say,—

(1.) Where a remainderman for life intervenes in the order of the limitations between the tenant who commits the waste and the owner of the inheritance in remainder or reversion (*Tracy v. Tracy*, 1 Vern. 28);

(2.) Where the tenant for life who commits the waste is in collusion with the remainderman in fee to the prejudice of an intervening contingent remainderman (*Garth v. Cotton*, 1 Ves. 546); and

(3.) Where the waste is *equitable* as opposed to *legal*.

See titles AMELIORATIVE WASTE; EQUITABLE WASTE; LEGAL WASTE.

WASTE-LANDS. Otherwise called *commons*, belong to the lord of the manor in which they lie, as part of his freehold estate in the entire manor. The lord is therefore entitled to all the mines and minerals thereunder. His ownership is, however, subject to the general customs (and, if any, the special customs) of the manor, whereby the copyholders enjoy certain limited rights incidental more or less to their copyhold or freehold tenements held of the manor; but subject to such customs (general and special), the lord's right to the waste is unlimited (*Curtis v. Daniel*, 10 East, 273; *Duke of Portland v. Hill*, L. R. 2 Eq. 766). The lord may approve (*i.e.*, inclose) portions of the waste land under the Statute of Merton; but waste-lands are usually inclosed under and subject to the provisions of General and Special Inclosure Acts.

See titles APPROVEMENT; INCLOSURE.

WASTE OF MANOR: See titles MANOR; WASTE-LANDS.

WATCH AND WARD. Watching is properly for the apprehending of rogues in the night, as warding is for the day; for default of watch or ward, the township may be punished. In 1233, watch and ward was established in every township throughout the country to supplement the then inadequate police organization. The system was improved by being brought into combination (but for the preservation only of internal peace) with the militia as regu-

WATCH AND WARD—continued.

lated by the Assize of Arms, and in effect every man, whether free or villein, was required to provide himself with arms suitable to his condition for the purpose of keeping watch and ward (1252-53). And by the Statute of Winchester (13 Edw. 1), the whole hundred in which any robbery had been committed was made answerable for the damage, unless the felon was brought to justice.

See title **POLICE**.

WATER-RAILIFF. An officer in port towns for the searching of ships. In the City of London he has the supervising of fish brought thither, the gathering of the toll arising from the Thames, and the arrest of men for debt, or other personal or criminal matters, on that river.

WATERMEN. There are eight overseers elected annually by the Lord Mayor and Court of Aldermen of the City of London to exercise supervision over all wherry-men, watermen, and lightermen upon the River Thames between Gravesend and Windsor. Their duties were latterly regulated by the Consolidation Act, 7 & 8 Geo. 4, c. 75; but the matter is now to some extent regulated by the recent stat. 27 & 28 Vict. c. 113.

WATERWORKS. The Waterworks Clauses Act, 1847 (10 Vict. c. 17) is the general Act regulating the construction of waterworks; and in general (and, *semble*, in all cases) a special Act is required for their construction, just as in the case of railway companies, all waterworks companies being more or less companies of a public character, and not merely private adventures. They are within the provisions generally of the Public Health Acts.

See titles **GASWORKS**; **PUBLIC HEALTH**; **SANITARY LAWS**.

WATER AND WATERCOURSE: See title **EASEMENTS**, sub-title **WATER**.

WAYS. Ways are of four principal varieties, namely—

- (1.) *Iter*, i.e., a footway;
- (2.) *Actus*, i.e., a horse and footway, called also a packway;
- (3.) *Via*, i.e., a cartway (including foot and horseway); and
- (4.) A driftway (probably included in Roman Law under the term *actus* but being excluded therefrom in English Law), i.e., a way for driving cattle.

Ways are either *public* or *private*, the former being open to all the king's subjects, the latter being open to the inhabitants of a particular parish, village, or house only; a public way is also commonly called a highway.

WAYS—continued.

It is commonly said that every highway is the king's; but this means that the king and his subjects have at all times the right to pass and repass only at their pleasure; for the freehold and all the profits thereof belong to the lord of the soil (2 Inst. 705), being in general the adjoining owner, who therefore may bring trespass for digging in the highway (1 Burr. 143).

A public way need not be a thoroughfare; nor is a thoroughfare of necessity a public way.

The dedication of a public way is readily presumed from user as such, *e.g.*, from eight or six years' user. But a highway may also exist by virtue of an express grant. It most commonly exists in virtue of some Act of Parliament.

With reference to the repair of highways the whole parish is of common right bound to repair all the roads of the parish, and the whole county all the roads of the county. And this liability continues, although some particular person or persons may be liable in the first instance to make the repairs. Such particular person or persons may be bound to repair a highway either by reason of *prescription* or by reason of *inclosure*. The prescriptive duty to repair is often called the liability to repair *ratione tenuræ*. The liability by reason of inclosure arises when the owner of unenclosed lands adjoining the highway encloses them, and thereby prevents the public going on the lands enclosed when the road is bad.

Anything whereby the public are incommoded in their use of the highway is a nuisance to it, *e.g.*, the foulness of the adjoining ditches, the overhanging of boughs, &c., whence the adjoining owner is bound to scour his ditches, and also to lop his trees adjoining the highway. Every unauthorized obstruction of a highway is an indictable offence.

Any one may justify in pulling down or abating a common nuisance, *e.g.*, in demolishing a gate erected in a common highway.

The whole law of highways is now principally regulated by statute; see 5 & 6 Will. 4, c. 50; 25 & 26 Vict. c. 61, and 27 & 28 Vict. c. 101.

See titles **EASEMENTS**, sub-title **Way**; **EASEMENTS**, **QUASI**; **HIGHWAY**; **TURNPIKE ROADS**.

WEAR. A great dam made across a river, accommodated for the taking of fish, or to convey a stream to a mill.

WEIGHTS AND MEASURES. There are two sorts of weight in use, *viz.*, troy weight and avoirdupois, the former containing 12 oz. and the latter 16 oz. to the

WEIGHTS AND MEASURES—contd.

pound. The statutes principally regulating weights and measures are 5 & 6 Will. 4, c. 63, and 41 & 42 Vict. c. 49. The 3rd section of the former Act prohibits the use of weights and measures different from the imperial standard; and all sales by any standard other than the imperial one are void (*Rosseter v. Cahman*, 8 Exch. 361). The Act of 1878 re-enacts like provisions.

WEIR: See title **WEAR**.

WELSH MORTGAGE. A Welsh mortgage is a mortgage in which the rents and profits are received by the mortgagee as an equivalent for the interest, and the principal remains undiminished. In such a mortgage there is no contract, express or implied, between the parties for the repayment of the debt at a given time; and while the mortgagee cannot foreclose the estate or sue for his money, the mortgagor or his heirs may redeem the estate at any time (*Howell v. Price*, Prec. Ch. 423, 477).

WERGILD. This was the price of homicide, or other atrocious personal offence, paid partly to the king for the loss of a subject, partly to the lord for the loss of a vassal, and partly to the next of kin of the injured person. In the Anglo-Saxon laws the amount of compensation varied with the degree or rank of the party slain.

See title **DEATH, DAMAGES FOR**.

WHIPPING. This is a punishment which may or not accompany sentences of imprisonment in most cases; as to females, it was abolished by 1 Geo. 4, c. 51.

See title **ARMY DISCIPLINE ACT, 1879**.

WIDOW: See titles **DOWER**; **FREE-BENCH**; **NEXT OF KIN**.

WIDOW OF KING. The king's widow was she who, after her husband's death being the king's tenant *in capite*, could not marry again without the king's consent.

WIFE: See titles **HUSBAND AND WIFE**; **MARRIED WOMAN**.

WILD'S CASE, RULE IN. That rule is commonly expressed as follows:—A devise to X. and his children (or issue), X. *having no children (or issue) at the time of the devise*, gives him an estate tail; but if X. *has issue at the time of the devise*, then he and his children take as co-tenants. But the rule must be taken to be subject to many important exceptions, the construction of wills being pre-eminently one in which the intention of the testator is to be gathered from the will, with as little restraint from technical rules as possible, unless when these latter rules are of clear application (*Webb v. Byng*, 2 K. & J. 669).

WILFUL DEFAULT. When a mortgagee is in possession, he is considered in Equity, in some measure, in the light of a trustee, or bailiff, for the mortgagor, and is accountable for the rents and profits of the land; but he is not obliged to account according to the actual value of the land, nor is he bound by any proof that the land is worth so much, unless it can be proved that he made so much out of it, or might have done so but for his own "wilful default," as if without cause he turned out a sufficient tenant who held it at so much rent, or refused to accept a tenant who would have given so much for it. This question of the mortgagee's accountability commonly arises in an action for the foreclosure or redemption of the estate; but the like accountability extending also to "wilful default" arises upon the mortgagee's exercise of the power of sale incident to his mortgage (*Mayor v. Murray*, 8 Ch. Div. 424).

See title **MORTGAGE**.

WILFUL or NEGLIGENT: See title **TRESPASS OR CASE, WHICH?**

WILKES' CASE. This case, and the proceedings in Parliament incident to it (1766–1774), determined as a matter of Parliamentary Law that when a member is expelled from the House and even declared incapable of re-election, he still remains re-eligible; but, *semble*, his re-election may again be annulled by a re-expulsion.

See title **PRIVILEGE OF PARLIAMENT**.

WILL, ESTATE AT: See title **TENANT AT WILL**.

WILLS. The whole law of wills has been digested in a single Act, viz., the New Wills Act (7 Will. 4 & 1 Vict. c. 26), the short contents of which Act are as follows:—

I. As to the property devisable or bequeathable:

All real estates (whether legal or equitable) that are descendible generally, whether then already possessed or afterwards acquired;

All customary or copyhold estates (whether legal or equitable) that are descendible generally, whether then already possessed or afterwards acquired;

All estates *pur autre vie*;

All personal estate;

All contingent, reversionary, and future interests in real or personal estate, whether already created or not;

All rights of entry.

II. As to the capacity of testators:

(1.) Persons under twenty-one years have no such capacity, even for

WILLS—continued.

the purpose of exercising a power expressed to be exercisable during minority, and the subsequent attainment of twenty-one years will not validate the will (Sugd. R. P. Stat. 330);

- (2.) Married women have a limited capacity, that is to say, to the extent of exercising any power over real or personal estate, or to the extent of property (real or personal) settled to their separate use (*Thomas v. Jones*, 2 J. & H. 475).

III. As to the formal requisites of wills :

- (1.) Writing; whether in ink or in pencil (*Gregory v. Queen's Proctor*, 4 No. Ca. 623; *Bateman v. Pennington*, 3 Moo. P. O. 227); and whether or not in testamentary form (*Thorncroft v. Lashman*, 2 Sw. & Tr. 479); and the writing of the will may, by reference, incorporate other then existing documents (*Allen v. Maddock*, 11 Moo. P. O. 427); provided they are documents made immediately before, i.e., shortly before, the date of the will (*Wild v. Barber*, W. N. 1879, p. 141), and be clearly identified (*Singleton v. Tomlinson*, 3 App. Ca. 404).
- (2.) Signature by testator, or by some other person by his direction and in his presence, at the foot of the will (15 & 16 Vict. c. 24); the testator's mark is a sufficient signature, whether he can or cannot write, even though his name is not affixed to the mark (*Re Bryce*, 2 Cur. 325); and even an impressed facsimile is sufficient (*Jenkins v. Saisford*, 3 Sw. & Tr. 93); and signature by initials is good (*Re Wingrove*, 15 Jur. 91); a witness may sign the testator's name for him (*Re Bailey*, 1 Cur. 914);
- (3.) Presence of two witnesses at one and same time, being time that testator signs personally or by proxy;
- (4.) Attestation of witnesses in the presence of the testator, although not necessarily in each other's presence, but no form of attestation is required (*Bryan v. White*, 2 Rob. 315); although the full attestation clause is useful, obviating the necessity of proof of the formalities of

WILLS—continued.

execution (*Re Diaper*, 3 N. R. 215);

- (5.) Subscription of witnesses in the presence of the testator, although not necessarily in each other's presence; but the witness's mark is a sufficient subscription whether he can or cannot write (*Re Amiss*, 2 Rob. 116); and a subscription by initials is good (*Re Christian*, 2 Rob. 110); since the 20 & 21 Vict. c. 77, s. 33, the execution of the will may be proved by one only of the attesting and subscribing witnesses (*Belbin v. Skeats*, 1 Sw. & Tr. 148);
- (6.) In the special case of wills executing powers, if the power is to be exercised by writing under seal, and a will is used for the purpose of executing it, the will must be sealed in addition to the observance of the formalities before mentioned (*West v. Ray, Kay*, 385); and generally all other extra formalities required by the donor of the power, not being formalities of execution or of attestation, however whimsical, must be complied with, notwithstanding s. 10 of the Wills Act, which relates only to execution and attestation;
- (7.) No publication of a will is necessary, other than such publication as consists in the observance of the formalities before mentioned, s. 13.

IV. As to the capacity of witnesses :

- (1.) The incompetency of an attesting witness is not to invalidate the will, whether such incompetency existed at the time of the testator's execution of the will or at any time afterwards (s. 14);
- (2.) A gift, whether by devise or bequest, to a witness, or to the then existing wife or husband of a witness, is not to affect the competency of the devisee or legatee as a witness (s. 15); but the gift is to be void, unless in the case of a creditor (ss. 15, 16), any charge of debts or direction for their payment remaining valid, notwithstanding that the creditor is a witness;
- (3.) An executor of the will may be a witness (s. 17).

V. As to revocation of will :

- (1.) In the general case, and also in the case where the will is in

WILLS—continued.

exercise of a power of appointment over property which would in default of appointment devolve upon the real or personal representatives of the donee of the power, the marriage of the testator, whether male or female, revokes the will, the marriage being a legal marriage (*Re Mette*, 7 W. R. 543);

- (2.) In the case where the will is in exercise of a power of appointment over property which would not in default of appointment devolve upon the real or personal representatives of the donee of the power, the marriage of the testator, whether male or female, does not revoke the will (*Hawksley v. Barrow*, L. R. 1 P. & M. 147);

- (3.) Revocation by presumption is abolished (s. 19);

- (4.) Revocation may also be by subsequent will or codicil, being well executed, and the testator acting on that assumption (*Re R. L.* 20 L. T. 26);

- (5.) Revocation may also be by the burning, tearing, or otherwise destroying the will, with the intention of thereby revoking it (*Re Kennett*, 2 N. R. 461); and such burning, tearing, or other destruction may be either by the testator personally, or by any other person in his presence acting by his direction; such revocation may be in part only (*Christmas v. Whinyates*, 11 W. R. 371); but if the part cut out or destroyed is the signature of the testator, the revocation is of the whole will (*Walker v. Armstrong*, 4 W. R. 770); but the mere cancelling of the signature is nothing (*Stephens v. Taprell*, 2 Cur. 458); the codicil shares the fate of the will, in the absence of an intention that the codicil should operate substantively (*Grimwood v. Cozens*, 5 Jur. (N.S.) 497); where the will has been destroyed or lost *sine animo revocandi*, a copy of it will be admitted to probate (*Brown v. Brown*, 8 El. & Bl. 886; *Sugden v. Lord St. Leonards*, 1 P. Div. 154);

- (6.) Revocation may be partially effected by means of interlineations, or by means of obliterations, or by means of other

WILLS—continued.

alterations generally, made in the will after execution, provided such interlineations, obliterations, or other alterations are executed as a will (s. 21);

- (7.) Revocation by alteration of estate is abolished (s. 23);

- (8.) A revoked will may be revived by the re-execution of the will, or by a codicil duly executed with the intention of reviving it (s. 22; *Marsh v. Marsh*, 35 L. T. 523); however, a will revoked by a revoking instrument would not be revived by the revocation of the latter instrument (*Major v. Williams*, 3 Cur. 432; *Wood v. Wood*, L. R. 1 P. & M. 309.)

VI. As to operation of will:

- (1.) With reference to the real and personal estate comprised in it, a will operates from the death of the testator (s. 24); but that only in the absence of a contrary intent;

- (2.) With reference to matters other than the property comprised in it, a will operates from the date of the execution (*Re Wollaston*, 9 Jur. (N.S.) 727; *Bullock v. Bennett*, 7 De G. M. & G. 283; *Trimmell v. Fell*, 16 Beav. 539; *Gibbins v. Eyden*, L. R. 7 Eq. 371; *Noble v. Willock*, W. N. 1873, p. 124; 21 W. R. 711);

- (3.) With reference to lapsed and void devises, these are included in the residuary devise (if any) (s. 25) (see LAPSE);

- (4.) With reference to the distinctions of property in land, as being freehold, leasehold, copyhold, or customaryhold, a devise of lands generally is to include lands of all those four qualities, whether or not the testator has also freehold lands;

- (5.) With reference to the distinction between ownership and power of appointment, a general devise or bequest of real or of personal estate is to include real or personal estate over which the testator has a general power of appointment; and it has been decided that a power may be exercised subsequently even to the date of the execution of the will, if the instrument which creates the power comes into operation in the testator's lifetime (*Stillmann v. Weedon*, 16 Sim. 261), but not when it comes into operation after his

WILLS—continued.

death (*Jones v. Southall*, 32 Beav. 31);

- (6.) In the absence of words of limitation, or of other words indicating a contrary intention, a beneficial devise is to pass the fee simple or other the whole estate of the testator (s. 28); and the same rule is extended to the case of devises to trustees (s. 30); and the fee simple estates of trustees are not to be determinable upon the purposes of the trusts being satisfied (s. 31);
- (7.) An estate tail given to any devisee who predeceases the testator, but leaves inheritable issue who survive the testator, is not to lapse, but to take effect in the predeceasing devisee (s. 32) (*see title LAPSE*);
- (8.) A devise or bequest to any child of the testator is to take effect in such child, notwithstanding he may die before the testator, provided any of his issue survive the testator (s. 33) (*see title LAPSE*);
- (9.) The phrase "dying without issue," and like phrases, formerly construed to give an estate tail by implication, are deprived of that effect (s. 29); and
- (10.) The Act is to extend to the wills of all persons executed or republished on or after the 1st of January, 1838.

The stat. 1 Vict. c. 26, does not extend to aliens (*Sugd. R. P. Stats.* 331), nor to British subjects not domiciled in England (*Bremer v. Freeman*, 10 Moo. P. C. 306); but the latter restriction has been partially removed by the 24 & 25 Vict. c. 114, and the former restriction is now altogether removed by the Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 2, subject to the question of domicile.

See titles LEGACIES; WILLS OF PERSONAL ESTATE; WILLS OF REAL ESTATE.

WILLS OF PERSONAL ESTATE. All the then remaining restraints arising from custom upon the power of bequeathing one's personal estate by will were abolished by the stat. 1 Vict. c. 26, the great majority of such restraints having long previously been either abolished by statute or become obsolete of themselves. The Statute of Frauds (with a limited exception, since abolished, as regards nuncupative wills) required writing to the validity of a will of personal estate, but did not require any

WILLS OF PERSONAL ESTATE—continued.

witnesses to the execution of such a will, but by the Act 1 Vict. c. 26, two witnesses became and are now necessary. An English subject travelling abroad may make his will of personal estate, either (1.) According to the law of his domicile at the time of making the will, or (2.) according to the law of the place where he makes it, or (3.) according to the law of the place of his domicile of origin (24 & 25 Vict. c. 114).

See titles PROBATE; PROVING A WILL; WILLS.

WILLS OF REAL ESTATE. Were anciently impossible; but with the growth of the power to alienate lands *inter vivos*, a customary will came into existence, being (in effect) a feoffment of the lands to the uses specified in the paper writing called a will. By the Statute of Uses (27 Hen. 8, c. 10), such modes of making a will of real estate ceased to be legal; but by the Wills Act of Hen. VIII. (32 Hen. 8, c. 1), a tenant in fee simple holding by Knight's service was enabled to devise two-thirds of his real estate; and if he held by Socage tenure, he was enabled by that statute to devise the entirety of his lands. The Statute of Frauds (29 Car. 2, c. 3) required for the validity of a will of lands, writing, and also three witnesses to the signature of the testator; but by the New Wills Act (1 Vict. c. 26), although writing continues to be necessary, two witnesses to the testator's signature are now sufficient; and since the 12 Car. 2, c. 24, abolished Knight tenure and converted same into Socage tenure, there has ceased to be any restriction upon the power of devise. A will of real estate need not be proved, as a will of personal estate must be; nevertheless, a will of real estate is in general proved, the heir being cited, and thereby all question of its validity on the part at least of the heir is got rid of.

See titles ALIENATION; PROVING A WILL; WILLS.

WINCHESTER, STATUTE OF: *See title WATCH AND WARD.*

WINDING-UP. This phrase means simply squaring the accounts of a (partnership or) company with a view to the dissolution of the same. Usually (partnerships and) companies are wound up only when they are in insolvent circumstances; and in the case of companies, such winding-up may be either voluntary, or by the compulsory order of, or under the supervision of, the Court of Chancery, which Court acts in the matter of the winding-up of companies under the provisions of the statutes 25 & 26 Vict. c. 89 (the Companies

WINDING-UP—continued.

Act, 1862) and 30 & 31 Vict. c. 131 (the Companies Act, 1867). When an order has been made for the compulsory winding-up of a company, and even in the case of a voluntary winding-up, the Court of Chancery will stay actions by creditors against the company (*In re Keynsham Company*, 33 Beav. 123; *In re Life Association of England*, 34 L. J. (Ch.) 61). A winding-up is usually carried out by means of a liquidator, who (as the name denotes) liquidates, i.e., ascertains, the assets and liabilities of the company, with a view to the discharge of the latter by the former, so far as they go (Buckley on the Companies Acts).

See titles CONTRIBUTORIES; LIMITED LIABILITY.

WINDING-UP, COMMENCEMENT OF.

Where the winding-up is compulsory, it is deemed to commence at the time of the presentation of the petition for the winding-up (Companies Act, 1862, s. 84); where the winding-up is voluntary, it is deemed to commence at the time of the passing of the resolution to wind up (Companies Act, 1862, s. 130); and where the winding-up is voluntary, but subject to supervision, its date of commencement as a voluntary winding-up appears to remain unchanged (Companies Act, 1862, ss. 147-151). Even unregistered companies may be wound up, but only by compulsory order, and provided they are not illegal, as e.g., violating the Companies Acts in their very constitution (*Re South Wales Atlantic Steamship Company*, 2 Ch. Div. 763).

WINDING-UP ORDER. The order directing a company to be wound up is so called.

See title WINDING-UP.

WINDING-UP UNDER SUPERVISION:

See title SUPERVISION, WINDING-UP UNDER.

WINDING-UP, VOLUNTARY: See titles WINDING-UP, COMMENCEMENT OF; WINDING-UP.

WINDOW: See title ACCESS OF LIGHT.

WITCHCRAFT. A practice for which in former times persons might have been, and often were, condemned to death, even upon their own confession (Best on Evidence, *Criminal Confessions*). The rule of the Mosaic Law was,—“Thou shalt not suffer a witch to live:” and the Civil Law also punished with death sorcerers and witches. By the English Law, witchcraft was at one time (under 33 Hen. 8, c. 8) a felony without benefit of clergy—a severity continued in the Act 1 Jac. 1, c. 12; but at the present day under the stats. 9 Geo. 2, c. 5, and 56 Geo. 3, c. 138, no prosecution for witchcraft is for the

WITCHCRAFT—continued.

future to be carried on; but the PRETENCE of witchcraft is made a misdemeanour punishable with a year's imprisonment and hard labour.

WITENAGEMOTE. An assembly of wise men, used distinctively to denote the Parliament of Anglo-Saxon times. It exercised the power of electing to the Crown, and could also depose the reigning sovereign. Besides its executive functions, it possessed also large judicial and also legislative powers. Upon the Conquest it became the *Curia Regis*, and is now represented by the High Court of Parliament.

See titles COURTS OF JUSTICE; PARLIAMENT.

WITHDRAWAL OF ACTION. An action when entered for trial may be withdrawn by the consent in writing of all parties (Order XXIII., 2a). A plaintiff may also withdraw the entire action or any part thereof, sometimes with leave and upon terms only, sometimes without leave.

See title DISCONTINUANCE OF ACTION.

WITHERNAM: See title CAPIAS IN WITHERNAM.

WITHOUT DAY: See title SINE DIE.

WITHOUT PREJUDICE: See title EVIDENCE, sub-title Admissions.

WITNESSES. These are a means or instrument of evidence, and are persons who inform the tribunals regarding matters of fact. Generally, all persons are compellable to give evidence excepting only the sovereign; but witnesses may object to answer particular questions, being chiefly questions which tend to criminate or to expose to penalties or forfeitures, but not (unless where the judge interposes) questions tending to bring the witness into disgrace or ridicule, or to render him liable to merely civil proceedings.

A distinction is taken between the competency and the credibility of witnesses, the former determining absolutely the admission or rejection of their evidence, the latter going to corroborate or to impugn its truthfulness. At the present day, all objections to witnesses (with one exception) go to the credibility of their testimony and not to their competency, the stats. 14 & 15 Vict. c. 99, and 32 & 33 Vict. c. 68, having rendered even the parties to an action of whatever sort competent and also compellable to give their testimony. The one exception referred to, is that in criminal proceedings a husband is not compellable to give evidence against his wife, or the wife against her husband, these twain being one flesh.

See title COMPETENCY OF WITNESSES.

WITNESSES—continued.

However, for various reasons a person may not be competent to take an oath, and therefore may never fall under the category of witness at all, so that neither the question of his competency nor that of his credibility may come into question. Thus, from want of understanding, whether innate deficiency (as in the case of idiots) or extreme immaturity (as in the case of children of very tender years), or, *semble*, atheism, a person is incompetent to take an oath, and is therefore excepted from the class of witness, excepting that an atheist may now make a solemn affirmation, and a child may on examination on the *voir dire* be found to be conscious of the sanctity of an oath.

The principal grounds for suspecting the credibility of a witness (as distinguished from his competency) are pecuniary interest, sexual relationship, social connections, self-regarding sentiments, and the feeling of sympathy with others.

Usually the method of dealing with witnesses is for the party on whose behalf they are called to examine them in chief, then for the opposite party to cross-examine them, and finally for the chief examiner to re-examine them. The object of the examination-in-chief is to obtain facts in support of the case of the plaintiff; the object of the cross-examination is to impugn or throw discredit upon that first examination; and the object of the re-examination is to undo the prejudice which may so have been occasioned by the cross-examination.

See titles EVIDENCE; ONUS PROBANDI; PRIVILEGE OF WITNESSES; &c.

WOODS AND FORESTS. The Commissioners of Woods and Forests have been appointed for the management of Crown lands under the stat. 10 Geo. 4, c. 50, and subject always to the control of the Treasury. But the Board of Trade have received under the stat. 29 & 30 Vict. c. 62, a large part of such management.

See title CROWN LEASES.

WORK DONE: See title WORK AND LABOUR.

WORK AND LABOUR. A contract for work and labour properly so called is not a contract for goods within the 17th section of the Statute of Frauds; but it is so when it amounts in effect to a sale or purchase of goods, *e.g.*, a contract with an artist or sculptor for a work of art.

WORKS, ACCOMMODATION: See title ACCOMMODATION WORKS.

WORKS AND BUILDINGS. By the Works and Public Buildings Act, 1874 (37 & 38 Vict. c. 84), the various commissions or corporations theretofore existing under

WORKS AND BUILDINGS—continued.

particular statutes for the management of Her Majesty's public works and buildings are (in effect) amalgamated in one corporation, *viz.*, that created by the stat. 14 & 15 Vict. c. 42.

WORKHOUSES: See title POOR.

WORKSHOPS: See title FACTORIES.

WORKMEN. Regarding the wages of workmen, see titles TRUCK ACT and WAGES; and regarding their contracts, see titles MASTER AND SERVANT and SERVICE, CONTRACTS OF; and regarding the legality of their combinations to regulate labour, see title TRADES-UNIONS; and regarding illegal acts by workmen towards their fellow-workmen, to coerce either them or their masters, see title MOLESTATION.

WRECK. Such goods as after a shipwreck are cast up by the sea and left there within some county. By the Common Law all wrecks belonged to the Crown; but it was usual to seize wrecks to the king's use only when no owner could be found. The Common Law was modified by statute in the reign of Henry I., who granted that if any person escaped alive out of the ship it should be no wreck; and afterwards by the Statute of Westminster the First (3 Edw. 1) c. 4, if a man or a dog or a cat escape alive the goods shall be no wreck, but the sheriff shall keep the same (or, if perishable, their value) for a year and a day, in order to restore them to the rightful owner, or his representatives upon establishing their claim to them. And by the statute 27 Edw. 3, c. 13, if a ship is lost on the shore and the goods come to land, they are to be at once returned to the owners, they paying a reasonable reward for their *salvage*. By the stat. 7 & 8 Geo. 4, c. 29, plundering any vessel in distress or wrecked is made felony punishable with death. If for a year and a day no one claims wreck, it still belongs to the king as before.

See also titles FLOTSAM; JETSON; SALVAGE.

WRITS. In general, a writ is the king's precept in writing under seal issuing out of some Court and commanding something to be done touching a suit or action, or giving commission to have it done (*Les Termes de la Ley*).

Writs in civil actions were either original or judicial. *Original writs* issued out of the Court of Chancery for summoning a defendant to appear, and were granted before the suit was begun, to begin the same, whence the name; *judicial writs* issued out of the Court where the original was returned after the suit was begun. The original bore date in the name of the king, the judicial in the name of the judge.

WRITS—continued.

Another division of writs was into *real*, *personal*, and *mixed*; the real concerning the possession of land, and being either writs of entry or writs of right, the personal concerning goods, chattels, and personal injuries, and the mixed partaking of the nature of both. Again, writs concerning the possession of land were either *possessory*, of a man's own possession, or *ancestral*, of the seisin and possession of his ancestor as well. Writs also commonly bore some special name or addition descriptive of their particular purpose, *e.g.*, writ of assistance, of inquiry, of *capias*, &c.

Writs original were abolished (1 & 2 Vict. c. 110); also, all the real and mixed writs have been abolished (3 & 4 Vict. c. 17; C. L. P. Act, 1860); and ejectment itself even is now commenced by an ordinary writ of summons, tested in the name of the Lord Chancellor.

See title **WRIT OF SUMMONS**.

WRIT DU CURSU: See title **DE CURSU PROCEEDINGS**.

WRIT OF ENQUIRY: See title **INQUIRY, WRIT OF**.

WRIT OF ERROR: See title **ERROR**.

WRIT OF EXECUTION: See title **EXECUTION, WRIT OF**.

WRIT, ISSUE OF: See title **ISSUE OF WRIT**.

WRIT OF RIGHT. This was a writ which lay for a man who had the right of property against another man who had the right of possession and was in possession under such right. This severance of the two rights arose in three cases chiefly:—

- (1.) Upon discontinuance by tenant in tail;
- (2.) After judgment in a possessory action; and
- (3.) After the possessory action was barred by the Statute of Limitations.

The writ of right properly lay only to recover corporeal hereditaments for an estate in fee simple; but there were other writs said to be "in the nature of writs of right" available for the recovery of incorporeal hereditaments or of lands for a less estate than a fee simple estate.

In this action, the demandant alleged some seisin of the lands in himself, or else in some one under whom he claimed; and usually the tenant in possession denied the demandant's right, which the latter was thereupon required to prove; and failing such proof, the demandant was perpetually barred of his claim, otherwise he recovered the lands against the tenant and his heirs for ever. There was a limit to the seisin which the demandant might allege; and

WRIT OF RIGHT—continued.

such limit was fixed by the Statute of Westminster the First (3 Edw. 1), c. 39, from the time of Richard I.; and afterwards by the stat. 32 Hen. 8, c. 2, seisin in a writ of right was to be alleged within sixty years.

By the stats. 3 & 4 Will. 4, c. 27, s. 36, and C. L. P. Act, 1860, s. 26, all writs of right and writs in the nature thereof were abolished; and the extreme limit of time for bringing an action for the recovery of land is that fixed for the merely possessory action (which is now the only remedy), *viz.*, the period limited by the stats. 3 & 4 Will. 4, c. 27, and 37 & 38 Vict. c. 57.

See title **LIMITATION OF ACTIONS**.

WRIT OF RIGHT OF ADVOWSON: See titles **QUARE IMPEDIT**; **SPOILIATION**; **USURPATION OF ADVOWSON**.

WRIT OF RIGHT OF DOWER: See title **DOWER**.

WRIT OF RIGHT OF WARD: See titles **WARD**; **WARDSHIP**.

WRIT, SERVICE OF: See title **SERVICE OF WRITS, &c.**

WRIT OF SUMMONS. An action in the High Court of Justice is commenced with the issue of a writ of summons. The writ in the case of Chancery matters was issued from the Record and Writ Clerk's Office, Chancery, and in the case of Common Law matters was issued from the Queen's Bench, Common Pleas, or Exchequer Division Office, as the case might be, and now in all cases from the Central Office, upon payment of 10s., an adhesive stamp for that amount being affixed to the writ, and the seal of the office being then impressed upon the writ. The writ is tested (*i.e.*, witnessed) in the name of the Lord Chancellor, or (but only in the case of there being no Lord Chancellor) in the name of the Lord Chief Justice of England, and bears date the day of issue (Order II., 8). The plaintiff takes the sealed writ (and which is called the original writ), and leaves a copy of same at the office; and the copy so left is filed in the office, and an entry of the filing is made in the Cause-book, and the action is distinguished by the date of the current year of filing, a letter (being the first letter of the plaintiff's surname), and a number (being the number which denotes the order of the particular writ among all the writs entered under the same letter in the same year). So soon as the writ is issued, the plaintiff should in general serve same on the defendant or defendants at once. And thereafter the defendant or defendants appear to the writ of summons, and the action proceeds in the usual way.

WRITING. This word usually denotes any instrument in the nature of an agreement under hand only.

See title **AGREEMENT**.

WRITTEN EVIDENCE: See title **EVIDENCE BY AFFIDAVIT**.

WRONG: See title **TORT**.

Y.

YARD. An enclosed space of ground generally attached to a dwelling-house, and in legal contemplation impliedly included in the word messuage, and also in the word house (Wms. Real Property).

YEA AND NAY. Yes and No; according to a charter of Athelstan, the people of Ripon were to be believed in all actions or suits upon their yea and nay, without the necessity of taking any oath.

YEAR. The year, as divided by Julius Cæsar, consists of twelve months. It appears that in early English times the year began with Christmas Day; but as from the reign of William I. the year is designated by that of the reign only. Upon the Reformation of Religion the year was made to begin with the 25th of March, being the day of the feast of the Annunciation, but the year of the reign continued to be the common mode of denoting dates until the Commonwealth, when the year of our Lord came into use; and ultimately, by the 24 Geo. 2, c. 23, it was enacted that the 1st of January next following the last day of December, 1751, should be the first day of the year 1752, and so on for the first day of every succeeding year; and that the then next ensuing 2nd of September, 1752, should continue to be reckoned as the second, but the next succeeding day (which of right would be the third of September, 1752) should be reckoned as the 14th of September, 1752, omitting for that time only the eleven intermediate days. And all writings after the 1st of January, 1752, were to be dated according to the new style.

See titles **DAY**; **MONTH**; **TIME**.

YEAR AND DAY. This period was fixed for many purposes in law. Thus, in the case of an *estray*, if the owner did not claim it within that time, it became the property of the lord. So the owners of wreck must claim it within a year and a day. Death must follow upon wounding within a year and a day if the wounding is to be indicted as murder. Also, a year and a day was given for prosecuting or

YEAR AND DAY—continued.

avoiding certain legal acts, e.g., for bringing actions after entry, for making claim, for avoiding a fine, &c.

See title **YEAR, DAY, AND WASTE**.

YEAR-BOOKS. Reports in a regular series from the reign of King Edward II inclusive to the time of Henry VIII, said to have been taken by the prothonotaries or chief scribes of the Court at the expense of the Crown: they were published annually, whence their name.

See title **REPORTS**.

YEAR, DAY, AND WASTE. It was formerly a part of the king's prerogative to take the profits of the lands of felons for a year and a day, and to make waste of the same lands unless the lord of the felon redeemed the king's waste. But the king was restricted of this right of waste by Magna Charta, 9 Hen. 3, c. 22, and after taking the profits for a year and a day, he was to deliver them over to the lord. This prerogative of the king was abolished altogether by the stat. 54 Geo. 3, c. 145, which enacted that no future attainder for felony, except in cases of high treason or murder, should extend to the disinheriting of any heir, or to the prejudice of the right or title of any person other than the right or title of the offender himself during his life.

See title **ESCHEAT**; **FORFEITURE**.

YEAR TO YEAR TENANCIES. A tenant from year to year has a lease for one year certain, with a growing interest during every year thereafter, springing out of the original contract, and parcel of it (*Cattley v. Arnold*, 1 J. & H. 651; 28 L. J. Ch. 352). This tenancy may be either expressly created, by letting premises to hold "from year to year," or may arise by implication where rent is paid in respect of the occupation of premises, and with reference to a yearly holding (*Per Parke, B.*, in *Braythwaite v. Hitchcock*, 10 M. & W. 497). Also, where a person has entered into possession of premises and paid rent under a void lease, or void agreement for a lease, he is presumed to be tenant from year to year upon such of the terms of the instrument as are consistent with that tenancy; the tenancy when thus implied will cease, without notice to quit, at the end of the term mentioned in the instrument. But in the case of express tenancies from year to year, a notice to quit ending with some current year of the tenancy is required, and the length of such notice is that prescribed by the express lease or agreement, and when there is no express agreement upon the point, then it used to be six months, but

YEAR TO YEAR TENANCIES—*contd.*
under the Agricultural Holdings Act, 1875, it is one full year.

YEARS, LEASES FOR : See titles **LEASE** ; **LANDLORD AND TENANT**.

YEOMAN. A grade of society next in order to that of *gentleman* (6 Ric. 2, c. 4, and 20 Ric. 2, c. 1). The word etymologically means a man or a common man, *i.e.*, *commoner*.

Yeoman also designates an officer of the Queen's household, holding a middle place between serjeant and groom. Also, there are yeomen of the Queen's guard, being a body of soldiers first established in the reign of Henry VIII.

YEOMANRY : See title **ARMY**, sub-title **VOLUNTEERS**.

YEOMEN OF THE GUARD : See title **YEOMAN**.

YEOMEN OF THE HOUSEHOLD : See title **YEOMAN**.

YEW. A tree of which bows were commonly made for warfare; whence the tree was commonly planted in the churchyards, to ensure its protection.

YEW-CLIPPINGS. For damage resulting in death caused to cattle of an adjoining owner by the yew-clippings of his neighbour, the latter was held not to be liable, as for a tort resulting from negligence, no duty being shewn to take care of the clippings (*Erskine v. Adeane*, L. R. 8 Ch. App. 756; *Wilson v. Newberry*, L. R. Q. B. 31). *Secus*, where there is such a duty.

YIELDING AND PAYING. The phrase which commonly expresses the reservation of rent in a deed of lease.

See titles **RENT** ; **RESERVATION**.

YORK. Lands in any of the three ridings require to be registered, under the statutes 2 & 3 Anne, c. 4 (West Riding), 6 Anne, c. 62 (East Riding), and 8 Geo. 2, 6 (North Riding).

See titles **REGISTRY OF DEEDS** ; **REGISTRY OF LAND**.

YOUNGER CHILD. Is a child who neither originally is nor (through the death of a child or children older than himself) becomes an eldest son (*Bayley's Settlement*, L. R. 9 Eq. 491; 6 Ch. App. 590; *Bathurst v. Errington*, 4 Ch. Div. 251; 2 App. Ca. 698).

YOUNG'S CASE. A case in 33 Hen. 6, in which freedom of speech as a privilege of Parliament was questioned.

See titles **FREEDOM OF SPEECH** ; **PRIVILEGE OF PARLIAMENT**.

YULE. A north country word for Christmas. The word is still in common use in Scotland, and is part of the local dialect.

Z.

ZEALOT. This word is commonly taken in a bad sense, as denoting a separatist from the Church of England, or a fanatic.

ZEALOUS WITNESS. When a witness is over-zealous on behalf of his party, the counsel who calls him ought to interrogate him with an appearance of indifference, to repress the witness's readiness to give evidence, and to prevent him from diminishing the effect or weight of his testimony; and he ought to dismiss him so soon as he has obtained all the evidence that he wants from him. Of such a witness Quintilian says,—"*Nec nimium instare interrogationi [debet], ne ad omnia respondendo testis fidem suam minuat; sed in tantum evocare eum, quantum sumere ex uno satis sit*" (Best's Evidence, 819). Over-zeal in a witness is clearly a matter affecting his trustworthiness (Tayl. Evid. p. 70).

See title **EXAMINATION OF WITNESSES**.

ZOLLVEREIN. Is the name of the trade-league constituted by twenty-five of the states of the German Empire, until recently of the German Confederation. It comprises the kingdoms of Prussia, Bavaria, Saxony, Hanover, and Wurtemberg, together with one electorate (Hesse), three grand duchies, seven duchies, seven principalities, one landgraviate, and the city of Frankfort-on-the-Main. These states have agreed upon a general system of law with regard to commerce, the effect of which is to override the particular laws of the particular states, excepting where the general law is silent. See the Convention with regard to Letters Patent, dated the 21st of September, 1842, and ratified the 29th of June, 1843 (*Johnson's Patentees' Manual*, p. 356). And see *Wheaton's International Law*, 70, 78 (n.)

See titles **INTERNATIONAL COPYRIGHT** ; **INTERNATIONAL LAW**.

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